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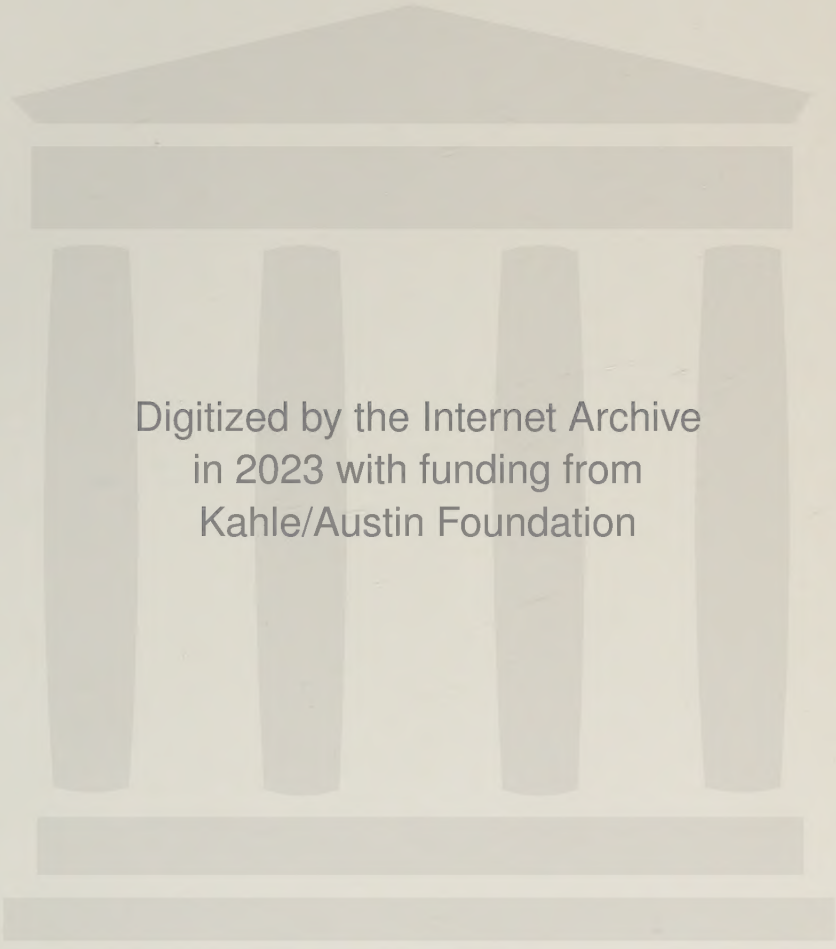
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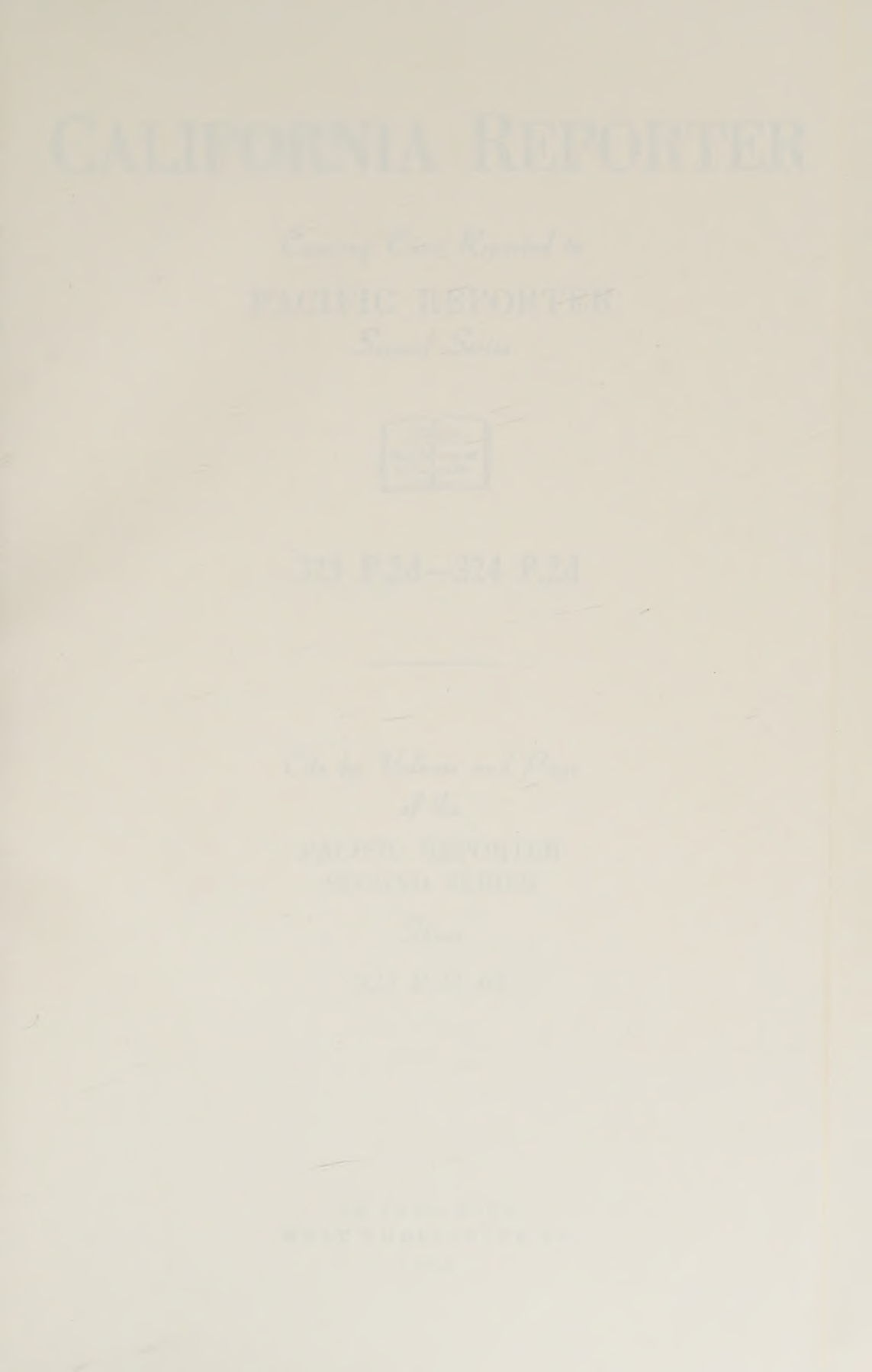
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CALIFORNIA REPORTER

323 PACIFIC REPORTER
SECOND SERIES

DEPARTMENT OF MENTAL HYGIENE of the State of California, Plaintiff and Respondent,

v.

Laurence McGILVERY, Executor of the Estate of Annie Christabel Girard, Deceased, Defendant and Appellant.*

L. A. 24830.

Supreme Court of California,
In Bank.

March 25, 1958.

Rehearing Granted April 24, 1958.

Claim by Department of Mental Health against executor of mother's estate for support and maintenance of daughter at state mental institution. From an award of the Superior Court, Los Angeles County, Burnett Wolfson, J., in favor of the department, the executor appealed. The Supreme Court, Shenk, J., held that where Director of Mental Health did not cancel amounts due from mother, following an investigation and determination of her inability to pay for care of her daughter, failure to enforce obligation of mother to pay for care of her daughter, did not constitute such administrative action as would result in modifying, remitting or cancelling obligation and Department of Mental Health was entitled to recover from mother's estate portions of obligation which were not barred by statute of limitations.

Judgment affirmed.

Schauer, J., dissented.

Opinion, 316 P.2d 46, vacated.

1. Statutes ⇐208

Section making certain relatives of mentally ill person liable for care, support and maintenance of such person in state institution, must be considered with other sections in pari materia. West's Ann. Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653.

2. Mental Health ⇐74

While unconditional liability is imposed upon certain relatives of person who has been committed to state institution for mentally ill, amounts due from such relatives may be reduced, remitted, or cancelled by administrative action. West's Ann.Welfare & Inst.Code, §§ 6650, 6652, 6653.

3. Mental Health ⇐75

Fact that mother of person, who had been committed to mental institution, was unable to pay amounts which she was obligated to pay for such person's care, did not of itself constitute a reduction, remission or cancellation of the obligation. West's Ann.Welfare & Inst.Code, §§ 6650, 6652, 6653.

4. Executors and Administrators ⇐202(1)
Mental Health ⇐75

Where Director of Mental Health did not cancel amounts due from mother, following investigation and determination of her inability to pay for care of her daughter at state mental institution, failure to enforce obligations of mother to pay for care of her daughter, did not constitute such administrative action as would result in modifying, remitting or cancelling obligation, and Department of Mental Health was entitled to recover from mother's estate portions of obligation which were not barred by statute of limitations. West's Ann.Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653; West's Ann. Code Civ.Proc. § 345.

5. Estoppel ⇐70(2)
Mental Health ⇐75

Failure of Department of Mental Health to make a prior demand on mother for cost of care and maintenance of her daughter, who had been committed to state mental institution, did not waive its right to recover for care of daughter, nor was department estopped from demanding payment from mother's executor. West's Ann.Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653.

6. Mental Health ⇐82

There can be no laches in delaying bringing of action against relative for care of person committed to a mental institution if action is brought within period of limitation, unless there are some facts

* Opinion vacated 329 P.2d 689.

or circumstances attending delay which have operated to injury of defendant. West's Ann.Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653.

Carter, Young, Zetterberg & Henrie and Richard T. Young, Pomona, for appellant.

Edmund G. Brown, Atty. Gen., and Ariel C. Hilton, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal by the defendant Laurence McGilvery as executor of the estate of Annie Christabel Girard, deceased, from a judgment awarding to the plaintiff, the Department of Mental Hygiene of the State of California, the sum of $4,737 on a claim filed against the estate of the decedent.

In 1935 Joan McGilvery, daughter of the decedent was adjudged mentally ill and from that time has been confined in state hospitals and maintained and provided for by state agencies whose interests the Department of Mental Hygiene now represents.

When first confined Joan was married to Neil McGilvery, and their son Laurence, the defendant executor, was three years of age. In 1936 the husband disappeared and his whereabouts remain unknown. Joan's mother took Laurence into her home and provided for his support and education. In 1955 she died. Her will was admitted to probate and Laurence, then an adult, was named as executor. Other than a $1,000 trust fund for the benefit of Joan, the estate was left to Laurence.

It appears that at the time of Joan's commitment, Mrs. Girard was a single woman, 63 years of age. She owned a home in Oakland from which she had an annual income of approximately $200. She supplemented that income with her earnings as a nurse, found to be about $20 a month. The only evidence of her earnings between the time of Joan's commitment and Mrs. Girard's death relates to the last four years of her life. During those years she had an income of approximately $100 a month, $50 a month from an investment fund derived, apparently, from the sale of her home, and $50 a month from federal old age benefits. At her death her estate was appraised at $14,504.69. It increased to $18,984.69 during administration.

The claim presented by the Department of Mental Hygiene is for Joan's support and maintenance for the four year period immediately preceding Mrs. Girard's death. The executor rejected the claim and this action was commenced by the department to enforce its payment. There is no dispute as to the amount of the claim. The only question is the liability of the estate for its payment.

The department's claim is based upon legislation found in the Welfare and Institutions Code which provides for the care and maintenance of mentally ill persons. Section 6650 provides in its pertinent parts: "The husband, wife, father, mother, or children of a mentally ill person * * * shall cause him to be properly and suitably cared for and maintained * * *. The husband, wife, father, mother, or children of a mentally ill person * * and the administrators of their estates * * * shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. * * *" Section 6651 provides in part: "The monthly rate for the care, support, and maintenance of all mentally ill * * * persons * * * at the state hospitals for the mentally ill where there is liability to pay for such care, support, and maintenance, shall be reviewed once each fiscal year and fixed at the state-wide average per capita cost of maintaining patients in all state hospitals for the preceding fiscal year, as determined by the Director of Mental Hygiene, and shall be payable in advance. * * * The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care, support, and maintenance of any

mentally ill * * * person * * * who is a patient of a state hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care, support, and maintenance. * * *" In section 6652, the Department of Mental Hygiene is given the authority to take such action as may be necessary to effect the collection of the charges mentioned in section 6650.

In section 6653 it is provided that "The department shall, following the admission of a patient into a State hospital for the insane * * * make an investigation to determine whether the patient has any relative or relatives responsible under the provisions of Section 6650 for the payment of the costs of * * * maintenance, and shall ascertain the financial condition of such relative or relatives to determine whether in each case such relative or relatives are in fact financially able to pay such charges. * * *"

Following Joan's commitment an investigation was conducted regarding Mrs. Girard's financial circumstances. No charge or other exaction was attempted to be collected from her under section 6650 of the Welfare and Institutions Code, either at that time or during her lifetime.

[1] It is claimed by the defendant that section 6650 does not impose on the persons named therein an absolute and unconditional liability for the support and maintenance of a mentally ill relative, but that liability is imposed only if the investigation mentioned in section 6653 reveals that those persons "are in fact financially able to pay such charges." It is obvious that the language of section 6650 cannot be considered alone, but that it must be considered with other sections in pari materia. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639, 122 P.2d 526. Section 6650 was enacted in 1937. It was based on the former Political Code section 2176. That section contained the provisions, now set forth in all material respects in sections 6652 and 6653, as well as 6650, including the provision that the department shall make an investigation to determine the financial ability of named relatives to pay the charges for the support and maintenance of the mentally ill. Under the circumstances sections 6650 and 6653 "shall be construed as restatements and continuations * * * and not as new enactments" (Welf. & Inst.Code, § 2), and are to be considered together. Accordingly we must look to the construction given section 2176 of the Political Code prior to 1937.

Section 2176 when first enacted in 1903 (Stats.1903, p. 505) clearly made ability to pay a condition of liability. It provided that "* * * the husband, wife, father, mother, or children of an insane person, if of sufficient ability * * * shall be liable for the care, support and maintenance of any insane person in a state hospital * * *." In 1909 that section was modified and the words "if of sufficient ability" were deleted. Stats.1909, p. 71. In 1921 the section was again modified by the addition of a second paragraph requiring an investigation into the financial circumstances of the responsible parties to determine whether they were "in fact financially able to pay such charges" provided for in the first paragraph. Stats.1921, p. 1335. In 1931 a further amendment did not alter the provisions of the same section in any respect material to the present inquiry. Stats. 1931, p. 322. It was in 1937 that the section was divided. The first paragraph, providing for charges as against responsible relatives, became section 6650 of the Welfare and Institutions Code. The second paragraph, providing for an investigation into the financial circumstances of responsible relatives, became section 6653 of the same code.

It is significant that the Legislature had first expressly specified the relatives who were responsible as those "of sufficient ability" to pay and thereafter deleted that requirement. The defendant contends that regardless of the deletion, the Lunacy Commission, then performing the functions of the Department of Mental Hygiene, con-

tinued to use ability to pay as a criterion in making charges after 1909. It appears in several of the Commission's biennial reports to the Legislature that ability to pay was considered as a factor in determining whether the Commission enforced its monthly charges. (See Reports of the State Commission in Lunacy, Attorneys' Reports: Vol. 4, Appendix to Journals of Senate and Assembly of California, 41st Session (1915), p. 24; Vol. 6, Appendix to Journals of Senate and Assembly of California, 42nd Session (1917), p. 32; Vol. 1, Appendix to Journals of Senate and Assembly of California, 44th Session (1921), p. 19.) But there is nothing to indicate in either the statutes or in the administrative practices that ability to pay was a factor in determining liability for the charges after 1909. Likewise in 1921, when the provision for the investigation of the financial circumstances of responsible relatives was added there was no indication that the purpose of the added provision was to determine liability of relatives already made unequivocally liable. The language of the first paragraph of section 2176 and the change of the law in 1909 too clearly provided for the imposition of an initial liability to permit any other construction. The investigation provided for in the 1921 legislation must be deemed to serve some purpose and that purpose is apparent from companion sections first enacted in 1903. Section 2180 of the Political Code then enacted provided for the amount of monthly support to be paid by relatives of the mentally ill, and further provided that "the medical superintendent of a state hospital for the insane shall, on the order of the commission, reduce or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care, support, maintenance and clothing of any insane person committed thereto and confined therein, on satisfactory proof that said estate or said relatives, as the case may be, are unable to pay the said sum * * *." Stats.1903, p. 506. The foregoing has been carried through and appears today in its material aspects in section 6651 of the Welfare and Institutions Code above set out. The legislation of 1921, in providing for an investigation of financial circumstances of responsible relatives, was intended to furnish state agencies with knowledge sufficient to enable them to reduce or remit the amounts for which the relatives were liable if the circumstances justified it.

[2–4] It therefore appears that while an unconditional liability is imposed, the amounts due thereunder may be reduced, remitted, or cancelled by administrative action. It may be assumed in the present case that Mrs. Girard, during her lifetime, was unable to pay the amounts for which she was obligated. However, mere inability to pay cannot of itself constitute a reduction, remission or cancellation of the obligation. As stated, proper consideration of the statutory provisions clearly indicates that the Legislature intended liability to attach regardless of ability to pay. It is true that the Director of Mental Hygiene (or his predecessor, the Director of Institutions) might have cancelled or remitted the amounts due, following an investigation and determination of inabilty to pay on the part of the deceased, in accordance with section 6651 of the Welfare and Institutions Code. But there is no evidence that such action was taken following the initial investigation. On the other hand it does appear that during the four years for which recovery is sought the Department of Mental Hygiene, through its director, made determinations as to the monthly rate for the care, treatment, support and maintenance of mentally ill patients and that the claim of the department filed in the present case was in accord with those rates. Mere failure to enforce the obligation cannot be deemed to constitute such administrative action as would result in modifying, remitting or cancelling the obligation, constructively or otherwise. The only effect of such failure, insofar as the obligation to pay is concerned, is to make unenforceable those portions of the obligation which, in accordance with the applicable statute of limitations (Code Civ.Proc. § 345), were outstanding for more than four years.

The plaintiff relies on a decision of the Appellate Department of the Superior Court. Department of Mental Hygiene v. Shane, 142 Cal.App.2d Supp. 881, 299 P.2d 747. In that case a father did not have the ability to pay for the support of his son, an inmate in a state hospital. Nevertheless his estate was held liable in an action against the executor, although no attempt had been made to collect the amounts due from the father during his lifetime. The present case cannot be distinguished from that case. Decisional law in other states is based on legislative enactments not the same as those here involved and for that reason are not controlling.

It is contended by the defendant that our statutory provisions provide "only for prospective collection, in advance, by order duly made and modifiable." This argument necessarily assumes that the obligation to pay was extinguished or rendered uncollectible upon the death of the decedent. Neither assumption may properly be made. If the statute be construed to provide for collection only in advance the obligation would be destroyed upon the death of the decedent. This would lead to the curious assumption that the obligation expressly imposed by section 6650 on the administrators of the estates of responsible relatives must be satisfied by collection prior to their death. The argument further assumes that an order must be made before the obligation is collectible. But the obligation to pay was unconditionally created by statute upon Joan's commitment, and no administrative order was required to perfect it. It continued in the absence of effective administrative action to modify, remit or cancel it. Thus it cannot be said that after Mrs. Girard's death the state purported for the first time to create an obligation to pay for Joan's maintenance. Nor can it properly be contended that the amounts due from an estate for past obligations within the period of limitations are uncollectible from the later acquired assets of the estate. In Re Estate of Phipps, 112 Cal.App. 2d 732, 247 P.2d 409, 412, 33 A.L.R.2d 1251, the Department of Mental Hygiene brought an action under section 6655 of the Welfare and Institutions Code against the estate of an incompetent for care and maintenance furnished prior to his acquisition of the estate. It was contended that there was a legislative intent to limit liability to those obligations which arose after the acquisition of assets by the estate. The court held that "Section 6658, which provides that the department may bring an action to enforce payment for a patient's care against any person, guardian or relative, does not limit such action to a situation in which the judgment is collectible." While the provisions of the law applicable to the present case are not quite the same as those there involved they are found in the same article of the Welfare and Institutions Code and require a consistent construction.

[5, 6] Likewise there is no merit in the contention that the department has waived its right by its failure to make a prior demand for payment, or that it is now estopped from demanding payment. In Re Estate of Fassetta, 14 Cal.App.2d 239, 57 P. 2d 1336, 1337, it was claimed that "the director [of the Department of Institutions] is estopped to present said demand on account of leading the guardian to understand that no demand of the kind would be made, but that the same was waived." There, as here, the defendant relied upon the state's silence over the years; but there was no proof that the state gained any advantage by its conduct, or that the defendant changed his position or suffered any disadvantage in reliance upon the claimed waiver, and the court affirmed a judgment for the Department of Institutions. Nor, is the action barred by laches. "[T]here can be no laches in delaying the bringing of an action if it is brought within the period of limitation * * *, unless there are some facts or circumstances attending the delay which have operated to the injury of the defendant." Meigs v. Pinkham, 159 Cal. 104, 112 P. 883, 886; see also Burns v. Ross, 190 Cal. 269, 278, 212 P. 17; Handyspot Co. of Northern California v. Buegeleisen, 128 Cal.App.2d 191, 195–196, 274 P.2d 938; 18 Cal.Jur.2d 208. In the present case there is no sub-

stantial evidence of injury to the defendant occasioned by the delay in bringing the action.

From time immemorial it has been the natural primary obligation of the parent to bear the financial burden of caring for an afflicted child. In this humanitarian age the state has assumed that obligation in the absence of the parent's ability to do so. This fact has not, however, entirely abolished the parental obligation. It has done so only to the extent provided by statute. There is no apparent reason why the state should not provide that the parent's financial responsibility created during her lifetime should continue as an obligation of her estate. The fact that, because of circumstances, the obligation created during her lifetime was not then collected did not extinguish it as a valid claim against her estate in an amount within the statute of limitations.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

I cannot agree that the liability set forth in section 6650 of the Welfare and Institutions Code is unconditional regardless of ability to pay. The Welfare and Institutions Code, with its comprehensive provisions for the liability of responsible relatives to the appropriate public agency for the support of the needy, is the measure of such liability; its sections, read together, constitute a complete system which occupies the field of such liability. (See County of San Bernardino v. Simmons (1956), 46 Cal.2d 394, 399, 296 P.2d 329; County of Contra Costa v. Lasky (1954), 43 Cal.2d 506, 509, 275 P.2d 452.) When the pertinent portions of the code are read together it appears that the liability of the responsible relatives stated in section 6650 is subject to the condition, stated in section 6653, that investigation disclose that "such relative or relatives are in fact financially able to pay such charges."

There was, in effect, a determination by the department during Mrs. Girard's lifetime that she need not pay any amount for the care and maintenance of Joan, as evidenced by the failure to make any charge for such care and maintenance after investigation of Mrs. Girard's financial circumstances. This determination was, in effect, a remission of the conditional liability which would have attached only in the event of a determination that Mrs. Girard was "financially able to pay such charges."

Section 6651 of the code provides that "The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care * * * of any mentally ill or insane person * * * who is a patient of a state hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care." The power to "reduce, cancel or remit" appears correlative to the power to impose, and where liability is not imposed during the lifetime of the responsible relative it does not appear consonant with legislative intent to seek to impose such liability after the responsible relative's death.

I would not analogize In re Estate of Phipps (1952), 112 Cal.App.2d 732, 247 P.2d 409, 33 A.L.R.2d 1251 (majority opinion, 323 P.2d at page 69). The question there was the liability of the estate of an incompetent for care furnished the incompetent at a state hospital prior to the acquisition of any estate by the incompetent. It may fairly be said that the liability of the estate of the incompetent under section 6655 of the Welfare and Institutions Code, once the incompetent has died, is "unconditional" as opposed to the liability of the estate of a responsible relative under sections 6650, 6651, and 6653. In the Phipps case it is said (at page 735 of 112 Cal. App.2d, at page 411 of 247 P.2d) that "The liability of both [the estate of the incompetent and the responsible relatives] is there, although there may be no collectibility due to absence of estate or funds."

This statement appears too broad insofar as it indicates that the estate of a responsible relative would be liable even though during the lifetime of the relative there was no determination of ability to pay.

From what has been said it is apparent that I disagree with Department of Mental Hygiene v. Shane (1956), 142 Cal.App.2d Supp. 881, 299 P.2d 747 (majority opinion, 323 P.2d at page 69). There, there was no evidence that the department ever made demand upon the decedent, during his lifetime, for the support of his insane son. After his death the department filed a claim in his estate. The court said (at page 883 [1] of 142 Cal.App.2d Supp., at page 749 of 299 P.2d), "We don't see any connection between the fact that the decedent did not have the ability to pay for his son, the inmate, while he was living and the fact that his estate would be liable." However, it appears that there is a connection between the fact that the department was not shown to have made claim to payments and established the ability of the decedent to make such payments during the period for which support was sought rather than waiting to make claim therefor after the asserted liability had accrued and the responsible relative had died.

As stated in the majority opinion (323 P.2d at page 67), section 2176 of the Political Code when enacted (Stats.1903, p. 505) "clearly made ability to pay a condition of liability." It provided, in material part, that "The husband, wife, father, mother, or children of an insane person, *if of sufficient ability*, * * * shall be liable for the care, support and maintenance of any insane person in a state hospital for the insane * * *" (Italics added.) When the Legislature deleted the phrase "if of sufficient ability" in 1909 (Stats.1909, p. 71) it added to the Political Code a form of commitment which expressly provided for a statement of financial ability (Pol.Code, § 2170, Stats.1909, p. 70). And in 1921, as the majority opinion points out, the Legislature added to section 2176 of the Political Code the provision that "The commission shall * * * make an investigation to determine whether the patient has any relative or relatives as mentioned in this section, and who are herein made responsible for payment for the care * * * of such patient, * * * and shall ascertain the financial condition of such relative or relatives, to determine whether in each case such relative or relatives are in fact financially able to pay such charges." (Stats.1921, p. 1335.) It thus appears that the Legislature has always had in mind financial ability as a condition of the liability of responsible relatives.

For the reasons above stated, I would reverse the judgment.



49 Cal.2d 826

Philip F. JOHNSTON and Merle F. Johnston, Plaintiffs and Appellants,

v.

CITY OF CLAREMONT (a Municipal Corporation) et al., Defendants and Appellants.

L. A. 24247.

Supreme Court of California.
In Bank.

March 26, 1958.

Rehearing Denied April 23, 1958.

Declaratory relief action brought by property owners seeking to have ordinance changing their property from residental uses to commercial uses held valid. From a judgment of the Superior Court, Los Angeles County, Donald R. Wright, J. pro tem., holding the ordinance valid, both the property owners and city appealed. The Supreme Court, McComb, J., held that city council, in adopting rezoning ordinance which amended general zoning ordinance of city of sixth class by changing plaintiffs' property from single family residence to commercial acted in a legislative capacity, and rezoning ordinance was subject to referendum.

Judgment reversed and property owners' application for leave to produce additional evidence denied.

Carter, Shenk, and Schauer, JJ., dissented.

Opinion, 312 P.2d 300, vacated.

1. Municipal Corporations ⇐108.8

City Council, in adopting rezoning ordinance which amended general zoning ordinance of city of sixth class by changing plaintiffs' property from single family residence to commercial acted in a legislative capacity, and rezoning ordinance was subject to referendum. West's Ann.Const. art. 4, § 1; West's Ann.Gov.Code, § 65804.

2. Municipal Corporations ⇐108.8

Power of referendum may be invoked only with respect to matters which are strictly legislative in character. West's Ann.Const. art. 4, § 1.

3. Municipal Corporations ⇐621.39

The board of supervisors, in granting a permit under a zoning ordinance, acts in an administrative capacity.

4. Municipal Corporations ⇐601(15)

A zoning ordinance constitutes exercise of a governmental and legislative function and is subject to change by legislative power. West's Ann.Gov.Code, § 65804.

5. Municipal Corporations ⇐601(15)

Zoning of use districts or changes of uses and restrictions within a district can be accomplished only through an amendment of the zoning ordinance, and amendment must be made in same mode as its original enactment. West's Ann.Gov. Code, § 65804.

6. Municipal Corporations ⇐108.8

Zoning ordinance adopted by legislative body of general law city without complying with requirements of zoning act is subject to referendum. West's Ann. Const. art. 4, § 1; West's Ann.Gov.Code, § 65804.

7. Municipal Corporations ⇐108.8

Whenever legislative body of city acts in its legislative capacity, action it takes is subject to constitutional right of referendum unless such action falls into one of exceptions provided for in Constitution. West's Ann.Const. art. 4, § 1; West's Ann.Gov. Code, § 65804.

8. Municipal Corporations ⇐601(15)

Where wording of zoning ordinances must be changed in order to accomplish desired revision, act is legislative and not administrative and change must be initiated and adopted in same manner as original zoning ordinance, but where regulation is changed pursuant to a provision of an existing ordinance permitting an administrative variance upon finding of certain facts, the act is administrative. West's Ann.Gov.Code, § 65804.

9. Municipal Corporations ⇐625, 626

Where highway conditions in front of plaintiffs' property which abutted on boulevard made plaintiffs' property more reasonably usable and suitable for commercial purposes than for residential and agricultural purposes and substantially all of property in county contiguous to and for some distance east and west along boulevard had been zoned for business, but area south of plaintiffs' property was zoned for single family residences and to east it was zoned for single family residences, city ordinance zoning plaintiffs' boulevard property for residential and agricultural use was not unreasonable oppressive, arbitrary and discriminatory.

10. Municipal Corporations ⇐63(2)

Although courts will inquire as to whether a zoning ordinance is arbitrary or unreasonable, decision of zoning authorities as to matters of opinion and policy will not be set aside or disregarded by court unless regulations have no reasonable relation to public welfare or unless physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in exercise of police power.

11. Municipal Corporations ⇐63(1, 2)

Wisdom of prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination it will not substitute its

judgment for that of zoning authorities if there is any reasonable justification for their action.

12. Municipal Corporations ⇐601(17)

Findings and conclusions of trial court as to reasonableness of a zoning ordinance are not binding on an appellate court if record shows that question is debatable and that there may be a difference of opinion on the subject.

13. Municipal Corporations ⇐625

Fact that some hardship is experienced through exercise of police power or that it may be more profitable to make other use of property is not controlling in determining whether zoning regulations are arbitrary or unreasonable.

14. Municipal Corporations ⇐601(15)

Amendment of city ordinance changing plaintiffs' property from agricultural and residential use to commercial use without a hearing before city council of general law city was invalid. St.1951 p. 3897, § 14; St.1953 p. 2929, § 4.

15. Easements ⇐26(1)

Where property owners delivered to city a grant deed conveying a twenty-foot easement over portion of their property for widening of a highway and deed provided for automatic defeasance of grant if ordinance rezoning plaintiffs' property for commercial uses should be repealed, suspended, or otherwise not take effect according to its terms, city did not have a valid and subsisting easement upon defeat of zoning ordinance on referendum.

Harry R. Roberts, Pomona, for plaintiffs and appellants.

William G. Bergman, Jr., Claremont, City Atty., Burke, Williams & Sorensen, Harry C. Williams and Royal M. Sorensen, Los Angeles, for defendants and appellants.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Roger Arnebergh, City Atty., and Bourke Jones, Asst. City Atty., Los Angeles, as amici curiae for defendants and appellants.

McCOMB, Justice.

Plaintiffs and defendants appeal from a judgment in a declaratory relief action which held that an ordinance of the city of Claremont rezoning plaintiffs' property as commercial property was valid.

Plaintiffs' property is located on the southwest corner of Foothill Boulevard and Mountain Avenue in Claremont, extending 959 feet in a westerly direction along the south side of Foothill and 569 feet in a southerly direction along the west side of Mountain. Most of it is planted in citrus trees, but on the northeast corner there are a reservoir, water well, and pumping plant, which have been used for many years for commercial purposes.

The northern and western borders of plaintiffs' property constitute the boundaries between Claremont and land which is unincorporated territory of Los Angeles County.

Foothill Boulevard is a widely travelled highway. The unincorporated area on both sides of the highway for a distance of several miles has been zoned C–1 by the county, a zoning which permits commercial establishments such as retail stores, gasoline stations, and restaurants. A great deal of such land is being devoted to commercial uses. The property on the south side of Foothill immediately west of plaintiffs' property is being used for a trailer sales business.

Next to plaintiffs' property on the south, there is a substantial area which has been zoned R–1 (single family residence) by the city of Claremont. The eastern side of Mountain is zoned residential for several blocks north and south of Foothill. East of Mountain on Foothill there is no commercial zoning for over a block and no commercial use for about two blocks.

According to the latest estimate available at the time of trial, Claremont had a population of about 9,000. A downtown area of approximately six square blocks is zoned for C–2 (commercial) uses. In addition, a four-block strip on Foothill,

principally on the southern side, has been zoned commercial since 1953. There is evidence that only a few lots are vacant in either of these commercial zones, but single family residences are located on more than two square blocks of the downtown area.

Although one real estate appraiser who had investigated the area testified that in his opinion a profit of $38,600 could be realized from subdividing plaintiffs' property for residential purposes under a plan providing for lots which would back onto Foothill, another one testified that in his opinion such a subdivision would result in a loss of $7,800.

A zoning consultant for the city of Claremont and other cities was of the opinion that the city was essentially residential in character and that there should be no more commercial use permitted on the south side of Foothill. There was also testimony to the effect that the city has zoned 50% more land for commercial purposes than the size of the population would indicate is currently needed, and, in the opinion of a zoning expert, an excess commercial zoning of 25% to 30% is a reasonable amount for future expansion. Other testimony, however, was to the effect that there should be twice as much commercial zoning as is necessary at present.

Chronology

i. In 1951 defendant city of Claremont, a sixth class city, adopted a general zoning plan, ordinance No. 441, under the general law. Plaintiffs' property was zoned for agricultural and residential use.

By the terms of the general zoning ordinance as originally adopted, a public hearing was required to be held by the planning commission on any request for redistricting, but none was expressly prescribed by the ordinance to be held thereafter by the city council.

ii. On May 3, 1954, plaintiffs filed a request with the city council for a change in the zoning of their property from a residential zone to a commercial zone. A public hearing was held by the planning commission, and thereafter the commission referred plaintiffs' request, without recommendation, to the city council.

iii. On June 1, 1954, without further public notice, the city council adopted ordinance No. 503, purporting by its terms to rezone a portion of plaintiffs' property from a residential to a commercial zone. A week later and without notice to plaintiffs, the city council purported to adopt an emergency measure, ordinance No. 504, reciting that the general zoning ordinance did not conform to the Government Code of the State of California and providing that ordinance No. 503 be repealed. Ordinance No. 503 was never published as required by law.

iv. On July 29, 1954, the city council, by ordinance No. 507, amended the general zoning ordinance No. 441 to require a public hearing by both the planning commission and the city council on applications for rezoning.

v. On September 21, 1954, after the effective date of ordinance No. 507, plaintiffs filed a second request for the rezoning of their boulevard frontage to a depth of 300 feet. This application was referred to the planning commission, which held a public hearing on October 19, 1954, but the commission failed to act upon the application within the 40-day period prescribed by ordinance No. 441, as amended by ordinance No. 507, resulting in an approval by operation of law of plaintiffs' application.

vi. On December 6, 1954, the city council held a public hearing upon plaintiffs' application.

vii. On December 14, 1954, defendant city adopted ordinance No. 513, the effect of which was to rezone plaintiffs' boulevard frontage property from an R-1 zone (single family residence) to a C-2 zone (commercial).

viii. Concurrently with the adoption of ordinance No. 513 rezoning plaintiffs' boulevard frontage, plaintiffs delivered to the city a grant deed conveying a 20-foot easement over the most easterly portion of their boulevard frontage for the widening

of Mountain Avenue, which deed provided for the automatic defeasance of the grant should ordinance No. 513 be repealed or suspended or otherwise not take effect according to its terms. The city council accepted this grant deed according to the terms thereof.

ix. About January 3, 1955, there were filed with the city clerk referendum petitions signed by 829 registered voters of the city, entitled "Referendum Petition Against Ordinance No. 513 Redistricting Certain Property in the City of Claremont Located at the Southwest Corner of Mountain Avenue and Foothill Boulevard From an R-1 Zone (single family residence) to a C-2 Zone (heavy commercial)."

x. Pursuant to said referendum petition, a special election was held May 3, 1955, to submit to the electors the question of whether ordinance No. 513 should be approved.

xi. On May 10, 1955, after a canvass of the returns it was determined that a majority[1] of the voters had voted against the adoption of ordinance No. 513.

xii. On August 5, 1955, plaintiffs instituted the present declaratory relief action seeking to have it held that ordinance No. 513 was valid.

xiii. After trial, the court found:

(a) That ordinance No. 513 complied in all respects with the requirements of the general zoning law of defendant city and with state law; that it was not subject to referendum under the laws of the State of California; and that as a necessary corollary plaintiffs' deed to the city was a valid and subsisting grant of an easement;

(b) That the highway conditions in front of plaintiffs' property rendered its boulevard frontage more reasonably usable and suitable for commercial purposes than for residential or agricultural purposes; that substantially all the property in the county contiguous to and for some distance east and west along Foothill Boulevard was and had been zoned for business; and that next to plaintiffs' property there were a reservoir, water well, and pumping plant which for many years had been used for commercial purposes;

(c) That ordinance No. 503 was invalid because it was not adopted in conformity with the requirements of state law then in effect; and

(d) That the general zoning law, ordinance No. 441, as amended by ordinance No. 513, was not discriminatory as to plaintiffs.

Defendants' Appeal

[1] Question: *Is a rezoning ordinance that amends a general zoning ordinance of a city of the sixth class (general law city) subject to referendum?*

Yes. The following principles are here applicable:

1. Our Constitution reserves the referendum power to the electorate, including the voters of cities without charters, with certain exceptions not applicable to the present case. (Cal.Const., art. IV, § 1.[2])

1. Of the ballots cast in person, the election was found to be a tie, with 1153 votes for the ordinance and the same number against, but when the 44 absentee ballots were counted, ordinance No. 513 was defeated by a margin of 24 votes.

2. Section 1 of article IV of the Constitution provides, in part: "The second power reserved to the people shall be known as the referendum. No act passed by the Legislature shall go into effect until 90 days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the State, and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house.

"* * * provided, however, that no measure creating or abolishing any office or changing the salary, term or duties of any officer, or granting any franchise or special privilege, or creating any vested right or interest, shall be construed to be an urgency measure. * * *

"The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to

[2] 2. The power of referendum may be invoked only with respect to matters which are strictly legislative in character. (Simpson v. Hite, 36 Cal.2d 125, 129[1], 222 P.2d 225; Dwyer v. City Council, 200 Cal. 505, 511[3], 253 P. 932; Chase v. Kalber, 28 Cal.App. 561, 568 et seq., 153 P. 397.)

[3] 3. A board of supervisors in granting a permit under a zoning ordinance acts in an administrative capacity. (Johnston v. Board of Supervisors, 31 Cal.2d 66, 74 [6], 187 P.2d 686; Essick v. City of Los Angeles, 34 Cal.2d 614, 623[3], 213 P.2d 492.)

[4] 4. A zoning ordinance constitutes the exercise of a governmental and legislative function and is subject to change by the legislative power. (Gov.Code, § 65804; 8 McQuillin, Municipal Corporations (3d ed. rev. 1957), Zoning, § 25.65, p. 145 [3]; cf. Dwyer v. City Council, supra, 200 Cal. at page 515, 253 P. at page 936; Wilkins v. City of San Bernardino, 29 Cal.2d 332, 341 [5], 175 P.2d 542; Lockard v. City of Los Angeles, 33 Cal.2d 453, 460[2], 202 P.2d 38, 7 A.L.R.2d 990.)

[5] 5. The amendment of a legislative act is itself a legislative act. The power to legislate includes by necessary implication the power to amend existing legislation. Rezoning of use districts or changes of uses and restrictions within a district can be accomplished only through an amendment of a zoning ordinance, and the amendment must be made in the same mode as its original enactment. (Gov.Code, § 65804; 8 McQuillin, Municipal Corporations (3d ed. rev. 1957), Zoning, § 25.245, p. 594 [4]; Blotter v. Farrell, 42 Cal.2d 804, 811[6], 270 P.2d 481.)

We must therefore determine this question: *Did the city council act in an administrative capacity or in a legislative capacity in adopting ordinance No. 513?*

In view of the foregoing rules, it is evident that the amendment of legislation is necessarily legislative in character and that where, as here, the council amends a zoning ordinance so as to exclude from a particular zone property previously included in such zone, its act in amending is a legislative act and not an administrative act.

It is to be noted that this is an entirely different situation from one in which a zoning ordinance confers upon the council or an official the power to grant an easement or variance in a particular case. (See Johnston v. Board of Supervisors, supra; Essick v. City of Los Angeles, supra.)

Likewise, section 65804 of the Government Code [5] provides that the changing of

be exercised under such procedure as may be provided by law. * * * Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of Section 8 of Article XI of this Constitution. * * * This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

3. In 8 McQuillin, Municipal Corporations (3d ed. rev. 1957), Zoning, § 25.65, p. 145, it is said: "* * * a zoning ordinance constitutes an exercise of a governmental and legislative function and, hence, is subject to change by the legislative power."

4. In 8 McQuillin, Municipal Corporations (3d ed. rev. 1957), Zoning, § 25.245, p. 594, it is said: "Generally, rezoning of use districts or changes of uses and restrictions within a district can be accomplished only through an amendment of the zoning ordinance, and the amendment must be made in the same mode as its original enactment. Amendments are subject to limitations set by the general law or charter, and the amendment of such ordinances must be enacted as prescribed. Generally, the amendment can be effected only by an ordinance enacted by the municipal legislative body, and not by a mere resolution or order."

5. Section 65804 of the Government Code reads: "Except as otherwise provided in this article, an amendment to a zoning ordinance which amendment changes

property from one zone to another must be accomplished by an ordinance amending the original ordinance.

This conclusion is in accord with the views expressed by this court in several previous decisions. In Dwyer v. City Council, 200 Cal. 505, 515, 253 P. 932, 936, we said: "A zoning ordinance as amended becomes in effect a different ordinance. Even if it be granted that a reclassification of an area as small as that involved in the instant case cannot be said to effect a new scheme, the same rule must necessarily be followed as would be applied if a larger area had been reclassified, and it may be observed that a piecemeal rezoning of small areas may result in a plan differing in vital particulars from that originally contemplated."

In Wilkins v. City of San Bernardino, 29 Cal.2d 332, 341 [5], 175 P.2d 542, 549, it was held that whether an area of general use within a zone of limited use should be expanded was "clearly within the discretion of the legislative body of the city."

In Lockard v. City of Los Angeles, 33 Cal.2d 453, 460 [2], 202 P.2d 38, 42, 7 A.L.R.2d 990, Mr. Chief Justice Gibson, speaking for this court, said: "In enacting zoning ordinances, the municipality performs a *legislative function,* and every intendment is in favor of the validity of such ordinances." (Italics added.)

It has been held that referendum is not available in street improvement cases. (Chase v. Kalber, 28 Cal.App. 561, 573 et seq., 153 P. 397; Starbuck v. City of Fullerton, 34 Cal.App. 683, 684 et seq., 168 P. 583; St. John v. King, 130 Cal.App. 356, 366 et seq., 20 P.2d 123.) However, it should be noted that the Legislature has prescribed procedural steps to be taken *after* the adoption of an ordinance providing for street improvements, which steps would be circumvented if the proceedings were subjected to either the initiative or the referendum. (Chase v. Kalber, supra, 28 Cal.App. at page 573 et seq., 153 P. at page 401.) But no such objection exists with respect to subjecting a zoning ordinance to the referendum, since the procedural steps prescribed by the Legislature in such a case must be taken *before* the adoption of the ordinance. On the other hand, the objection would apply where a zoning ordinance was adopted by a general law city by means of an initiative measure without compliance with the general law relating to zoning. It has been held that an ordinance adopted under such circumstances was void for that reason. (Hurst v. City of Burlingame, 207 Cal. 134, 140 [5], 277 P. 308.)

[6] It was pointed out in the Hurst case, supra, 207 Cal. at page 140 [4] et seq., 277 P. at page 311, that the electors of a city or county can adopt under the initiative law only such ordinances as the legislative body thereof would have had the power to enact. (See also Blotter v. Farrell, 42 Cal.2d 804, 810 [5], 270 P.2d 481.) Clearly, the legislative body of a general law city could not validly adopt a zoning ordinance without complying with the zoning act. Where such body has adopted a zoning ordinance, complying with the requirements of the act, there is no reason not to subject the ordinance to referendum. This principle was recognized in the Hurst case, supra.

There the proponents of the initiative measure relied upon Dwyer v. City Council, supra, and in answer to their contention this court said, 207 Cal. at page 142, 277 P. at page 312: "The question of the operation of the initiative law to such local legislation was not involved in the Dwyer Case and therefore no necessity arose to distinguish between the effectiveness of the initiative and the referendum in zoning cases. *If the point were involved, it would undoubtedly be conceded that, had the board of trustees of the city of Burlingame adopt-*

any property from one zone to another or imposes any regulation listed in Section 65800 not theretofore imposed or removes or modifies any such regulation theretofore imposed shall be initiated and adopted in the same manner as required for the initiation and adoption of the original zoning ordinance."

ed a zoning ordinance, as provided by the statute, its final action would be subject to the referendum provisions of the constitution and laws of the state, for the obvious reason that there is embodied in the enactment of a zoning ordinance such elements of legislative action as to subject the ordinance when adopted to the reserved legislative power of the electors of the city, when properly invoked, to approve or reject it." (Italics added.)

[7] Whenever the council acts in its legislative capacity, the action it takes is subject to the constitutional right of referendum unless such action falls into one of the exceptions provided for in the Constitution.

The right of referendum with respect to zoning ordinances is essential for the protection of the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property.

[8] Under the provisions of section 65804 of the Government Code, supra, no distinction is made between the council's act in adopting zoning ordinances and making amendments thereto. The section provides that an amendment to a zoning ordinance that changes any property from one zone to another shall be initiated and adopted in the same manner as an original zoning ordinance.

In light of this section and the above authorities, where the wording of ordinances must be changed in order to accomplish the desired revision, the act is legislative and not administrative. On the other hand, where a regulation is changed pursuant to a provision of an existing ordinance permitting an administrative variance upon the finding of certain facts, the act is administrative. (Wheeler v. Gregg, 90 Cal. App.2d 348, 363 [7], 203 P.2d 37.)

Therefore, since defendant city, in adopting ordinance No. 513, was amending the general zoning ordinance to change certain property from one zone to another, it was acting pursuant to its inherent power to amend its legislative act and thus was acting in a legislative capacity. As it was acting in a legislative capacity in adopting the ordinance, the ordinance was subject to referendum.

Plaintiffs' Appeal

[9] Questions: First. *Was the zoning of plaintiffs' boulevard property for residential and agricultural use in the general zoning ordinance No. 441 unreasonable, oppressive, arbitrary and discriminatory, in the light of the trial court's finding (b), supra?*

[10] *No.* It is settled that, although the courts will, of course, inquire as to whether a zoning ordinance is arbitrary or unreasonable, the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power.

[11] The wisdom of the prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action. (Lockard v. City of Los Angeles, 33 Cal.2d 453, 461, 202 P.2d 38, 7 A.L.R.2d 990; see also Wilkins v. City of San Bernardino, 29 Cal.2d 332, 337 et seq., 175 P.2d 542.)

[12] As hereinabove stated, the trial court found that the highway conditions in front of plaintiffs' property rendered its boulevard frontage more reasonably usable and suitable for commercial purposes than for residential or agricultural purposes and that substantially all the property contiguous to and for some distance east and

west along Foothill Boulevard was zoned for business. However, the findings and conclusions of the trial court as to the reasonableness of a zoning ordinance are not binding on an appellate court if the record shows that the question is debatable and that there may be a difference of opinion on the subject. (Lockard v. City of Los Angeles, supra, 33 Cal.2d at page 462 [6], 202 P.2d at page 43.) Giving due consideration to the basic physical facts appearing in the record, such as the character of plaintiffs' property, the nature of the surrounding territory, the use to which each has been put, and recent trends of development, we have concluded that the question of the reasonableness of the ordinance was debatable and that there was a reasonable basis for the action of the zoning authorities.

[13] Even assuming, however, as would be justified from the record, that plaintiffs' property would be more valuable if it were commercially zoned, such factor would not be determinative. As was said in Lockard v. City of Los Angeles, supra, 33 Cal.2d at pages 466 et seq., 202 P.2d at page 46: "Exercises of the police power * * * are apt to have an adverse effect on property interests, and the fact that some hardship is experienced or that it may be more profitable to make other use of the property is not controlling in determining whether the regulations are arbitrary or unreasonable." Furthermore, in view of our conclusion that there was a reasonable basis for the action taken, the rule is applicable as stated in the Lockard case, supra, 33 Cal.2d at page 462, 202 P.2d at page 43, where it is said that in cases of this kind "the function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed."

Second. *Was ordinance No. 503 validly enacted?*

[14] *No.* Ordinance No. 441 was adopted April 17, 1951. It set forth a procedure, for redistricting, which procedure was followed in adopting ordinance No. 503. This procedure was in conflict with the state law in effect at the time ordinance No. 503 was adopted.

In 1951 (Stats.1951, ch. 1690, p. 3897) the following was enacted by the Legislature: "Any ordinance or amendment thereto passed pursuant to the Zoning Law of 1917 or the Conservation and Planning Act or its predecessor, is hereby confirmed, validated and declared legally effective." This validating act is part of section 14 of chapter 1690, which amended the Zoning Law of 1917.

In 1953 (Stats.1953, ch. 1355, p. 2929) there was enacted by the Legislature the following: "Any ordinances passed pursuant to the Planning Act, the Conservation and Planning Act, such Article 4 [Article 4, Chapter 10, Part 2, Division 3, Title 4 of the Government Code], or its predecessor, prior to the effective date of this act, are continued in force until repealed pursuant to law." This validating act is section 4 of chapter 1355, which chapter enacted the now effective provisions relating to the adoption of zoning ordinances by general law cities. Such provisions were also in effect at the time of the adoption of ordinance No. 503.

Subsequent to the adoption of ordinance No. 503, there has been no act validating any zoning ordinance.

Plaintiffs contend that by virtue of the validating acts of 1951 and 1953, all provisions of ordinance No. 441, regardless of whether they were contrary to the provisions of the Zoning Law of 1917, the 1947 Planning and Conservation Act, or the 1953 act relating to zoning, were declared valid and effective insofar as the city of Claremont was concerned and superseded the general law on that subject, and that since ordinance No. 503 was adopted under a procedure authorized by ordinance No. 441 it was validly enacted.

The purpose of a validating act is not to validate an ordinance the provisions of which are in conflict with the general law

of the state covering the same subject matter. The purpose of a validating act is to declare, in effect, that although such an ordinance was not adopted in accordance with the procedure outlined by a general law of the state, the Legislature, as to that particular ordinance, declares that there has been substantial compliance with said provisions and, therefore, such ordinance shall be deemed to have been validly adopted the same as though there had been exact compliance.

Validating acts operate retroactively only and confer no validity upon acts subsequent thereto. (50 Am.Jur.(1944), Statutes, § 481, p. 504; People ex rel. Wangelin v. Pitcairn, 371 Ill. 616, 21 N.E.2d 753, 755.)

If plaintiffs' position were adopted, it would give to a validating act a prospective operation. Under such a theory, ordinance No. 441, insofar as the procedural requirements are concerned, could remain effective forever even though the Legislature specifically has delared that the statewide policy is that a local legislative body should hold a public hearing before adopting substantive changes in a zoning ordinance. To give such force to a validating act is not reasonable, as it would be interpreting a validating act to say that any subsequent state law enacted on the subject should have no effect upon any city which prior to the adoption of the validating act had enacted an ordinance contrary to such later enacted state legislation, as long as such ordinance remained in effect. Under such an interpretation, there would be implied in the act of 1953, which is the current act relating to zoning, a provision that this act should apply to all general law cities of the State of California except those cities previously having enacted ordinances contrary to the provisions of this act.

To read into the 1953 act the exception that all cities previously having enacted an ordinance contrary to the provisions of the act would be exempt from certain provisions thereof as long as such ordinance remained in effect would prevent it from having a uniform application, and thus the act would be unconstitutional. (Cal.Const., art. I, § 11; State ex rel. Keefe v. McInerney, 63 Wyo. 280, 182 P. 2d 28, 37; Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40.) To read such an exception into the 1951 act would have the same effect.

Since the Legislature has determined that as a matter of public policy there must be a hearing before the local legislative body on any ordinance changing the permitted use of property within the city, such policy must apply equally to all cities within the same class. There is no reason either in law or otherwise for defendant city of Claremont to be treated differently in this respect from any other general law city within the state. Therefore, no zoning ordinance adopted by the city of Claremont after the effective date of the current act relating to zoning is valid unless a hearing thereon before the local legislative body was held, as required by that act. Admittedly, no such hearing was held with respect to ordinance No. 503. Consequently, the ordinance was not validly enacted.

As indicated above, the city council, by ordinance No. 504, purportedly repealed ordinance No. 503 a week after its adoption. Plaintiffs contend that the procedure prescribed by the Government Code was not followed in the enactment of ordinance No. 504 and that it was therefore invalid. However, in view of our conclusion that ordinance No. 503 was not validly adopted, it is unnecessary to discuss whether or not ordinance No. 504, purportedly repealing it, ever became effective.

[15] Third: *Did defendant city have a valid and subsisting easement over the most easterly portion of plaintiffs' boulevard frontage by virtue of the grant deed which plaintiffs had executed in favor of the city?*

No. The grant deed by its terms provided for the automatic defeasance of the grant should ordinance No. 513 be repealed or suspended or otherwise not take effect according to its terms. Therefore,

since ordinance No. 513 was subject to referendum and a majority of the voters determined that it should not become effective, the deed which plaintiffs gave to defendant city granting an easement over their property was invalid by its terms.

Application by Plaintiffs for Leave to Produce Additional Evidence

Plaintiffs have filed an application for leave to produce certain additional evidence and have requested this court to make certain additional findings. However, in view of the conclusions reached herein, it is unnecessary to take additional evidence or make additional findings.

The judgment is reversed, and plaintiffs' application for leave to produce additional evidence and for this court to make additional findings is denied.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Assuming ordinance No. 513 which placed a portion of plaintiffs' property in a commercial zone (it had formerly been in residence and agricultural zone) was properly subject to a referendum, I believe that plaintiffs' constitutional rights have been invaded by application to them of the basic ordinance No. 441 which zoned their property for residence and agriculture. Plaintiffs' property lies along Foothill Boulevard, a highway which is not in the corporate limits of Claremont. The trial court found: "[T]hat approximately 12,800 vehicles per weekday traverse at high speeds said Foothill Boulevard, also known as U. S. Highway 66, in front of plaintiffs' said Boulevard Frontage, resulting in an almost continuous traffic roar therefrom which can be heard for more that 300 feet from said highway; that at all hours of the day and night an almost continuous stream of automobiles, trucks and passenger buses pass in front of plaintiffs' said Boulevard Frontage in both an easterly and westerly direction and the speed, weight and volume of such traffic make the ground vibrate for a distance of at least forty feet from said Foothill Boulevard; that the volume of said traffic passing plaintiffs' said Boulevard Frontage materially and substantially increases on week-ends and on holidays * * * said highway is not posted as a restricted speed zone by any signs whatsoever; that eastbound traffic upon said Foothill Boulevard travels in such an unrestricted speed zone for more than five miles immediately to the west of plaintiffs' said Boulevard Frontage; that said Foothill Boulevard east of the intersection thereof with Mountain Avenue is in a restricted speed zone and is posted by speed limit signs of thirty-five (35) miles per hour; that the said traffic conditions upon said Foothill Boulevard render plaintiffs' said Boulevard Frontage more reasonably suitable and usable for commercial uses and purposes, as authorized and permitted in a C-2 Zone by the terms of said Zoning Ordinance No. 441, as amended, than for any other use or purpose. * * *

"That it is true: that plaintiffs' said property is now, and has been for many years, planted to citrus trees; that said vehicular traffic travelling upon said Foothill Boulevard emits a large volume of fumes, odors and gases; that said fumes, odors and gases emitted from said traffic upon Foothill Boulevard have progressively increased over the years; that as a direct and proximate consequence of said fumes, odors, and gases emitted from said traffic, the citrus trees along the northerly boundary of plaintiffs' said Boulevard Frontage for a depth of approximately 100 feet have been killed, or the productivity of said trees has been adversely affected thereby and as a consequence thereof plaintiffs' Boulevard Frontage is not reasonably suitable or usable for such agricultural purposes; that said traffic conditions render plaintiffs' said Boulevard Frontage more reasonably suitable and usable for C-2 commercial uses and purposes, as such uses and purposes are authorized and permitted in a C-2 Zone by the Zoning Ordinance No. 441, as amended, than for any other use or purpose.

"That it is true: that the property west of Mountain Avenue on the northerly side of Foothill Boulevard and across from plaintiffs' said Boulevard Frontage, to a depth * * * (300) feet from the northerly side of Foothill Boulevard, is in the unincorporated territory of the County of Los Angeles and the same is in a C-1 Zone under the terms of said Los Angeles County Basic Zoning Ordinance No. 1494; that said County C-1 Zoned property on the north side of Foothill Boulevard is presently planted to lemon trees and was formerly a part of a large citrus grove extending northerly thereof; that said northerly balance or remainder of said former citrus grove is presently being subdivided for single family residences and such balance is presently owned by different owners than the persons owning said County C-1 zoned property; that said County C-1 zoned property across from plaintiffs' said Boulevard Frontage is more reasonably suitable for commercial purposes than any other use or purpose and the same is being presently held by the owners thereof for sale for commercial uses and purposes * * * that there is no real or substantial difference between said property on the north side of Foothill Boulevard west of Mountain Avenue and plaintiffs' said Boulevard Frontage and by reason thereof plaintiffs' said Boulevard Frontage is more reasonably suitable and usable for C-2 commercial uses and purposes, as such uses and purposes are authorized and permitted in a C-2 Zone by the terms of Zoning Ordinance No. 441, as amended, than for any other use or purpose. * * *

"[T]hat the property, to a depth of * * * (300) feet, situated in the unincorporated area of the County of Los Angeles and lying on both the northerly and southerly sides of Foothill Boulevard for a distance of several miles immediately westerly from plaintiffs' said Boulevard Frontage, is zoned for C-1 uses, as such uses are defined and permitted by the terms of said Los Angeles County Basic Zoning Ordinance No. 1494, as amended, and a substantial portion of such C-1 property is actually used for said C-1 uses; that the property immediately west of and adjoining plaintiffs' said Boulevard Frontage has been for several years, and now is, used for the sale of new and used automobile trailers, all of which have been, and now are, exhibited for sale by outdoor display on said property under and pursuant to a special permit or exception granted to the owners thereof by the Regional Planning Commission of the County of Los Angeles * * * that in addition to said trailer sales business there are other commercial and business uses presently being made and carried on upon the property lying on the south side of said Foothill Boulevard between plaintiffs' said Boulevard Frontage and San Antonio Avenue on the West, all of which business uses are in the unincorporated territory of the County of Los Angeles and in the same block as plaintiffs' said Boulevard Frontage, to wit, a gasoline filling station, a restaurant and a liquor store and that by reason of such uses and business being presently made and carried on, said property on the south side of Foothill Boulevard between plaintiffs' said Boulevard Frontage and said San Antonio Avenue has a predominantly commercial character and aspect; that there is no real or substantial difference between said property in said unincorporated territory of the County of Los Angeles and plaintiffs' said Boulevard Frontage and the said zoning of such other property, and the uses to which the same is put, as aforesaid, render plaintiffs' said Boulevard Frontage more reasonably suitable and usable for commercial uses and purposes as authorized and permitted in a C-2 Zone by the terms of said Zoning Ordinance No. 441, as amended, of defendant City, than for any other use or purpose.

"That it is true: that at all times since about the year 1895 the northeast corner of plaintiffs' said Boulevard Frontage at the intersection of Foothill Boulevard and Mountain Avenue, consisting of a parcel of land of approximately 160 feet by 160 feet, both of said measurements being taken from the intersection of Foothill Boulevard and

Mountain Avenue, has been, and now is, known as the 'Reservoir Site'; that since about the year 1895 said 'Reservoir Site' has been used for a commercial purpose, to wit: for a reservoir for the storage and distribution of water for a number of users; * * * that in addition to said reservoir there has been since about the year 1930, and there now is, a water well and pumping plant upon said 'Reservoir Site' for the commercial production of water; * * * that said The North Palomares Irrigation Company has been at all times since 1930, and now is, engaged in the business of producing and distributing water originating from said well and pumping plant to numerous customers and users; that said well and pumping plant emit noises in the pumping of water from said well, which noises can be heard a distance of approximately 160 feet away; that the aforesaid reservoir upon said 'Reservoir Site' provide an adequate and reasonable screen to any commercial activities which might be carried on upon plaintiffs' said Boulevard Frontage; that the aforesaid uses made of and said activities carried on upon said 'Reservoir Site' render plaintiffs' said Boulevard Frontage more reasonably suitable and usable for commercial uses as authorized and permitted in a C-2 Zone by the terms of said Zoning Ordinance No. 441, as amended, of defendant City, than for any other use or purpose.

"That it is true: that plaintiffs own all of the real property immediately adjoining and lying southerly of plaintiffs' said Boulevard Frontage for its entire length and distance; that the use of plaintiffs' said Boulevard Frontage for commercial uses would not reasonably tend to damage or otherwise materially adversely affect any property or the value thereof owned by any third person.

"That it is true: that the said Downtown Business District of defendant City, presently zoned for C-2 purposes by the terms of Zoning Ordinance No. 441, as amended, includes an area of approximately one and one-half blocks, bounded on the north by 4th Street and on the south by 3rd Street and on the west by Alexander Avenue and on the east by the alley one-half block east of Yale Avenue, in which one and one-half blocks substantially all of the property is developed and improved with residences excepting a service station on the northeast corner of 3rd and Yale Avenue; that the remaining portion of said Downtown Business District is substantially completely occupied by stores and business buildings on lots of a frontage of approximately 50 feet or less, all of which are owned by numerous owners thereof with only three small vacant lots therein; that the property surrounding and immediately adjoining said Downtown Business District is substantially all built upon with residences and other buildings; that plaintiffs do not own the premises upon which plaintiffs conduct their said automobile dealership business and plaintiffs lease the same from two different landlords. * * *"

Summarizing, plaintiffs' property is not usable for either residential or agricultural purposes; it is surrounded by commercially used property; there is no room for expansion of commercial projects in the commercial zone in Claremont under Ordinance No. 441, hence the business now there is granted a monopoly on the business activities in the community. Such constitutes a taking of property without due process of law and is unconstitutional. Plaintiffs are left with property which is worthless because they cannot use it for commercial purposes by reason of the zoning ordinance and it is unusable for any other purpose. The only value of property lies in the present or prospective uses that may be made of it. The facts being as they are here, there is no conceivable basis for the exercise of the police power to accomplish a zoning objective. The police power in the zoning field may not be so exercised as to render a person's property valueless. Indeed, no reason is even suggested how plaintiffs' property could be limited to agriculture and residence uses here except to create a monopoly for that part of Claremont which is jointly zoned for commercial purposes. Not only do we have the

finding of the trial court but the city council, *after a hearing,* came to the same conclusion in adopting ordinance No. 513. Certainly there was no reasonable basis for having plaintiffs' property zoned for residential and agricultural uses, when the planning authorities of Los Angeles County zoned all of the property around plaintiffs' as commercial. Thus such cases as Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38, 7 A.L.R.2d 990, are not in point. In fact they support the conclusion I have reached as it is there said: "* * * that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power." Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 460, 202 P.2d 38, 42. Under the reasoning in the Lockard case the class in which plaintiffs' property was zoned was arbitrary and capricious and its reasonableness is not "fairly debatable." The only time it was considered in the sense that a hearing was held was when ordinance No. 513 was passed which zoned plaintiffs' property as commercial. There was no hearing during the referendum election and the close vote on the matter showed that the question was more than "fairly debatable." The appellate court must, as Lockard says, "look beyond" the results of that election and determine the reasonableness of the zoning, giving consideration to the "character of the property," the "nature of the surrounding territory," the "use" to which it has been put and the "recent trends of development." All those factors point to only one conclusion here: The property has no use or value for residence or agriculture; the evidence shows this without dispute and the court so found. It is aptly said in Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 216, 237 P. 538, 539, 40 A.L.R. 782: "A municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts. In re White, 195 Cal. 516, 234 P. 396." In Wilkins v. City of San Bernardino, 29 Cal.2d 332, 340, 175 P.2d 542, 548, it is said that zoning ordinances are invalid "Where the restrictions create a monopoly," *"Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance,"* (emphasis added) and "Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses." While Lockard and Wilkins upheld the validity of the zoning there, they did not involve a case such as we have here, where the use of the adjacent property renders the land unsuited for the limited uses imposed by the zoning. A case closely in point is Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93. There plaintiff's property was, as here, zoned residential, but it was near a large cannery which emitted noise and on a highway carrying heavy traffic and "As described by the appellant his property consists of 5 acres upon which he had prune trees at one time. These trees were removed because of the insects which came over to them from the piled boxes of the cannery across the street, and there is now nothing on it but a barn and a house worth about $1,000." 14 Cal.2d at page 215, 93 P.2d at page 94. Similarly, here we have the noise and the lessened value of the property for agricultural uses. Holding the ordinance invalid the court said (14 Cal.2d at page 216, 93 P.2d at page 94): "Considering all the facts shown by the record, it clearly appears beyond question that the land owned by the appellant is entirely unsuited for residential purposes. *The adjoining cannery with the continuous noise which must necessarily result from twenty-four hour operation, creates a situation similar to that which is found in the industrial part of a great city.* Certainly no one wants to live next door to a large factory, and the question whether any consideration of public health, peace, safety or general

welfare justifies the continued restriction upon the appellant's property which prohibits its use for commercial purposes is not fairly debatable. In its application to the land owned by the appellant, the ordinance is void." (Emphasis added.) The identical facts appear in the case at bar.

I would therefore affirm the judgment on the ground that ordinance No. 441 is unconstitutional as applied to plaintiffs' property. This conclusion renders it unnecessary to determine whether ordinance No. 513 rezoning plaintiffs' property to commercial uses was subject to referendum or otherwise valid and effective.

SHENK and SCHAUER, JJ., concur.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.



49 Cal.2d 815

Grace Marie VATER, Appellant,

v.

COUNTY OF GLENN et al., Defendants, Glenn-Colusa Irrigation District (a Corporation), Respondent.

Sac. 6826.

Supreme Court of California, In Bank.

March 21, 1958.

Rehearing Denied April 16, 1958.

Action for wrongful death of plaintiff's husband and son when their automobile went off irrigation district's bridge into the district's canal. The Superior Court, Glenn County, W. T. Belieu and Curtiss E. Wetter, JJ., sustained the district's demurrers to the second amended complaint and entered judgment in favor of district. The plaintiff appealed. The Supreme Court, Gibson, C. J., held that under the circumstances the doctrine of governmental immunity was applicable.

Affirmed.

Carter, J., dissented.

Opinion, 309 P.2d 844, vacated.

1. States ⇐112

Waters and Water Courses ⇐228¾

Generally, in absence of statutory or constitutional provision to the contrary, the state and its agencies, including irrigation districts, are immune from liability for tort in discharge of governmental duties and activities.

2. Waters and Water Courses ⇐228¾

Provision in Water Code that when an officer is held liable for acts done in his official capacity the irrigation district shall pay the judgment without obligation for repayment by officer discloses a legislative intent not to abrogate the role of governmental immunity for irrigation districts except with respect to the payment of such judgments. West's Ann.Water Code, § 22731.

3. Waters and Water Courses ⇐228¾

Where no judgment had been obtained or sought against any officer of irrigation district for wrongful death of plaintiff's husband and son when their automobile went off district's bridge into the district's canal, liability of district for the death could not be based on provision in Water Code that when an officer is held liable for acts done in his official capacity the irrigation district shall pay the judgment without obligation for repayment by the officer. West's Ann.Water Code, § 22731.

4. States ⇐112

The abrogation or restriction of doctrine that state and its agencies are immune from liability for tort in discharge of governmental duties and activities is primarily a legislative matter, and where the legislature has clearly expressed its intention to maintain immunity, that intention is controlling.

5. Municipal Corporations ⇐742(4)

In considering whether the facts alleged are sufficient to constitute a nuisance within exception to the immunity doctrine where a governmental unit is maintaining a nuisance, the plaintiff must show that a legislative body has declared the condition complained of to be a nuisance.

6. Automobiles ⇐301(1)

In action against irrigation district for wrongful death of plaintiff's husband and son when their automobile went off district's bridge into the district's canal, plaintiff could not allege facts to support a cause of action on any theory that district was maintaining a nuisance. West's Ann. Civ.Code, § 3479.

7. Pleading ⇐225(2)

Where there was no reasonable possibility that defect in complaint could be cured by amendment, there was no abuse of discretion in failing to grant further leave to amend after sustaining demurrer.

8. Appeal and Error ⇐102

Order sustaining demurrer to second amended complaint was not appealable.

P. M. Barceloux, Burton J. Goldstein and Goldstein, Barceloux & Goldstein, San Francisco, for appellant.

Duard F. Geis, Carroll F. Byrd, Geis & Byrd and Carroll F. Byrd, Jr., Willows, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action against Glenn County and the Glenn-Colusa Irrigation District for damages for the wrongful death of her husband and son. General and special demurrers by the district to the second amended complaint were sustained without leave to amend, and judgment was entered in its favor.[1] Plaintiff moved to set aside the judgment upon the grounds of mistake, inadvertence, surprise and excusable neglect. She filed a supporting affidavit of her attorney to the effect that on the hearing of the demurrer he had neglected to argue an available theory of liability. The motion was denied without prejudice to its renewal within ten days, accompanied by a proposed amended complaint. Pursuant to this permission plaintiff renewed the motion and presented a proposed third amended complaint. This motion was also denied.

The principal question is whether plaintiff has alleged facts which constitute a cause of action.

The allegations of the second amended complaint may be summarized as follows: In 1910 certain persons, some of whom were agents of the district, constructed a private roadway over their land in extension of County Roard R so as to make the private roadway appear to be part of the county road. About the same time the district or its predecessor in interest constructed a wooden bridge to connect two portions of the private roadway which were separated by the district's main canal. There was a 45-degree turn where the roadway met the bridge, but the turn was not indicated by any signs or warning devices, and there were no adequate barricades, railings or lights. The levees of the canal were above the roadway, and, because of the construction and height of the levees and the bridge, travelers could not observe the abrupt change of direction or see the bridge until they were upon it. As a result, travelers were likely to drive off the bridge into the canal, and the roadway and bridge thus constituted a dangerous and defective condition and an "absolute nuisance per se." The district permitted this condition to exist on its premises without taking any steps to protect the public or provide a reasonable warning. In 1917 the bridge was taken over by the county to be maintained by it as a county bridge. Although the county and its supervisors knew of the dangerous condition, they failed to remedy it or warn the public. Plaintiff's husband was led by the appearance of the private roadway to believe that it was a public highway. As a proximate result of the dangerous condition of the roadway and the bridge, he drove his car off the bridge into the canal, and he and his son were killed.

The proposed third amended complaint repeated in substance the allegations of the second amended complaint and further stated that there is a dispute between

1. The county of Glenn apparently filed an answer to plaintiff's second amended complaint.

the several parties as to whether the county or the district or both are responsible for the maintenance of the bridge and that plaintiff does not know whether either or both are responsible. It was also alleged that plaintiff does not know whether the district constructed the bridge or acquired it, that the dangerous condition has existed for 40 years and that the district had notice of it.

[1] The general rule is that, in the absence of a statutory or constitutional provision to the contrary, the state and its agencies are immune from liability for tort in the discharge of governmental duties and activities. Pianka v. State, 46 Cal.2d 208, 210, 293 P.2d 458; Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 36, 257 P.2d 22; Stang v. City of Mill Valley, 38 Cal.2d 486, 488, 240 P.2d 980. This rule has been applied to irrigation districts. Nissen v. Cordua Irr. Dist., 204 Cal. 542, 545, 269 P. 171; Jackson & Perkins Co. of California v. Byron-Bethany Irr. Dist., 136 Cal.App. 375, 380 et seq., 29 P.2d 217, 30 P.2d 516; Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal. App. 234, 241–242, 212 P. 706; see Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 40, 257 P.2d 22.

Plaintiff does not claim that the district was acting in a proprietary capacity with respect to the bridge and roadway, and the only provisions upon which she relies as constituting a waiver of the district's immunity are sections 22725–22732 of the Water Code, which constitute the article entitled "Public Liability" in the division of the code relating to irrigation districts. Wat.Code, div. 11, pt. 5, ch. 4, art. 4. These sections are of no avail to plaintiff.

Section 22731 reads: "Nothing in the preceding portion of this article shall be construed as creating any liability except as provided in Section 22730 unless it would have existed regardless of this article." [2] Section 22730 provides that, when an officer is held liable for acts done in his official capacity, the district shall pay the judgment without obligation for repayment by the officer. In Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717, we considered the substantially identical provisions of the irrigation district liability law (Stats.1935, p. 2250), which was repealed when the Water Code was enacted, and said: "Section 3 [now section 22730] imposes a limited liability on the district by obligating it to pay certain judgments against its officers. This, according to section 4 [now section 22731], is the only new liability created by the act." 19 Cal.2d at page 127, 119 P.2d at page 720. The Powers Farms case was an action for damage to land caused by the seepage of water from a canal of an irrigation district, and it was brought under the provision of article I, section 14, of the California Constitution which prohibits damage to property for public use without just compensation. We held that this provision gave the plaintiff a cause of action against the district, but that the part of section 2 [3] of the irrigation district liability law which requires the filing of a claim in actions based upon the dangerous or defective condition of property

2. Section 22732, the only section in the article which follows section 22731, permits the district to carry liability insurance but does not create any liability. It is not alleged that the district carried insurance covering the liability claimed here, in which case it has sometimes been held that the injured person could maintain an action. Taylor v. Knox County Board of Education, 292 Ky. 767, 167 S.W.2d 700, 145 A.L.R. 1333; Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414.

3. Now contained in section 22727 of the code which provides: "Whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property under the control of any district or its officers or employees or the negligence of any officer or employee of a district, a verified claim for damages shall be presented in writing and filed with the officers or employees involved and also with the secretary within 90 days after the accident or injury has occurred. If an officer or employee cannot be found to be served, the officer's or employee's copy may be served on the secretary, but in any event a verified claim must be served on the secretary."

of the district was applicable to the action, and that plaintiff's failure to file a claim prevented his recovery. It is clear that we did not consider section 2 of the act as imposing liability upon the district for defective conditions because we expressly stated that the basis of liability was the constitutional provision (19 Cal.2d at page 126, 119 P.2d at page 720) and that the act imposed no liability on the district other than the one to pay certain judgments against its officers (19 Cal.2d at page 127, 119 P.2d at page 720, quoted above).

[2, 3] There is no doubt that section 4 of the act and section 22731 of the code show a legislative intent not to abrogate the rule of governmental immunity for irrigation districts except with respect to the payment of such judgments. In the present case no judgment has been obtained or sought against any officer of the district, and, therefore, liability cannot be based upon the provisions of the Water Code.

[4] Most of the authorities who have recently written on the subject strongly advocate abolition or modification of the principle of governmental immunity, which lets the loss caused by tortious conduct of the government rest on the injured individual instead of distributing it among all the members of the community, the beneficiaries of the governmental activity. (See, e. g., 2 Harper and James, The Law of Torts (1956), 1612; Prosser on Torts (2d ed. 1955), 775; Borchard, State and Municipal Liability in Tort—Proposed Statutory Reform, 20 A.B.A.J. 747 et seq.; Kuchel, Should California Accept Tort Liability? 25 Cal.State Bar J. 146, 151.) However, the abrogation or restriction of this doctrine is primarily a legislative matter (see Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 41, 257 P.2d 22; Waterman v. Los Angeles County General Hospital, 123 Cal.App.2d 143, 144, 266 P.2d 221), and, where, as here, the Legislature has clearly expressed its intention to maintain immunity, that intention is controlling.

[5] Several cases have recognized an exception to the immunity doctrine where a governmental unit is maintaining a nuisance. Phillips v. City of Pasadena, 27 Cal.2d 104, 106–107, 162 P.2d 625; Hassell v. City and County of San Francisco, 11 Cal.2d 168, 170, 78 P.2d 1021; Adams v. City of Modesto, 131 Cal. 501, 502–503, 63 P. 1083; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557; Lind v. City of San Luis Obispo, 109 Cal. 340, 343, 42 P. 437; Bloom v. City and County of San Francisco, 64 Cal. 503, 3 P. 129. In considering whether the facts alleged are sufficient to constitute a nuisance, we must keep in mind that, in order to state a cause of action based upon this theory, the plaintiff must show that a legislative body has declared the condition complained of to be a nuisance. Palmquist v. Mercer, 43 Cal. 2d 92, 101, 272 P.2d 26; Ward v. Oakley Co., 125 Cal.App.2d 840, 850–851, 271 P.2d 536; Brooks v. City of Monterey, 106 Cal. App. 649, 654, 290 P. 540; cf. People v. Lim, 18 Cal.2d 872, 879 et seq., 118 P.2d 472; People v. Johnson, 129 Cal.App.2d 1, 8–9, 277 P.2d 45.

[6] Plaintiff contends that this case comes within section 3479 of the Civil Code, which provides in part: "Anything which is injurious to health * * * or unlawfully obstructs the free passage or use, in the customary manner, of * * * any public * * * street, or highway, is a nuisance." The situation described by the complaint was not injurious to health within the meaning of this section. There is no specific allegation that the accident took place on a public highway, and, even if we were to assume that this deficiency is cured by the allegations that the bridge was a county bridge and that plaintiff's husband believed the road to be a public highway, the claimed defective condition did not unlawfully obstruct the free use of the road in the customary manner. Our attention has been called to no other statute which would support a conclusion that the facts alleged constitute a nuisance.

[7] Plaintiff claims that the trial court failed to recognize the nuisance exception to the immunity doctrine and that she should be given another opportunity to

amend her complaint. She has made no contention, however, that her allegations which describe the condition of the bridge and roadway are untrue or incomplete, and it does not appear that there is any reasonable possibility that the defect can be cured by amendment. Under the circumstances, there was no abuse of discretion in failing to grant further leave to amend. Cf. Lemoge Electric v. County of San Mateo, 46 Cal.2d 659, 664, 297 P.2d 638.

[8] The order sustaining the demurrer to the second amended complaint is not appealable, and the attempted appeal therefrom is dismissed. The judgment and the order denying the motion to vacate the judgment are affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

Once again this court is faced with the question of the scope of governmental immunity and again the majority has seen fit to broaden the scope when an analysis of applicable statutes shows such action to be clearly unwarranted.

The majority in this case determines that the irrigation district (hereinafter the district) is immune from suit under the doctrine of governmental immunity on the grounds that there is no statutory basis for liability, and that the condition complained of was not a nuisance within the meaning of Civil Code section 3479. The majority's interpretation of section 3479, although perhaps unduly restrictive, is not without authority. However, the conclusion that there is no basis for the district's statutory liability is incorrect and the result of misinterpreting the Public Liability article of the Water Code (§§ 22725–22732) and in particular section 22727 and the case construing it. See, Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717.

Section 22727 of the Water Code provides that "Whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property under the control of any district *or* its officers or employees or the negligence of any officer or employee of a district, a verified claim for damages shall be presented in writing and filed with the officers or employees involved and also with the secretary of the district within 90 days after the accident or injury has occurred. If an officer or employee cannot be found to be served, the officer's or employee's copy may be served on the secretary, but in any event a verified claim must be served on the secretary." (Emphasis added.) The progenitor of this section is found in Deering General Laws (Stats.1935, p. 2250) and was entitled the Irrigation District Liability Law. With the exception of the words "and/or" which were inserted as follows: "Whenever * * * as a result of any * * * condition of any property under the control of any district or its officers or employees *and/or* the negligence of any officer * * *" the two sections are identical. To be more precise the Public Liability article has merely incorporated the sections of the Irrigation District Liability Law and given these sections different designations: sections 1 and 2 of the Liability Law became sections 22726 and 22727 of the Water Code; section 2 was further transposed into sections 22728 and 22729, and sections 3 and 4 became sections 22730 and 22731.

The Irrigation District Liability Law was construed in Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717. In that case plaintiff brought an action against an irrigation district for injuries sustained as a result of seepage from irrigation canals. The action was based upon article I, section 14, of the California Constitution requiring compensation to be paid for property damaged or taken for a public use. This court recognized the principle that failure to meet the ninety day filing procedural prerequisite of section 2 of the Liability Law (now Water Code § 22727) was fatal to a cause of action under the statute. The question before the court was whether plaintiff, who admittedly had not

complied with the filing requirements, could maintain an action based upon the constitutional provision. This court held that he could not. The court reasoned that the act evinced a legislative intent to embrace all actions (see, Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d 129, 119 P.2d 721), including the one before it, and that failure to comply with the filing prerequisites defeated a cause of action against a district regardless of its basis.

In reaching its conclusion the court analyzed the sections of the Irrigation Liability Law at length, and nowhere was there any indication to forsake the principle that this law enabled injured parties to sue the district apart from its officers or employees. To the contrary the court took pains to point out that section 2 permitted claims for damages against a district on grounds of "(1) a dangerous or defective condition of property of the district and negligence of an officer or employee; *or (2) a dangerous or defective condition of property of the district, that is, a general liability without reference to negligence*, or (3) the negligence of an officer or employee." (Emphasis added.) Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d 128, 119 P.2d 721. This statement is susceptible only of the interpretation that an irrigation district's governmental immunity is removed by this statute and that such districts are liable independently of their employees or officers.

Therefore, it would seem to follow that since section 2 of the Irrigation Liability Law and section 22727 of the Water Code are the same, and under the former a district is liable apart from its employees for a dangerous and defective condition, the district still remains liable separately under section 22727.

However, we are now told that this is not so, but that by some peculiar alchemy the transposition of the Irrigation District Liability Law into the Water Code altered the nature of these sections to such an extent that this court is now required to regard sections 22730 and 22731 of the Water Code as controlling. Thus, the district's liability would be limited to negligent acts of its officers in their official capacity. Furthermore, we are told that in the Powers case "It is clear that we did not consider section 2 of the act [now Water Code, § 22727] as imposing liability upon the district for defective conditions because we expressly stated that the basis of liability was the constitutional provision [citation] and that the act imposed no liability on the district other than the one to pay certain judgments against its officers [citation]."

As an original proposition the majority's construction of sections 22730 and 22731 might have been plausible, but it is now forestalled by the Powers case. Moreover, if this court now seeks to interpret the Powers case as not affecting the district's liability other than as described in sections 22730 and 22731, it will be necessary to modify the contrary language therein since a reading of that case makes it obvious such was not the interpretation when it was written.

To substantiate this latter statement one need only read this court's restatement of plaintiff's contention in the Powers case, which appears as follows: "The respondent * * * contends that the law [Irrigation District Liability Law] concerns actions sounding in tort; *that it has no reference to the general liability of the district, and should be construed as applying only to suits against directors, officers, agents, and employees, based on negligence, and to the secondary liability of the district, created by section 3* [now Water Code, § 22730], *to pay certain judgments against officers.*" Emphasis added; 19 Cal.2d 123, 127–128, 119 P.2d 717, 721. This contention was rejected notwithstanding sections identical to sections 22730 and 22731 of the Water Code. This court stated that the statute could only be construed in the manner contended by ignoring the reference in the title to the liability of the irrigation district and the phraseology of section 2 (now Water Code, § 22727). There can be no question from this language that this court, at the time of the Powers case, viewed the district as liable apart from its officers.

The Powers case, then, established that the district's liability was twofold: (1) a general independent liability under section 2 of the liability law (now Water Code, § 22727) and (2) liability for the negligent act of its employees in their official capacity. The necessary implication of the decision being that sections 3 and 4 of the liability law (now Water Code, §§ 22730 and 22731) were only describing the conditions under which a district would be liable for the acts of its employees and were not limiting the district's independent liability. Thus, without sections 3 and 4 a district would not be liable for the acts of its employees when discharging govenmental duties and activities since a statutory provision is necessary to remove the protection of governmental immunity (see, Nissen v. Cordua Irr. Dist., 204 Cal. 542, 545, 269 P. 171; Jackson & Perkins Co. of California v. Byron-Bethany Irrigation Dist., 136 Cal.App. 375, 380, 29 P.2d 217, 30 P.2d 516). Under sections 3 and 4 a district's liability for its employees follows only when a judgment is rendered against an employee who, acting in his official capacity, negligently injures another, and providing proper notice is given to the district (Water Code, §§ 22727, 22730, 22731). However, if this is the extent of the district's liability it is obvious there is a large gap between the persons who may recover against a district and those who are injured. The closing of this gap was achieved in the Powers case where this court construed the applicable sections as rendering the district liable under specified conditions apart from its employees. The court did not blur their intent but made it manifest that sections 3 and 4 were not to be regarded as trespassing on an injured person's right to proceed directly against the district apart from its employees. Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d 128, 119 P.2d 721.

Therefore, section 22727 affirmatively answers the majority's question of whether there is a statute declaring the district liable independently of its employees. Any doubt that this is its purpose or meaning is answered in Powers Farms v. Consolidated Irr. Dist., supra. If there is some question concerning the legislative intent as to this section, the members of the court may draw comfort from the fact that the Legislature has apparently acquiesced to the Powers case and its implications since they were well aware of it but made no changes when codifying the Water Code.

Where plaintiff's complaint alleges compliance with the procedural prerequisites, as here, and sets forth proper grounds for a claim against the district, that is, a dangerous and defective condition is being maintained which caused an injury, this is all that is necessary to state a cause of action (see, Knight v. City of Los Angeles, 26 Cal.2d 764, 766, 160 P.2d 779; Insolo v. Imperial Irr. Dist., 147 Cal.App.2d 172, 175, 305 P.2d 176).

For the foregoing reasons the trial court erroneously sustained defendant's general demurrer, and the judgment of dismissal which followed should be reversed.

Rehearing denied; CARTER, J., dissenting.



49 Cal.2d 849

Garlan EPLEY, an individual doing business under the fictitious firm name and style of Retailers Credit Association, Plaintiff and Respondent,

v.

Amelia CALIFRO, as Administratrix of the Estate of Thomas T. Califro, Deceased, Lena Califro and Andy Mareck, Defendants,

Lena Califro, Defendant and Appellant.

Sac. 6671.

Supreme Court of California,
In Bank.
March 26, 1958.

Proceeding to dismiss action on ground that no answer had been filed to complaint and no judgment entered there-

in by plaintiff within three years after service of summons. The Superior Court, Yuba County, Warren Steel, J., entered order vacating previous order of dismissal and defendant appealed. The Supreme Court, Shenk, J., held that where complaint was filed and summons served on defendants who were represented of record by attorneys but answer subsequently filed was signed by one of the defendants, an attorney, for himself and other defendants without a substitution of attorneys, answer on behalf of other defendants was ineffectual, and when court entered order dismissing action because no answer had been filed and no judgment taken within three years after service of summons, disclosure that person filing answer was an attorney and purported to act for other defendants did not justify vacation of order of dismissal.

Reversed.

Opinion, 307 P.2d 641, vacated.

1. Appeal and Error ⇐82(3)
Judgment ⇐217

Where court entered order dismissing action because of failure to file answer and to have judgment entered within three years after service of summons, such order constituted a final judgment and special order vacating prior order of dismissal was appealable. West's Ann.Code Civ.Proc. §§ 581d, 963, subd. 2.

2. Evidence ⇐82

When answer was filed by one of the defendants, an attorney at law, on behalf of himself and other attorneys, it would be assumed that contents of verification stating that individual was one of the defendants and that he appeared for himself and other defendants were judicially known to the court at the time.

3. Attorney and Client ⇐69

Where summons in civil action was returned and firm of attorneys appeared for the defendants in order to file a demurrer and demand for bill of particulars, and subsequently one of the defendants, an attorney, purported to file an answer to complaint on behalf of himself and other defendants without any substitution of attorneys of record, court could only conclude that no authority appeared for party to represent his codefendants, and as to them no answer was regularly filed.

4. Attorney and Client ⇐62

Attorney of record has exclusive right to appear in court for his client, and neither the party himself nor another attorney should be recognized by the court in the conduct or disposition of the case. West's Ann.Code Civ.Proc. §§ 284, subds. 1, 2, 285, 581a.

5. Attorney and Client ⇐75(1)

Until written notice of substitution of a new attorney is given to the adverse party, attorney of record must be recognized as the exclusive representative. West's Ann.Code Civ.Proc. §§ 284, subds. 1, 2, 285, 581a.

6. Attorney and Client ⇐75(1)

Where summons in civil action was served and defendants were represented of record by firm of attorneys, but answer was subsequently filed by one of the defendants, an attorney, for himself and purportedly for other codefendants, but without a substitution of attorneys of record, answer on behalf of codefendants was ineffectual, and when court entered order dismissing action because no answer had been filed and no judgment had been taken within three years after service of summons, subsequent discovery that person filing answer was attorney at law who purported to act for rest of his codefendants did not justify vacation of order of dismissal. West's Ann.Code Civ. Proc. §§ 284, subds. 1, 2, 285, 581a.

Barbagelata, Zief & Carmazzi and Henry J. Broderick, San Francisco, for appellant.

Francis M. Arnoldy, and Heenan & Arnoldy, Marysville, for respondent.

SHENK, Justice.

This is an appeal by the defendant Lena Califro from an order entered August 26, 1955, granting plaintiff's motion to vacate an order entered July 21, 1955. The order of July 21 was made pursuant to the provisions of Code of Civil Procedure section 581a[1]. It dismissed the action as to Lena and her codefendant Mareck. The order appealed from was based on the asserted ground that the prior order was inadvertently made. The defendant Mareck did not appeal.

The issues presented on appeal are whether the order of August 26 is an appealable order and whether the trial court erred in vacating its prior order of dismissal.

The record consists of the clerk's transcript. It shows that on March 22, 1951, a complaint was filed for $2,300 due on an open book account naming as defendants Thomas T. Califro, Andy Mareck and several fictitious Does. Summons was issued and served. On May 1, 1951, a demurrer was filed on behalf of Thomas Califro, Lena Califro (sued as Jane Doe) and Andy Mareck by and through the law firm of Rich, Carlin and Fuidge. On May 4 the demurrer was withdrawn and the defendants were given 15 days to answer. In October a notice of taking a deposition by the plaintiff was served on these attorneys. No further pleadings were filed by the defendants' attorneys in the action. On December 14, 1951, a document was filed entitled "Answer and Cross-Complaint." The answer denied the allegations of the complaint and the cross-complaint prayed for damages in the sum of $100,000 on behalf of the cross-complainant, Thomas T. Califro. This document was signed "Thomas T. Califro in Pro Per." The verification stated that Thomas T. Califro "is one of the defendants in the above entitled cause; that the attorneys of record for the defendants having withdrawn and resigned as such, he now appears herein in his proper person for himself and for the defendants and cross-complainant * * *." It was signed "Thomas T. Califro." The document was served on counsel of record who have represented the plaintiff from the commencement of the action and on this appeal. On September 26, 1952, counsel for plaintiff filed an answer to the cross-complaint. The affidavit of service shows that it was served by mail on September 30, 1952, on the law firm of Hewitt and McBride. Notice of motion to set the case for trial was served on these attorneys. The cause came on for trial on July 21, 1955. The minute order of that date shows that attorney J. W. O'Neil appeared as counsel for Amelia Califro, Administratrix of the Estate of Thomas T. Califro, deceased, and that the court ordered the action dismissed as to defendants Mareck and Lena Califro "according to Section 581a of the Code of Civil Procedure." The trial proceeded as to the remaining defendants and the case was submitted. Insofar as the record shows no judgment has been entered.

While the case was under submission and on August 2, 1955, one of the plaintiff's attorneys of record filed a notice of motion to vacate the order of submission and to set aside the order dismissing the action as to the defendants Lena Califro and Andy Mareck. The pertinent portions of the supporting affidavit state: "Subsequent to the submission of said cause, your affiant further re-examined the Answer and Cross-Complaint filed by Thomas T. Califro in the above entitled action and discovered in the verification thereof that Thomas T. Califro appeared in propria persona for himself and as attorney for

1. Section 581a provides in its pertinent part: "All actions, heretofore or hereafter commenced, must be dismissed by the court * * * on its own motion * * * if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons, except where the parties have filed a stipulation in writing that the time may be extended."

defendants in said action. That Thomas T. Califro was an attorney at law, duly admitted and licensed to practice as such in all the Courts of California, appears in affiant's affidavit on file in said action, and therefore, said Thomas T. Califro was entitled to appear not only for himself, but on behalf of said defendants." Notice of this motion was served only on the attorney for the administratrix of the deceased defendant Thomas T. Califro. On August 26 the court made an "Order Setting Aside Order of Dismissal" which stated that the order of July 21 dismissing the action as to two defendants had been "inadvertently made" by the Court. The order recites that notice of the motion to vacate had not been given to the defendants Lena Califro or Andy Mareck or their attorney; that the attorney for the administratrix had advised the court that he was not and never had been the attorney for either of those defendants, and that he had appeared solely on behalf of the administratrix. The clerk's register of that date states: "Aug. 26. Motion to vacate submission, denied, by stipulation. Court ordered motion to vacate Order of Dismissal granted. Case to be re-opened as to defendants Lena Califro and Andy Mareck only." On November 2, 1955, a "Substitution of Counsel" was filed by defendant Lena Califro substituting her present counsel for the law firm of Rich, Carlin and Fuidge. This paper was signed by her former and present counsel of record and by herself.

[1] The plaintiff urges that the order of August 26 is not an appealable order. His argument is based upon the fact that some of the allegations of the cross-complaint refer to damages suffered by the "defendants" and that the court took no action and made no decision regarding the cross-complaint. Section 581d of the Code of Civil Procedure provides that the dismissal of an action by the court shall be entered upon the minutes and upon the clerk's register, and that when entered upon the minutes it shall constitute a judgment and be effective for all purposes. The order of dismissal was entered upon the minutes of the court and upon the clerk's register of actions and, therefore, constituted a final judgment. The order of August 26 vacating the order of dismissal was a special order made after final judgment and appealable under the provisions of section 963, subdivision 2, of the Code of Civil Procedure. Nicholson v. Henderson, 25 Cal.2d 375, 153 P.2d 945, and Krug v. Meehan, 106 Cal.App.2d 554, 235 P.2d 410, relied upon by the plaintiff, are not in point because, for the reasons hereinafter stated, the cross-complaint was not regularly filed.

The appellant urges that the order of August 26 was in excess of the court's jurisdiction and was void. In making the order of July 21 the court impliedly found and concluded from the undisputed facts that the complaint was filed on March 22, 1951; that summons was issued and served forthwith; that on May 1, 1951, the firm of Rich, Carlin and Fuidge filed a demurrer and a demand for a bill of particulars; that this appearance constituted them as attorneys of record for the defendants; that there was no substitution of those attorneys in the manner provided by law; that more than three years had elapsed from the date of service of summons; that plaintiff failed to have judgment entered; that no stipulation for extension of time was on file; that no answer was filed by the attorneys of record for the defendants, and that no authority appeared for Thomas T. Califro to file an answer and cross-complaint on behalf of his co-defendants. The judgment of dismissal could only be made after an examination of the facts and the application of the legal principles involved. It appears beyond question that this order correctly reflected a judicial determination and that the minute order correctly sets forth the decision of the court on that date.

[2, 3] The order of dismissal was set aside without notice on the ground that it was inadvertently made. It is stated by counsel for the plaintiff, and not denied,

that at the hearing on July 21 the attention of the court was not called to the fact that Thomas T. Califro was an attorney at law or to the contents of the verification to the answer and cross-complaint. It must be assumed that the contents of the verification were judicially known to the court at that time. Hollenbach v. Schnabel, 101 Cal. 312, 316, 35 P. 872; 18 Cal. Jur.2d 471. While a Reporter's Transcript has not been furnished on this appeal, the parties concede that the facts as to the purported substitution of attorneys were before the court and that Thomas filed the answer and cross-complaint on behalf of himself and his co-defendants. His authority to do so was in direct issue. On the record the court could only have concluded that no authority appeared for Thomas to represent his co-defendants and therefore that as to them no answer or cross-complaint was regularly filed.

[4, 5] The verification contained nothing which would avoid the mandatory provisions of section 581a. The only attorneys of record for the appellant were Rich, Carlin and Fuidge. No substitution or change of attorneys was made in the manner provided by sections 284 and 285 of the Code of Civil Procedure.[2] The attorney of record has the exclusive right to appear in court for his client and neither the party himself nor another attorney should be recognized by the court in the conduct or disposition of the case. People v. Merkouris, 46 Cal.2d 540, 554, 555, 297 P.2d 999; Wells Fargo & Co. v. City, etc., of S. F., 25 Cal.2d 37, 42, 152 P.2d 625. Under section 285 written notice of the substitution of a new attorney must be given to the adverse party. Until then the attorney of record must be recognized as his exclusive representative.

[6] That Thomas T. Califro was an attorney at law gave him no legal right to represent his codefendants for the reason that they were still represented of record by other attorneys. The court's unawareness of Thomas' status as an attorney was not material to its determination that no answer had been filed and that dismissal was mandatory. It could not serve as the basis for an order setting aside the dismissal on the ground of inadvertence or clerical error. The order of August 26th constituted a new decision after reconsideration of the facts and the applicable legal principles. As stated in Bastajian v. Brown, 19 Cal.2d 209, 214, 120 P.2d 9, 11, citing Stevens v. Superior Court, 7 Cal.2d 110, 112, 59 P.2d 988, "While a court has power to set aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure." In view of the factual situation appearing in the record, the trial court had no discretion but to dismiss the action against the appealing defendant.

The portion of the order of August 26, 1955, which purported to vacate the dismissal of the action as to the appellant Lena Califro is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

2. "§ 284. [Change of attorney.] The attorney in an action * * * may be changed at any time before or after judgment * * * as follows:

"1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;

"2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other * * *."

"§ 285. Notice of change. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney."

159 Cal.App.2d 22

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ray Veck BARNETT and Gordon F. Lymn, Defendants,

Ray Veck Barnett, Defendant and Appellant.

Cr. 6054.

District Court of Appeal, Second District, Division 1, California.

March 31, 1958.

Defendant was convicted of first degree robbery. The Superior Court of Los Angeles County, Richard C. Fildew, J., entered judgment, and the defendant appealed. The District Court of Appeal, White, P. J., held that where defendant, at no time during the trial, made any objection to introduction of any evidence, on ground that his arrest was illegal and in contravention of his constitutional rights, any such objection was deemed waived.

Judgment affirmed.

1. Criminal Law ⇐1175

Substantial rights of defendant, who was convicted of robbery in the first degree, were not prejudicially affected by fact that verdict recited that jury found that he was armed at the time of his "arrest" while trial court's minutes recorded that he was found to be armed at the time of the "offense."

2. Criminal Law ⇐1159(2)

Reviewing court is not authorized to determine weight of evidence, but can determine only whether, on face of evidence, it can be held that sufficient facts could not have been found by jury to warrant inference of guilt.

3. Criminal Law ⇐1159(2)

When evidence in criminal case is inherently improbable and therefore unworthy of belief, it presents a question of law, and when it is found to be of such a character, reviewing court may reverse conviction.

4. Criminal Law ⇐1159(2)

Before reviewing court, on ground of inherent improbability of testimony, which has been believed by duly constituted arbiter of the facts, may reject the testimony, there must exist a physical impossibility that testimony is true, or its falsity must be apparent without resorting to inferences or deductions.

5. Criminal Law ⇐1159(2)

Claim that testimony is inherently improbable and unworthy of belief involves a claim that something has been done that would ordinarily have been impossible to have been done under circumstances described or involves conduct that no sane person would likely be guilty of.

6. Robbery ⇐24(1)

Evidence sustained conviction of first degree robbery.

7. Criminal Law ⇐741(1), 742(1)

Jurors are the sole and exclusive judges of the credibility of witnesses and value and effect of evidence addressed to them except in those circumstances where it is declared by the law that it shall be conclusive proof of fact to which it relates. West's Ann.Code Civ.Proc. §§ 1847, 2061.

8. Criminal Law ⇐1159(4)

Arguments of defendant that there were variances and inconsistencies in testimony of prosecuting witness in robbery prosecution in his identification of defendant as perpetrator of the crime, though available in argument to jury in first instance and to trial court on motion for new trial, were unavailing on appeal by defendant, unless District Court of Appeal could say, as a matter of law, that there was no substantial evidence to support the verdict.

9. Criminal Law ⇐741(2)

It is the function of the jury to pass on the strength or weakness of identification and uncertainty, if any, of witnesses in giving their testimony.

10. Criminal Law ⇐742(1)

In robbery prosecution, verity of testimony of defendant's witnesses that defendant was in bed at their house during time

of robbery, though not impeached, was primarily for jury.

11. Criminal Law ⇐1159(2)

Argument of defendant that his alleged admissions should have been viewed with caution in robbery prosecution because no stenographic record or tape recording was made of them, went rather to the weight than to the admissibility of such evidence, and presented a question of fact for determination by the jury, rather than by District Court of Appeal on appeal.

12. Criminal Law ⇐698(1)

Where, at no time during trial of robbery prosecution, was any objection made by defendant to introduction of any evidence, on ground that his arrest was illegal and in contravention of his constitutional rights, such objection was therefore deemed waived.

13. Criminal Law ⇐1036(1)

Objection to introduction of evidence, on ground that arrest of defendant was illegal and in contravention of his constitutional rights, must be made at the trial, in order to afford prosecution opportunity to present fully the facts and circumstances surrounding the arrest, so that trial court can rule as to whether reasonable or probable cause existed for arrest and subsequent search or seizure.

14. Criminal Law ⇐395
Searches and Seizures ⇐3(1)

Where police officer saw .22 caliber pistol on top of rear seat of automobile, pistol was not taken by officer as result of a "search," since a "search" implies a prying into hidden places for that which is concealed, and that object of search has been hidden or intentionally put out of the way, and therefore pistol was admissible in robbery prosecution.

See publication Words and Phrases, for other judicial constructions and definitions of "Search".

15. Criminal Law ⇐395

Where defendant, voluntarily, and without being coerced, advised police officer that .32 caliber revolver was secreted under front seat of automobile, and thereupon officer searched automobile and found the revolver, the revolver was admissible in robbery prosecution.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

[1] In an information filed by the District Attorney of Los Angeles County, the above named defendants were charged with the crime of Robbery in that they forcibly took from one Louis Bosola $75 on or about April 22, 1957. It was further alleged that at the time of the commission of the offense, the defendants were armed with a deadly weapon, to wit, a .22 caliber automatic pistol. Defendants pleaded not guilty, were tried before a jury and found guilty of robbery of the first degree. While the verdict as to defendant Barnett recites that the jury found he was armed at the time of his *arrest*, the court's minutes record that he was found to be armed at the time of the *offense*. However, none of defendant Barnett's substantial rights were prejudicially affected by such variance (People v. Beltran, 94 Cal.App.2d 197, 208, 210 P.2d 238). Defendant Barnett was sentenced to state prison. From the judgment of conviction, he prosecutes this appeal.

The following will serve as a fair summary of the factual background surrounding this prosecution.

Louis F. Bosola testified that he was the owner of a liquor store located at 1933 Ventura Boulevard, Tarzana, in Los Angeles County. That at about 12:50 o'clock on the morning of April 22, 1957 (the day following Easter Sunday) the defendant Barnett came into the store and ordered a package of Salem cigarettes. He gave Mr. Bosola a dollar bill and as Mr. Bosola gave him his change, the defendant pointed a gun at him and told him to give him all the money he had. Mr. Bosola

asked the defendant if he wanted the silver and the latter said he only wanted the bills. After Mr. Bosola gave him the money, which amounted to $70 or $80, the defendant Barnett ordered him into the back room and made him lie on the floor. The defendant's gun was "on" Mr. Bosola during the entire proceedings. Defendant Barnett told Mr. Bosola, "Get down on the floor and stay there and don't try anything or I will be back."

Mr. Bosola gave the defendant the money because he was scared and because the appellant had a gun pointed at him.

At a later date Louis Bosola recognized the defendant Barnett in a police line-up. At the time of trial Mr. Bosola was positive that the appellant was the man who robbed him. Among other things, Mr. Bosola recognized the defendant's harelip, his dark brown hair, his height of 5 feet 9 inches and his weight of about 150 pounds. The witness stated that defendant's mustache had been a little thinner and a little darker than it was at the time of trial. On cross-examination the witness testified that the mustache of the intruder, "was a hairline type of moustache, straight across". That "it wasn't this walrus type that Mr. Barnett is wearing at the moment". The witness identified an automatic pistol, .22 caliber introduced in evidence at the trial as one that resembled or "looks like" the one defendant Barnett pointed at the witness on the occasion here in question.

About 9:30 o'clock on the evening of May 2, 1957, Frank J. Furgiuele, a police officer of the City of Beverly Hills, was operating a police patrol car when he observed a 1956 green Cadillac automobile pull up behind a motorcycle that he had observed had been parked at this location for several hours. That the motorcycle had a New Jersey license plate, and since it was parked in a residential district he had been keeping it under observation. That he stopped his patrol car directly across the street from the motorcycle and the Cadillac and observed the driver of the Cadillac, defendant Lymn, get out of the car and go to the motorcycle. That he approached defendant Lymn and was told that the registration to the motorcycle was in the Cadillac, and the witness walked back with both defendants to the car. The witness put his flashlight in the window of the car and noticed a gun on the rear seat. He immediately placed the two defendants under arrest. The witness stated that defendant Barnett volunteered that they had another gun under the front seat, and after additional police units arrived, they searched the Cadillac and found a .32 caliber gun in the car, together with a "jumper wire", a bandana, a wig, and some loose money in the glove compartment.

He testified that Barnett and Lymn were taken to the Beverly Hills Police Station, and while there, officers found that defendant Lymn was wearing a very narrow false "Hitler-type" mustache, straight across the upper lip. On cross-examination, the witness testified that the so-called "jumper wire" had only a clip on one end. When the contrivance was introduced into evidence it proved to be a battery-starting cable with clips on both ends.

On May 3rd, at about 10:30 or 11:00 a. m., Officer Cork of the Beverly Hills Police Department and Sergeant Valentine of the Beverly Hills Police had a conversation with the defendant Barnett. The latter's statements were free and voluntary. Sergeant Valentine told the defendant "I think you fellows have pulled a lot of jobs together, and it is our job to find out how many they are and where they are, and we want you to tell us about it."

Defendant Barnett said, "That is the funny part about it. There isn't a lot of jobs. There is only one." He further said that "The best he could remember, it was some time about the last week in April." He said that he and defendant Lymn were driving around in the valley near Ventura and Sepulveda at which time they spotted a liquor store. He said Lymn was driving and that they stopped in front or near the liquor store, that he took the gun, went in the liquor store, held the gun on the proprietor, and took $50 or $60. He then split the money with Lymn.

That same afternoon, defendant Barnett was interviewed by agents of the Federal Bureau of Investigation. His statements were free and voluntary. He said that the only thing he was "mixed up in" was the robbery in the valley.

On May 4th, at about 2:00 to 3:00 o'clock in the afternoon, Officer Webb of the Los Angeles Police Department, attached to the Detective Bureau, was present at a conversation with defendant Barnett, whose statements were free and voluntary.

The latter stated that approximately two weeks before on a Monday at around 1:00 o'clock in the morning he and defendant Lymn had driven west on Ventura Boulevard a little ways past Balboa; they parked the car in front of a liquor store on the north side of the street; Lymn stayed in the car while Barnett went inside the store; upon entering the store, he asked the man behind the counter for a package of Salem cigarettes; the man gave him the cigarettes and he gave the man a dollar; when the man gave him the change for the purchase, the defendant Barnett pulled the gun from his waistband and told the man he wanted all his money; when he started to give him the loose change, the defendant told him he only wanted the bills; after he obtained the bills he told the man to go to the back of the liquor store and he made him lie on the floor; he then walked out of the store and drove east on Ventura Boulevard.

On cross-examination the witness admitted that no stenographic record or tape recording was made of the conversation. Sergeant Murphy of the Detective Division, Los Angeles Police Department, was also present at the conversation just narrated and also testified that defendant Barnett told him that he had committed only one robbery. "The robbery that I told the Beverly Hills officers about."

The defendant Barnett also said he believed the robbery occurred on the 27th or 28th of April. Sergeant Murphy asked him if it would be the 22nd or 23rd and he stated it could have been. He told Sergeant Murphy that he and Lymn were riding around looking for a liquor store to hold up or some place to hold up and that they spotted a liquor store on Ventura Boulevard. He stated that when they pulled up in front of the store, defendant Lymn was driving his Cadillac and that he took a gun which he described as a .22 automatic, went into the liquor store, asked the clerk for a package of Salem cigarettes, offered to pay for the cigarettes with a dollar bill, and when the clerk rang up the purchase on the register and started handing him the change he took the gun from his waistband, pointed it at the clerk and asked him to give him all his money; the clerk asked if he wanted change and the defendant Barnett stated, "No, just the bills"; after the clerk had handed him the bills, he told him to turn around and start towards the back and he ordered him to lie down on the floor and remain there for a few moments. He said that he and Lymn counted the money and found that it was $69 or $70. None of defendant Barnett's statements were reduced to writing. Testimony as to similar incriminatory statements made by defendant Barnett was given by Officer Leonard M. Webb and Sergeant J. L. Austin of the Los Angeles Police Department.

Mr. and Mrs. Edward Bowers, called as witnesses for defendant Barnett, testified that on Easter Sunday, April 21, 1957, the latter came to their home, assisted Mr. Bowers in cleaning out the garage, had dinner with them, and about 9:30 p.m. complained of dizziness. Defendant Barnett was put to bed in their bedroom, and Mrs. Bowers changed a cold cloth applied to Barnett's head, four or five times during the evening, until both Mr. and Mrs. Bowers retired at approximately 1:30 a. m. on the morning of April 22nd. (The robbery occurred about 12:50 a. m. on this morning.) Both witnesses further testified that defendant Barnett did not leave their home during the night or morning and was in bed when Mr. and Mrs. Bowers left for work around 6 o'clock in the morning. They were aided in their recollection of the occasion because it was Easter Sunday.

Two character witnesses who were well acquainted with defendant Barnett and with others who knew him, testified that his reputation in the community in which he resided, for "truth, honesty and good moral character" was very good.

As a witness in his own behalf, defendant Barnett testified that on the night of the alleged robbery he was at the home of the Bowers from approximately 6:30 p. m. on Easter Sunday, April 21, 1957 until the following morning, April 22, 1957 after the Bowers had gone to work. That he did not leave the Bowers' home at any time during the night of the alleged robbery.

He testified that on the night of his arrest, May 2, 1957, he had stopped by co-defendant Lymn's house to exchange his .32 automatic for defendant Lymn's .22 automatic, as he was going on a motorcycle trip to the Colorado River to do some "plinking" (shooting at cans and bottles with a gun). That Lymn had asked him to ride to Beverly Hills with him to see if he could get Lymn's motorcycle started, as it had broken down that day. Defendant Barnett is a motorcycle mechanic. That both guns were in plain view on the back seat of Lymn's Cadillac and both guns were unloaded. That he had the clip to Lymn's automatic which he was borrowing, in the pocket of his shirt.

Defendant Barnett testified that at the Beverly Hills police station a third person had implicated both Lymn and himself in the Bosola liquor store robbery, but Barnett denied any knowledge of the same. He further denied that he had ever confessed to any robbery to any officer.

[2–5] As his first ground for reversal of the judgment, appellant earnestly urges that the evidence was insufficient as a matter of law to sustain his conviction. He recognizes the rule enunciated in the case of People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, that the court on appeal is not authorized to determine the weight of the evidence, but can determine only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. However, appellant relies upon the rule that when evidence is inherently improbable and therefore, unworthy of belief, it presents a question of law and when found to be of such a character, an appellate tribunal, in a criminal case, may reverse a conviction. But, before an appellate court, on the ground of its inherent improbability, may reject the testimony given by witnesses, and which has been believed by the duly constituted arbiter of the facts, there must exist a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. People v. Stangler, 18 Cal.2d 688, 691, 692, 117 P.2d 321; People v. Gardner, 147 Cal.App.2d 530, 536, 305 P.2d 614; People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. Or, as was said in People v. Carr, 113 Cal.App.2d 783, 786, 248 P.2d 977, 979: "* * * The claim that testimony is inherently improbable and unworthy of belief involves a claim that something has been done that would ordinarily have been impossible to have been done under the circumstances described; or it involves conduct that no sane person would likely be guilty of." See also People v. Loehr, 35 Cal.App.2d 1, 5, 94 P.2d 390; People v. Brown, 100 Cal. App.2d 207, 209, 223 P.2d 60; People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836; People v. Wilder, 151 Cal.App.2d 698, 702, 703, 312 P.2d 425.

[6, 7] Viewed in the light of the foregoing rules, we cannot say that in the instant case the jury was required to disregard the testimony of the victim of the robbery and that of the police officers, and to accept as true, the testimony of appellant and his alibi witnesses. Obviously, appellate justices are in no position to evaluate the credibility of a witness and the intrinsic value of evidence addressed to the triers of facts. For that reason the law has ordained that the jury are the sole and exclusive judges of the credibility of witnesses and the value and effect of the evidence addressed to them (Code Civ.Proc. sec. 1847), except in those instances where it is declared by the law that it shall be con-

clusive proof of the fact to which it relates (Code Civ.Proc. sec. 2061). People v. Haydon, 18 Cal.App. 543, 554, 123 P. 1102, 1114.

[8, 9] Appellant directs our attention to claimed variances and inconsistencies in the testimony of Mr. Bosola in his identification of appellant as the perpetrator of the crime. While these contentions afforded an opportunity for argument to the jury in the first instance and to the trial court on motion for a new trial, they are unavailing on appeal unless we can say, as a matter of law, that there was no substantial evidence to support the verdict. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainty of the witnesses, if any, in giving their testimony (People v. Shaheen, 120 Cal.App. 2d 629, 636, 261 P.2d 752; People v. Quijada, 124 Cal.App.2d 422, 424, 268 P.2d 745; People v. Johnson, 21 Cal.App.2d 673, 674, 70 P.2d 198). Furthermore, the identification testimony of the victim was supported by admissions or confessions made by appellant to various police officers concerning his participation in the crime.

[10] Appellant insists that the testimony of Mr. and Mrs. Bowers that he was in bed at their house during the time of the robbery was not impeached. But, as heretofore pointed out, the verity of this testimony was a question primarily for the jury (People v. Sotelo, 102 Cal.App. 688, 690, 283 P. 388; Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; Code Civ.Proc. sec. 1847). By their verdict, the jury indicated their unwillingness to believe the testimony of appellant's alibi witnesses, and under the pronouncements set forth in People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 779, we are without authorization to reweigh it.

[11] Appellant further argues that his claimed admissions should have been viewed with caution because no stenographic record or tape recording was made of them. This claim goes rather to the weight than to the admissibility of such testimony, and under familiar rules, presented a question of fact for determination by the jury.

[12–14] Appellant's final contention that his arrest was illegal and in contravention of his constitutional rights is unavailing for two reasons. First, at no time during the trial was any objection made to the introduction of any evidence on the ground now asserted, and any such objection is therefore deemed waived (People v. Close, 154 Cal.App.2d 545, 316 P.2d 1019; People v. Kitchens, 46 Cal.2d 260, 262, 294 P.2d 17). Such an objection must be made at the trial in order to afford the prosecution opportunity to present fully the facts and circumstances surrounding the arrest, so that the court could rule as to whether reasonable or probable cause existed for the arrest and subsequent search or seizure. Secondly, we entertain no doubt from a perusal of the record, that the trial court could reasonably have allowed into evidence the two weapons found in the automobile, even though timely objection had been interposed. It would unduly prolong this opinion to again narrate the testimony concerning the apprehension of appellant. Suffice it to say that the circumstances related by the officer without doubt authorized him to question appellant and his co-defendant, and when the officer saw the .22 caliber pistol on the top of the rear seat of the automobile, investigative action was warranted and within the scope thereof the officer was entitled to take the weapon. This weapon was not taken as the result of a search, for "* * * A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way * * *." People v. West, 144 Cal.App.2d 214, 219–220, 300 P.2d 729, 733. (See also, People v. Ambrose, 155 Cal.App. 2d 513, 318 P.2d 181.)

[15] As to the second weapon, appellant voluntarily advised the officer that it was secreted under the front seat of the vehicle (a violation of Penal Code, section 12025). Thereupon, the officer searched the vehicle and found the .32 caliber revolver. Appellant's incriminatory statement to the officer was not coerced. He was not obligated to make a statement and could have remained

silent. Appellant having told the officer that he was, in effect, committing a crime, his contention now that the officer's subsequent actions were unwarranted lacks substance.

For the foregoing reasons, the judgment is affirmed.

FOURT and LILLIE, JJ., concur.



158 Cal.App.2d 664

William P. COYLE, Plaintiff and Respondent,

v.

ALLAND & COMPANY, Inc., George J. Cabrol, Albert J. Aubert, and J. B. Doyle, individually, and dba Rancho Lombard Motel, Defendants and Appellants.

Civ. 17739.

District Court of Appeal, First District, Division 2, California.

March 26, 1958.

Rehearing Denied April 25, 1958.

Hearing Denied May 21, 1958.

Workmen's action to recover for personal injuries sustained in fall at motel under construction, against general contractor and owner. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment for employee and owner appealed. The District Court of Appeal, Brazil, J. pro tem., held that where liability of owner was based upon violation of city building ordinance, and ordinance, subsequent to injury but before trial, was amended by deleting portion imposing liability on owner, owner's liability could not be based on ordinance violation.

Judgment against one defendant affirmed and as against another defendant reversed.

1. Municipal Corporations ⇐592(1)

Existence of statute dealing with necessity of protective flooring during building construction did not prohibit city from enacting similar building ordinance and imposing liability on owner of premises and contractors for injuries resulting from violations of ordinance. West's Ann.Labor Code, § 7101.

2. Appeal and Error ⇐989, 996

Where a verdict is attacked as being unsupported, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion of jury, and when two or more inferences can be reasonably deduced from the facts the reviewing court is without power to substitute its deductions for those of the trial court.

3. Negligence ⇐134(9)

In action by employee of subcontractor for personal injuries received in fall occurring when temporary flooring in building under construction gave way, there was sufficient evidence to support finding of negligence on part of contractor in failing to securely nail temporary flooring in violation of San Francisco building ordinance.

4. Negligence ⇐44

Where contractor was constructing building of more than one story in height and provided subflooring to enable workmen to walk around, even without reference to city building ordinance respecting temporary flooring, contractor was under a duty of ordinary care to see that employee of subcontractor had a reasonably safe place to work.

5. Negligence ⇐6, 134(11)

While the standard of care to which one must conform is usually that of ordinarily prudent or reasonable person under like circumstances, proper conduct of such a reasonable person under particular situations may be prescribed by statute, and an act or failure to act below statutory standard is negligence per se so that where evidence establishes defendant's violation of statute proximately causing injury, and no excuse or justification for violation is shown, responsibility may be fixed on vio-

lator without proof of failure to use due care.

6. Negligence ⇐121(1)

While presumption of negligence arising from violation of applicable statute is not conclusive and may be rebutted by showing excuse or justification, proof of violation raises presumption of negligence and puts upon offender burden of proving that violation was excused or justified by causes or things beyond control of violator and in absence of such proof of excuse or justification presumption of negligence is conclusive.

7. Master and Servant ⇐5

"Independent contractor" is one who renders services in course of an independent employment or occupation, following employer's desires only as to results of work, and not as to the means whereby it is to be accomplished.

See publication Words and Phrases, for other judicial constructions and definitions of "Independent Contractor"

8. Statutes ⇐273

In cases of clear statutory remedy where no rights are vested, right falls when statutory remedy ceases to exist upon repeal of statute without a saving clause, unless the right has been converted into a final judgment prior to repeal of the statute.

9. Negligence ⇐31

Where employee brought action for personal injuries received during work on building under construction against contractor and owner of the premises, and liability of owner was based upon San Francisco building ordinance which at the time of accident imposed liability for injuries caused by violation of ordinance upon owner of premises, but before trial of action ordinance was amended so as to delete portion imposing liability upon owner, owner's liability, if any, could not arise on basis of ordinance as it existed at time of accident.

10. Evidence ⇐32

In general, an appellate court does not take judicial notice of city ordinances.

Hadsell, Murman & Bishop, San Francisco, for appellant Alland & Co.

Edward A. Friend, San Francisco, for other appellants.

W. A. Lahanier, John F. Gallen, San Francisco, for respondent.

BRAZIL, Justice pro tem.

The plaintiff recovered a judgment in a personal injury jury case against the general contractor and against the owners of the premises upon which a motel was being constructed. The appeal by Alland & Company, Inc., the contractor, is from the judgment, and the appeal of Cabrol, et al., the owners, is from the judgment and from the denial of their motion for judgment notwithstanding the verdict.

The owners in preparing to build a three story motel, on March 1, 1954, applied to the Department of Public Works for a building permit, which permit was issued to them by the Department on June 4, 1954. In the signed application, the owners agree that if a permit is issued for the construction "all the provisions of the permit and all the laws and ordinances thereto will be complied with." The first contractor hired by the owners having withdrawn from the job, they hired appellant Alland & Company, Inc. as general contractors to build the motel. One or the other of the owners visited the construction job almost every day, following the work rather closely during the first three months because of its slow progress and to see that the plans and specifications were being followed.

The motel consisted of thirty-two units in a three story structure, and, at the time of the accident here involved, it was about thirty-five to forty per cent completed. There were two balconies, designated during the trial as "A" and "B," and each had temporary flooring at this stage of the work, that in "B" being of planks and that in "A" being of plywood. The uncontradicted evidence shows that plywood is a suitable material to use as temporary flooring or decking. The plywood decking, with which we are concerned, was laid some two to four weeks before the accident. It

was laid on balcony cross beams of adequate size and strength and was placed on four foot centers. The plywood was new, in panels or sheets, 5/8ths of an inch thick, four feet wide and eight feet long. The cross beams were four feet apart, so placed that the ends of each panel rested on one and 5/16th inches of cross beam; they were nailed to the beams but the nails were not driven completely down in order to facilitate removal.

The respondent was, and for a great many years had been, a journeyman plumber; he was an employee of Crowley & Company, the plumbing subcontractor. He went on the job for the first time on the morning of November 1, 1954, the day of the accident. On that morning he was first taken by his foreman to the second floor to have his work pointed out during which time he and the foreman walked on both balconies. He was warned about balcony "B" but not about "A," and he was shown by the foreman where the plumbers had been working the preceding Friday on "B" and told to be careful. After finding out what he was to do, the foreman told him to get his tools and caulking materials and go to work. He took the only possible route to get to his work, which was through balcony "A" and over the temporary plywood decking of the second floor. As he stepped out onto "A," the floor gave way and he fell to the ground below, sustaining injuries. The evidence shows that he had walked on this same flooring, with his foreman, twice before on that morning without incident. The flooring, he said, appeared solid as he walked on it. There was no testimony on exactly what portions of the panels he had walked on, that is, whether over the center of the panel or near one of the cross beams on which the panels rested.

Although nobody else saw the actual fall, and respondent does not recall seeing the plywood sheet coming down with him, there is ample circumstantial evidence to establish that what happened was: as he stepped on a plywood panel, it gave way under his weight, and both plumber and plywood fell through the resulting hole between the cross beams. The carpenter foreman, an employee of Alland & Company, testified he had ordered two carpenters to start removing the plywood that day preparatory to the installation of permanent decking on the balcony. There was no direct testimony that the work of removal had been started. Right after the accident, a panel, which the jury could have inferred was the same one that had fallen, was put down over the opening caused by the respondent's fall. It was nailed down by one of the Alland & Company carpenters, where it remained in use for a week or two more. Examination of the plywood, before it was put back, showed there were no nails in it, nor was it shattered or broken in any way.

Over objection of appellant owners, the court admitted in evidence Section 4109 of the Building Code of San Francisco as it existed at the time of the accident which was nearly two years before trial. The section, as admitted, reads:

> "Temporary floors. Any building more than two stories high in course of construction shall have the joists, beams, and girders of every floor below the floor or level where work is to be done covered with flooring laid close together or with other suitable materials in order to protect workmen from falling and also to protect them from falling materials and tools. Temporary flooring shall not be removed unless and until it is replaced by the permanent flooring. It shall be the joint responsibility and the duty of the owner and the contractor to see that the provisions of this section are carried out."

The appellant owners then offered in evidence an ordinance enacted in April 1956, which repealed that portion of Section 4109 which made it the duty and responsibility of the owners to see that the provisions of the section were carried out. At time of trial, the ordinance as it then existed placed that duty and responsibility on the contractor alone. Respondent's objection to the introduction of the later ordinance was sustained. There was no saving

clause in his later ordinance preserving the rights of any one who may have theretofore been injured. The trial court instructed the jury that a violation of the ordinance as it existed at the time of the accident was negligence as a matter of law, and that the owners could not delegate the performance of their duty to an independent contractor.

The evidence establishes that the building was more than two stories high, that the two appellants were not engaged in a joint venture, that Alland & Company was an independent contractor and that Cabrol and his partners were the owners. Even though the owners may have frequently visited the premises to watch the work progress, the control of the construction procedure was with Alland & Company.

[1] Although appellant contractor did not at the trial object to the introduction in evidence of the original building code section, it now joins the appellant owners in maintaining that the ordinance is unconstitutional because it is in conflict with state law. They claim that the state has fully occupied the field by Labor Code, Section 7101 and 8 California Administrative Code Section 1571. The Labor Code section deals directly with protective flooring during building construction and is worded substantially like the building code section, except that it makes no attempt to fix the duty or responsibility. The administrative code section, which deals with protection of openings during construction, is in more detail than either code provision, but it too omits fixing responsibility for performance.

In support of their position, appellants cite James v. Myers, 68 Cal.App.2d 23, 156 P.2d 69 and People v. Villarino, 134 Cal. App.2d Supp. 893, 286 P.2d 86. In the Myers case the question related to the motor vehicle laws of the state. Section 458 of the Vehicle Code shows a clear legislative intent to occupy the field, wherein it provides, "no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein." In the Villarino case, the ordinance involved was of a penal, prohibitory nature and was in the exact language of the state law but provided for a different penalty. In our case the city could not by ordinance have placed responsibility on the owner if the state law had expressly relieved him of it. Labor Code, Section 7101 is contained in Division 5 entitled "Safety in Employment," part 3 "Safety in Buildings." The legislative intent about occupying the field appears to be nearly the opposite of that expressed in Vehicle Code, Section 458. Section 6317 of the Labor Code provides "Powers and jurisdiction of local governing bodies. Nothing in this part shall deprive the governing body of any county, city, or public corporation, board, or department, of any power or jurisdiction over or relative to any place of employment." That the field of legislation involved in this case is not fully occupied by the state is exemplified by the fact that building codes are usually adopted by the cities of California, and in most cases they are long, detailed and aimed at covering about every conceivable detail of building or construction that there is. The ordinance is not unconstitutional as being in conflict with state law.

The appellants next contend that the evidence is insufficient to support a verdict in favor of respondent for there is no showing of want of ordinary care, no negligence whatever, and furthermore respondent was in a better position than they to ascertain the presence of an obvious danger.

[2] "[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

[3] The respondent walked on the plywood on the day he was hurt, and other workmen had safely used it for more than two weeks before the accident. It cannot be said that the danger of a sheet of plywood suddenly giving away was an obvious danger to the respondent. He had just come on the job that morning, a few minutes before he fell. He had been warned to be careful about balcony "B" but nothing had been said to him about "A." At the very least, the evidence, if believed by the jury, was sufficient to support a finding that, as to him, the danger was not obvious.

[4] While the evidence shows without contradiction that the plywood used was suitable material for temporary decking, there was no testimony to the effect that the manner in which the panels were laid on the cross beams was a suitable method of placement. Without breaking or shattering, the sheet of plywood came loose from its bearings in one piece. It would not be unreasonable for the jury to infer that the panel was not nailed down as it should have been. Even without reference to the building code section received in evidence, appellant Alland & Company as general contractors in charge of the entire job were under a duty of ordinary care to see to it that respondent had a reasonably safe place to work.

Appellants cite Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26, wherein judgment for plaintiff employee who was hurt in a fall on the job was reversed upon the ground that the evidence was insufficient to hold the contractor negligent. Basically, the facts of that case and this one are very much alike in that they involved a building under construction, a building contractor, an employee of a subcontractor being hurt when he walked on a scantling placed across an open stairwell, and he fell when the scantling broke in the middle under his weight. However, from the opinion, it does not appear that there was evidence, as there is here, from which the trier of fact could draw reasonable inferences of notice and negligence. Furthermore, the Dingman case does not involve the violation of an ordinance.

[5, 6] The case law involving a finding of negligence from a statutory violation as set out in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 is as follows: "That case holds that the standard of care to which one must conform is usually that of the ordinarily prudent or reasonable person under like circumstances, but that the proper conduct of such a reasonable person under particular situations may be prescribed by statute; that an act or failure to act below a statutory standard is negligence *per se* or negligence as a matter of law; that where the evidence establishes a defendant's violation of a statute (proximately causing plaintiff's injury) and where no excuse or justification for violation is shown, responsibility may be fixed on the violator without proof of failure to use due care; that while the presumption of negligence arising from violation of an applicable statute is not conclusive and may be rebutted by showing excuse or justification, proof of the violation raises the presumption of negligence and puts upon the offender the burden of proving that the violation was excused or justified by causes or things beyond the control of the violator; that in the absence of such proof of excuse or justification the presumption of negligence is conclusive." Gruss v. Coast Transport, Inc., 154 Cal.App.2d 85, 315 P.2d 339, 341.

The appellant owners have two separate grounds of appeal: (1) the trial court was in error in sustaining the objection to the introduction of the second ordinance which repealed the owner's duty and responsibility provisions of the first one and (2) Building Code Section 4109, as to them is unconstitutional because it is unreasonable in requiring them to do something in a situation over which they had no control and of which they had no knowledge.

[7] There can be no doubt that Alland & Company was an independent contractor hired by appellant owners to construct a motel. "An independent contractor is one

who renders service in the course of an independent employment or occupation, following his employer's desires only as to the results of the work, and not as to the means whereby it is to be accomplished [citations]. The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work [citations]." McDonald v. Shell Oil Co., 44 Cal.2d 785, 788, 285 P.2d 902, 903. The appellant owners did not select, nor did they have the privilege of selecting, the plywood material, nor the manner in which it was to be laid. They did not exercise active control over the men employed or the operation of the equipment used by Alland & Company.

In the first place, the action against the owners was one of tort, not contract. The fact that the owners in getting the building permit agreed to comply with all laws and ordinances applicable thereto adds nothing to what the law already requires. Compliance with the law is not based upon agreement of a citizen to comply.

[8, 9] The rights and duties of the appellant owners and of the respondent were materially affected by the ordinance as introduced in evidence, read to the jury and used as a basis for an instruction that a violation thereof was negligence as a matter of law. If it was error to receive the ordinance in evidence as it existed at the date of the accident, and to refuse to admit it as it existed at time of trial, the judgment must necessarily be reversed, even though respondent might have nevertheless recovered under some conceivable exception to the general rule that an owner is not liable for the negligent conduct of the independent contractor.

> "The rule in such cases [purely statutory remedy] is clear that where no rights are vested the right falls and the statutory remedy ceases to exist upon the repeal of the statute without a saving clause unless the right has been converted into a final judgment prior to a repeal of the statute. Although the cause of action upon which the judgment herein is based, accrued prior to the date of the alleged repeal, the judgment was entered subsequent to that date. The repeal of the statute without a saving clause would therefore wipe out the cause of action and render the judgment of no legal validity [citations]." Penziner v. West American Insurance Co., 10 Cal.2d 160, 170, 74 P.2d 252, 257.

This case was apparently tried on the theory that the liability, if any, of the owners was dependent upon the provisions of the ordinance, and not on any exception to the common law rule of non-liability. The court instructed the jury "that the duty of compliance with an ordinance designed for the protection of members of the public rightfully on the premises cannot be delegated by the owners of the premises to someone else, and that such owner remains liable in the absence of contributory negligence, for injury suffered by a person rightfully on the premises which proximately results from the violation, if any, of such ordinance"; and that, if the jury found the building to be more than two stories high, "the ordinance * * * previously read to you places a duty upon the defendants owners" and they "are not relieved of this duty by the fact that they employed an independent contractor to build the motel. The duty imposed by this ordinance is what the law calls a nondelegable duty and, where the owners entrust the performance of this duty to a contractor, they are responsible if the contractor fails to perform the duty and such failure proximately caused the accident."

There were no instructions offered by the plaintiff and none given by the court with reference to inherently dangerous activities, possible contractual liability because the owners signed the application for the building permit, or any other conceivable exception to the rule that an owner is not responsible for the acts and conduct of the independent contractor. There can be but little doubt that the jury based its

verdict against the owners on the ordinance introduced and the instructions relating thereto.

Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17 and Snyder v. Southern Cal. Edison Co., 44 Cal.2d 793, 285 P.2d 912, in each of which owners were held liable for injuries to an invitee, despite the presence of an independent contractor, do not involve a repealed ordinance or statute. There are other distinguishing features which do not now require further consideration. It is significant that respondent in this brief on appeal in commenting on the Finnegan case makes this observation, "At common law the owner would have no liability to such invitee, but a city ordinance required certain safety devices in the building, and it was held that the owner's duty to comply with such ordinance made him liable for injuries." It was error not to allow appellant owners to show that Ordinance 4109, insofar as their duties and responsibilities were concerned, had been repealed. The ordinance as it existed at time of trial should have been received in evidence. Consequently, it was error to instruct the jury in the manner hereinbefore indicated with reference to appellant owners.

What has been said regarding the effect of the repeal of the ordinance obviates the necessity of discussing appellant owners' second contention that the ordinance as read to the jury was unconstitutional as to them.

[10] The ordinance which was denied admission in evidence is not before this court, although it appears in the record as an exhibit for identification. In general, an appellate court does not take judicial notice of city ordinances. Stamper v. City of Los Angeles, 80 Cal.App.2d 242, 245, 181 P.2d 687. We have not considered whether there is or can be any exception in this case to the general rule of non-liability of an owner for acts of negligence of an independent contractor. The case was apparently tried insofar as appellant owners were concerned on liability predicated upon the provisions of the ordinance.

In affirming the order denying the motion for a judgment notwithstanding the verdict, no inference is to be drawn therefrom as to the presence or absence of any exception.

Order denying motion for judgment notwithstanding the verdict is affirmed.

Judgment for respondent against appellant Alland & Company, Inc. is affirmed.

Judgment for respondent against appellants George J. Cabrol, Albert J. Aubert and J. B. Doyle, individually and doing business as Rancho Lombard Motel is reversed.

DOOLING, Acting P. J., and DRAPER, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



158 Cal.App.2d 597

Dorothy Kathleen PARKER, an Incompetent person, by the guardian of her person and estate, Robert Parker, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO et al., Defendants,

City and County of San Francisco, Respondent.

Civ. 17406.

District Court of Appeal, First District, Division 1, California.

March 24, 1958.

As Corrected April 14, 1958.

Hearing Denied May 21, 1958.

Action for injuries sustained when passenger alighting from defendants' bus parked outside marked bus zone partially occupied by truck was struck by automobile without brakes attempting to pass to right of bus. The Superior Court, City and County of San Francisco, Daniel R. Shoe-

maker, J., granted judgment in favor of defendants notwithstanding verdict for plaintiff. Plaintiff appealed. The District Court of Appeal, Bray, J., held that evidence raised questions for jury as to whether bus driver was negligent in parking bus 10½ feet from curb and whether such negligence was proximate cause of accident.

Judgment notwithstanding verdict reversed.

1. Appeal and Error ⇐934(1), 1024(4)

On appeal from judgment notwithstanding verdict, evidence and all reasonable inferences therefrom must be viewed most strongly in favor of verdict, and all conflicts, if any, must be resolved in favor of verdict so that if there is any substantial evidence to support verdict, the judgment must be reversed.

2. Carriers ⇐280(1), 303(6)

Carrier's duty to exercise highest degree of care for safety of bus passengers ends when the passenger is discharged into a relatively safe space; the carrier has a duty not to discharge the passenger into a dangerous area and this is so even though the passenger alights safely. West's Ann. Civ.Code, § 2100.

3. Negligence ⇐136(14)

Generally, the issue of negligence is a question for jury.

4. Carriers ⇐320(28, 30)

In action for injuries sustained when passenger alighting from defendants' bus parked outside marked bus zone partially occupied by truck was struck by automobile without brakes attempting to pass to right of bus, evidence raised questions for jury as to whether bus driver was negligent in parking bus, without looking to rear, some 10½ feet from curb instead of as close to curb as practicable as required by statute and ordinances, and whether such negligence was proximate cause of accident in that driver could have reasonably anticipated danger to alighting passenger and could have reasonably foreseen that if a motorist lost control he might drive to right rather than to left of bus. West's Ann.Civ. Code, § 2100; West's Ann.Vehicle Code, § 586(a)(9).

5. Negligence ⇐136(25)

Proximate cause is normally a question of fact; it can only be a question of law where reasonable minds cannot differ.

6. Negligence ⇐56(1.7, 1.12)

"Proximate cause" is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produced the injury or damage complained of and without which such injury or damage would not have occurred.

See publication Words and Phrases, for other judicial constructions and definitions of "Proximate Cause".

7. Negligence ⇐59

Proximate cause involves an element of foreseeability; "foreseeability" does not mean foreseeability of the actual consequences; it simply means foreseeability in the terms of causation.

See publication Words and Phrases, for other judicial constructions and definitions of "Foreseeability".

8. Negligence ⇐59

If conduct of person sought to be charged is a substantial factor in bringing about harm, the fact that he neither foresaw nor should have foreseen the extent or nature of the harm, or the manner in which it occurred, does not prevent him from being held liable.

9. Negligence ⇐61(1)

Two acts of negligence may concur in bringing about a harmful result, and the fact that neither party could reasonably anticipate the occurrence of the other's act will not shield him from liability so long as his own negligence was one of the causes of the injury, and the proportionate degrees of the negligence of the two actors is immaterial.

10. Negligence ⇐61(2)

Where negligence of person sought to be charged continues and exists up to time of injury the concurrent negligent act of

another is not a "superseding cause" but becomes a "concurrent proximate cause".

See publication Words and Phrases, for other judicial constructions and definitions of "Concurrent Proximate Cause" and "Superseding Cause".

11. Negligence ⇐136(25)

Foreseeability is a question of fact and only becomes a question of law if reasonable men cannot disagree.

Paul Friedman, San Francisco, for appellant.

Dion R. Holm, City Atty., C. Wesley Davis, Deputy City Atty., City & County of San Francisco, San Francisco, for respondent.

BRAY, Justice.

A jury rendered a verdict in favor of plaintiff and against defendant City and County of San Francisco for $80,000.[1] The trial court granted judgment notwithstanding the verdict in favor of defendant. Plaintiff appeals.

The sole question presented is whether there was any evidence of negligence of defendant proximately contributing to the accident.

Evidence.

Plaintiff was a passenger in defendant's motor bus driven by a driver of 6 years' experience. The bus stopped at the Fillmore Street intersection of Sacramento Street on which latter street the bus was proceeding. The marked bus zone was located across Fillmore Street to which zone the bus proceeded. This zone was 55 feet in length and 6 feet wide. Occupying the front end of the zone was a United Parcel truck which was 20 feet long and 7½ feet wide. Concluding that he could not get the bus into the remaining portion of the zone (the bus was 35 feet long and 8 feet wide and according to the driver required 12 to 14 feet clearance in front in order to swing out if flush with the curb—if not, it would need 10 feet) the driver parked the bus parallel with the curb with its front approximately opposite the rear end of the truck. The bus was 10½ feet from the curb at its right and its rear was even with the near line of the crosswalk crossing Sacramento Street. Its left side was about 9 inches from the center of the street. The driver testified that if the bus had pulled into the zone flush with the curb and still left room to move out around the truck into Sacramento Street the bus would have been 6 feet into the crosswalk. Later by use of the diagram it appeared that if so parked, leaving 10 feet to clear the truck, the bus practically would have blocked the crosswalk. If the bus were brought in at an angle so as to leave the right side of the bus closer to the curb than parking parallel as it did, the back of the bus would not have protruded as far into the crosswalk as if parked in the zone parallel to the curb. The driver testified that in conjunction with the rules hereafter mentioned the bus should be brought as close to the curb as possible where there was an obstruction in the bus zone; it was a matter of personal judgment for the driver to select the position.

Sacramento Street going into the intersection is an 8 per cent down grade and is 38½ feet wide. Edward Mackay[2] drove a borrowed 1940 Ford Coupe down Sacramento Street in second gear. At some point about 40 to 50 feet from the intersection he discovered that both his foot brakes and his emergency brake did not respond. As he approached the intersection he knew that the bus was on the other side but was not sure whether it had

1. This amount is subject to a credit of $40,000 paid plaintiff by defendants United Parcel Service and its driver.

2. He and the owners of the car he was driving were originally defendants in the case. A nonsuit was granted in favor of the owners and plaintiff dismissed without prejudice as to Mackay. United Parcel and its driver were also defendants. Plaintiff for the sum of $40,000 entered into a covenant with them not to execute.

stopped or was still moving. He saw some one in the crosswalk behind it. (This, of course, was not the plaintiff, who left the front right of the bus to walk to the curb.) Mackay, desiring to stop his automobile without hitting anybody, noticed the truck with a steel grate for a bumper. For that reason he decided to pull to the right of the bus and stop his car against the truck's bumper. He did not go to the left of the bus because he could not see around it although he did not see any oncoming traffic. He was going 10 to 15 miles an hour before the intersection but did not know his speed in the intersection or beyond it. He claimed that as he entered the intersection he was blowing his horn and yelling that he had no brakes. He became aware of the people whom he struck when he turned his car right to miss the bus. One witness testified that just as he stepped out of the rear door of the bus some one shouted "Look out" and the man who had proceeded him out of the door stopped him. The man driving the car yelled that his brakes were not working. The witness stepped back and the car just missed him and the other man. The car proceeded and hit plaintiff who had just alighted from the front of the bus. It also struck a man who had left the curb and had just arrived at the front door of the bus, pinning them between the car and the truck and severely injuring plaintiff.

The bus driver did not see the accident happen. He looked in his rear mirror before crossing the intersection and did not see any traffic behind him. He does not remember whether he again looked into that mirror, but imagined he did so again as it comes automatically. There is another bus stop on Sacramento Street at the end of the block. The bus driver testified that as he approached the intersection he saw that there were persons standing in the zone itself waiting for the bus. The bus driver stated that he knew that in stopping where he did he was disobeying the "rules of the City and County of San Francisco relative to where you should stop that bus." One witness testified that as the bus approached he stepped out into the bus zone and awaited it and that one or more persons also stepped into the zone. He waited by the front door until five or six persons alighted, and then the car came right by him. He heard no yelling or noise.

Was There Evidence of Negligence?

[1] It is well settled that on appeal from a judgment notwithstanding the verdict, the evidence and all reasonable inferences therefrom must be viewed most strongly in favor of the verdict, and all conflicts, if any, resolved in favor of the verdict so that if there is any substantial evidence to support the verdict, the judgment must be reversed. Mitchell v. Southern Cal. Gas Co., 122 Cal.App.2d 692, 695, 265 P.2d 118; Rodabaugh v. Tekus, 39 Cal.2d 290, 291, 246 P.2d 663.

The following city laws and regulations were read in evidence:

Section 208, Public Utilities Code: "* * It shall be unlawful for a bus operator to receive or discharge passengers upon a public street at other than a legally established bus zone, provided however, that he may receive or discharge passengers from a bus parked as close to the right-hand curb as practicable and at a point at least two city blocks distant from the nearest legally established bus zone."

Section 209, Public Utilities Code: "Buses must be stopped in marked bus zones. Whenever the driver or operator stops a bus at a bus zone, he shall bring said bus within the confines of said zone as marked out on the curb and/or street, unless such a zone is actually obstructed and the bus cannot be stopped therein."

General Bulletin No. 911, Municipal Railway: "Subject: Coaches stopping at curb. Unless regulated otherwise or when parked vehicles occupy zone, motor and trolley coaches must stop of [sic] curb for the purpose of taking on and discharging passengers, in accordance with rule requirements.

"Strict compliance with this important operative requirement will eliminate the cause for this type of complaint which is

being received at this office and will contribute greatly to—

"(1) Safety by keeping roadway clear, thus permitting traffic to flow unobstructed.

"(2) Comfort and convenience of patrons."

Section 3, Rule 45 of the Official Rule Book of the Municipal Railway: "Coaches must never be backed until operator has stepped from coach and inspected the area in rear, warning any children, pedestrians or traffic of his intentions. When it is necessary to pack [sic] a considerable distance he should seek the assistance of a railway employee to flag all traffic."

[2] While a carrier of passengers for hire is held to the exercise of the highest degree of care for the safety of passengers in their transportation and is liable for any injury sustained for failure to exercise such care (see Civil Code, § 2100; Bonneau v. North Shore R. R. Co., 152 Cal. 406, 409, 93 P. 106; Osgood v. Los Angeles etc. Co., 137 Cal. 280, 70 P. 169), that high degree of care ends when the passenger safely alights from the bus. See MacLean v. City & County of San Francisco, 127 Cal.App.2d 263, 272, 273 P.2d 698, and Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 735, 306 P.2d 432. This means that the duty ends when the passenger is discharged into a relatively safe space, not merely that he alights safely from the bus if he is discharged into a dangerous area. As we said in MacLean v. City & County of San Francisco, supra, 127 Cal.App.2d at page 272, 273 P. 2d at page 704: "The mere fact of stopping away from the curb *but as near thereto as practicable under the circumstances*" (emphasis added) is not negligence and buses "should not discharge their passengers out in the street where there is danger of their being hit by passing vehicles [citations], nor near known dangers from the condition of the street * * *." See also Brandelius v. City and County of San Francisco, supra, 47 Cal.2d 729, 735, 306 P.2d 432, holding that the rule that the relation of passenger and carrier terminates when a street car passenger alights upon a public street and clears the car from which he alights, is subject to certain qualifications depending upon the circumstances of the case. The court quoted from Dayton v. Yellow Cab Co., 85 Cal.App.2d 740, 745, 193 P.2d 959 (47 Cal.2d at page 735, 306 P.2d at page 436): "'until the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger, the rule of utmost care and diligence set forth in Civil Code, section 2100, still applies.'" It also quoted from Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 100–101, 187 P. 2 (47 P.2d at page 735, 306 P.2d at page 436): "'responsibility continues until the passenger has had a reasonable opportunity of getting away from the car without injury.'" While the Dayton, Boa and Brandelius cases and the cases referred to in the Brandelius case dealt with injuries received by passengers alighting from a common carrier inflicted by an agency of the common carrier, we can see no reason why the exception to the general rule applied in those cases should not apply where, as here, the passengers are discharged into an area of immediate danger. See "Proximate Cause in California" by William L. Prosser, 38 Cal.Law Review, pp. 369, 401: "The fact that the intervening cause is the negligent act of a third person will not necessarily relieve the defendant, since his own fault may lie in exposing the plaintiff to the risk that such negligence will intervene. * * * [A] partially blocked roadway with obstructed vision or inadequate room to pass means that some negligently driven automobile may hit a man or another car. * * * The issue here is not one of causation, which is beyond all dispute; but of whether the defendant was under any duty to protect the plaintiff against the intervening cause."

[3, 4] Generally, the issue of negligence is a question for the jury. Here the jury well could have found that while, in view of the truck's presence in the bus

zone and the fact that parking there would cause the bus to greatly obstruct the crosswalk, it was not practicable to park the bus wholly in the zone, nevertheless it reasonably could have been parked much closer than 10½ feet from the curb, and that the bus in the words of the MacLean case was not stopped as near to the curb "as practicable." (No reason appears why it could not have been parked at least adjacent to the outer line of the bus zone.) The bus driver conceded that in parking as he did he had violated the ordinance requirements that the bus be parked as close to the curb "as practicable." Thus there was support for the jury's finding that defendant was negligent. Moreover, the evidence would support a finding that the bus driver neither at the time he was approaching his parking place, at the time of stopping, nor at the time of opening the doors to let the passengers out, looked to the rear or to the left side to see if the bus zone was then a safe place into which to discharge his passengers and that therefore the driver was negligent.

The most serious question is as to whether that negligence constituted a proximate cause of the accident, or whether the sole proximate cause thereof was Mackay's negligence, that is, broke the chain of causation. In Ferroggiaro v. Bowline, 153 Cal.App.2d 759, 315 P.2d 446, we set forth the well settled general principles governing the determination of whether an intervening cause is the sole proximate cause of an accident (153 Cal.App.2d at page 763, 315 P.2d at page 448): "A defendant may be negligent for failing to guard against an intervening cause which in ordinary human experience is reasonably to be anticipated or which the defendant has reason to anticipate. In other words, the risk created by the original act of negligence may include the intervention of the foreseeable negligence of others. Prosser on Torts, 2d ed., p. 268 et seq. The fact that the intervening act of a third person is a negligent one will not make it a superseding cause of harm to another for an injury which the original actor helped to bring about, if the original actor at the time of his negligent conduct should have realized that a third person might so act. Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 282 P.2d 12. That is, the defendant will be held liable for the damages resulting from an intervening cause that he could foresee, or for those which are the normal results of the risk he has created. Of course, if 'the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.' Hale v. Pacific Tel. & Tel. Co., 42 Cal.App. 55, 58, 183 P. 280, 281. But, if the original actor's conduct is a substantial factor in bringing about harm to another, the fact that he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. Gibson v. Garcia, 96 Cal.App. 2d 681, 216 P.2d 119." We quoted from Osborne v. City of Whittier, 103 Cal.App. 2d 609, 230 P.2d 132: "'We hold, therefore, that liability is not, as a matter of law, dependent upon proximity of the damaged property to the dangerous condition, but is dependent upon the dangerous condition being a proximate cause of the damage, and that the question is one of fact'" and from Jones v. City of South San Francisco, 96 Cal.App.2d 427, 435, 216 P.2d 25: "'It is a rare case where the court may hold, as a matter of law, that the intervening act breaks the chain of causation because whether it was reasonably foreseeable is a question of fact and not of law. The second act will break the chain of causation only where, under no rational interpretation of the evidence, could the later act of negligence have been reasonably foreseen.'"

The question presented is whether or not when defendant parked its bus 10½ feet from the curb, under the facts of this

case, and the driver, without first looking to the rear, permitted his passengers to alight, the second act of negligence was reasonably foreseeable and both actors may be held liable. In determining this question we must bear in mind "'* * * the law does not say that if the particular injury arising from the negligence cannot be anticipated, a recovery cannot be had. That some damage, some injury, would probably arise from the existing negligence, and that it could reasonably have been expected, is all that the law requires to justify a recovery.'" Ferroggiaro case, 153 Cal.App.2d at page 765, 315 P.2d at page 449.

Thus, the question here is a relatively simple one, although its answer may be more difficult, particularly as to affirm the trial court's action requires that we decide the question as a matter of law rather than of fact. The question is, should the driver in stopping his bus 10½ feet from the curb, some 4½ feet outside the bus zone, without looking to the rear of the bus, and requiring his passengers on alighting from the bus to cross that area of the street, reasonably have anticipated danger to his passengers so alighting.

It is very doubtful if there was any evidence to show that had the bus driver looked to the rear at the time he opened the bus doors he would have seen Mackay's car in a position which reasonably would have warned him that it would go into the bus zone. For the purposes of the discussion hereafter on the question of foreseeability, we will assume that the bus driver's failure so to look alone was not a proximate cause of the accident.

This, then, brings us to the final question as to whether it can be said that it was reasonably foreseeable that any car would be driven into the obstructed bus zone, already occupied by persons waiting to get on the bus. This was a marked bus zone reserved for buses alone and in which stopping, standing or parking any other vehicle is prohibited "except when necessary to avoid conflict with other traffic or in compliance with the directions of a peace officer or traffic control signal device * * *." (Vehicle Code, § 586(i).) [3]

[5, 6] Because of the violation of the statute and rules of the company constituting negligence on the part of defendant, the plaintiff, a passenger, to whom the highest degree of care was owed, was allowed to get off 10½ feet from the curb, a place of danger. The passenger would not have been in that place of danger but for the negligence of defendant. Such negligence continued until the passenger reached a place of safety. Thus the negligence continued up until the very moment Mackay's automobile drove into the bus loading zone and hit the plaintiff. Was, then, the negligent act of Mackay a superseding cause for the reason that such action on his part was not reasonably "foreseeable"? We are here dealing, of course, with a question of causation. Proximate cause is normally a question of fact. It can only be a question of law where reasonable minds cannot differ. Whenever reasonable minds can disagree on the issue it is one of fact and not of law. Proximate cause, in the legal sense, is that cause "which, in natural and continuous sequence, unbroken by an efficient intervening cause, produced the injury or damage complained of and without which such injury or damage would not have occurred." (35 Cal.Jur.2d p. 551, § 54, and many cases cited.)

[7, 8] It is true that the conception of proximate cause involves an element of foreseeability. But what does this mean? It does not mean that the precise or intended consequence should have been foreseen. Foreseeability does not mean foreseeability of the actual consequences. It simply means foreseeability in the terms of causation. If the conduct of the person sought to be charged is a substantial factor in bringing about the harm, the fact that he neither foresaw nor should have foreseen the extent or nature of the harm, or the manner in which it occurred, does not pre-

3. This section was amended in 1957 and subdivision (i) is now subdivision (a) (9).

vent him from being held liable. (See many cases collected and commented on in 35 Cal.Jur.2d p. 552, § 55.)

[9] It is obvious that two acts of negligence may concur in bringing about a harmful result. The fact that neither party could reasonably anticipate the occurrence of the other's act will not shield him from liability so long as his own negligence was one of the causes of the injury. The proportionate degrees of the negligence of the two actors is immaterial. (See many cases commented on and collected in 35 Cal.Jur. 2d p. 555, § 57.)

[10] It is elementary that where the negligence of the person sought to be charged continues and exists up to the time of injury the concurrent negligent act of another is not a superseding cause, but becomes a concurrent proximate cause. As is stated in 35 Cal.Jur.2d at p. 561, § 62, supported by innumerable cases: "The fact that neither of the negligent parties could have reasonably anticipated the concurrent negligence will not shield him from liability so long as his own negligence was a proximate cause of the injury or damage complained of. And it is irrelevant in this respect whose negligence was first in time, who was more or who less negligent, or whether one was ordinarily and the other wantonly negligent."

[11] As before stated, ordinarily, foreseeability is a question of fact—it only becomes a question of law if reasonable men could not disagree. (See cases collected 35 Cal.Jur.2d p. 579, § 73.)

Of course, one could not reasonably foresee that Mackay would lose control of his automobile and choose to run to the right of the bus rather than into the back of it or to its left. But certainly it was foreseeable that, if one parked the bus 10½ feet from the curb on a street so narrow that traffic proceeding in the same direction was barred, some one might if he lost control of his car drive to the right rather than to the left of the bus. The bus driver here involved testified that in parking the bus 10½ feet from the curb he knew that he was disobeying the ordinance and rule. It is an obvious fact that if a bus is so parked that automobiles cannot pass it on the right that passengers alighting will not be hit by automobiles which, for any reason, try to pass it on the right. It is certainly a reasonable inference that one of the purposes of the drafters of the statute and rule requiring buses to park so that approaching automobiles could not pass them on the right was to protect alighting passengers from this very peril. The lawmakers of the city and the company saw that such a peril was possible. Such a danger to them was "foreseeable," and to protect against it they passed the ordinance and adopted the rule.

In Ferroggiaro v. Bowline, supra, 153 Cal.App.2d 759, 315 P.2d 446, one of the defendants sought to be charged with liability drove his car, negligently, into a telephone pole. This broke the power lines operating traffic lights at an intersection some distance away. Two cars approached the intersection at right angles. The drivers so negligently operated their cars that an accident occurred. Their negligent conduct did not, as a matter of law, break the chain of causation. It was argued in that case that it was not legally "foreseeable" that the negligence of the driver who hit the pole would be followed by the negligence of the two drivers whose cars collided. It was held that "foreseeability" and "proximate cause" were fact questions. The court cited many cases in support of the proposition that "where the first actor negligently maintains an obstruction in the public streets and the plaintiff is required to go around the obstruction and is injured by the negligence of a second and subsequent actor, the second act of negligence is reasonably foreseeable * * *." 153 Cal.App.2d at page 764, 315 P.2d at page 449. In the instant case the plaintiff got off where the bus driver stopped, believing, and having a right to believe, that she was in a place of safety. She was not. She was in a place of peril because of the bus driver's negligence in obstructing the street. Because of the obstruction Mackay had three

choices—go to the right or left of the bus, or hit the bus. He chose to go to the right. Had the bus been lawfully parked Mackay could not have done so. This was a peril the ordinance and rule were passed to protect against.

This court in the Ferroggiaro case referred to several leading cases, all holding that foreseeability is a question of fact. At pages 764, 765, 766 of 153 Cal.App.2d, at page 449 of 315 P.2d, this court said:

"In Jackson v. Utica Light & Power Co., 64 Cal.App.2d 885, 149 P.2d 748, an employee of a construction company met his death by electrocution when his power shovel came in contact with a farmer's telephone wire which was strung upon the same poles as were defendant's high voltage power lines. A distant pole had broken as a result of a rotten condition and, as a result, the power lines had fallen on the telephone wires. The court affirmed judgment for the plaintiff, holding that the power company's negligence in failing to repair the situation or to inspect the poles after notice that construction work was to begin on a new highway running under the wires was a proximate cause of the death of the decedent.

"The case of Walmsley v. Rural Telephone Ass'n of Delphos, 102 Kan. 139, 169 P. 197, is an interesting one. In that case defendant negligently permitted its telephone wire to sag across a public highway. Plaintiff, riding on a wagon with a grain bin loaded on it, was shot when the grain bin caught on the wire, causing the wagon to upset and throwing plaintiff to the ground. The bin struck the rifle which the plaintiff was carrying, discharging the gun and wounding him. The court affirmed judgment for the plaintiff, stating (102 Kan. at page 199, 169 P. at page 199): 'Damage of some sort was natural and probable, almost inevitable. That somebody would be shot through defendant's negligence would not have been anticipated. But the law does not say that if the particular injury arising from the negligence cannot be anticipated, a recovery cannot be had. That some damage, some injury, would probably arise from the existing negligence, and that it could reasonably have been expected, is all that the law requires to justify a recovery.' The same thought was expressed in Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 307, 240 P. 53, 54, where it was stated: 'If the negligent act or omission is one which the company ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then it is liable for any injury proximately resulting therefrom, although it might not have foreseen the particular injury which did happen.' See also Lim Ben v. Pacific Gas & Elec. Co., 101 Cal.App. 174, 281 P. 634. * * *

"In Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119, an automobile hit a pole maintained by the street railway company and the pole broke and hit the plaintiff. Plaintiff sued the street railway company alleging that the pole was weak, that the condition was known to defendant, and that its negligence was a proximate cause of the accident. Defendant's demurrer was sustained without leave to amend. This was reversed, the court holding that proximate cause was a question of fact and not of law.

"Carroll v. Central Counties Gas Co., 74 Cal.App. 303, 240 P. 53, illustrates the inclination of the courts to hold that the question of foreseeability is generally one of fact and not of law. There the automobile in which plaintiff was riding swerved to avoid an oncoming vehicle. Plaintiff's automobile fell from a bridge and broke a gas line operated by defendant. This permitted gas to escape which became ignited and burned the plaintiff. The trial court sustained a demurrer without leave to amend. This was reversed, the court holding that it could not be

said, as a matter of law, that the defendant gas company could not reasonably have foreseen the likelihood of danger from the pipe to persons lawfully using the highway. At page 308 of 74 Cal.App., at page 55 of 240 P. it was stated: '"Whether negligence *can* be inferred from the evidence is for the determination of the court, but whether it *ought* to be inferred is a question for the jury." [Citing a case.] This rule applies where the facts are undisputed, as well as where the evidence is conflicting, if conflicting inferences can reasonably be drawn therefrom.'"

All of these case are much closer on the issue of foreseeability than the instant one, yet in all of them foreseeability was held to be a question of fact.

There are other cases directly in point. In Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269, the defendant left heavy road-building equipment on the mesa, unlocked. Three drunks started it, drove it around for a while, and jumped out after heading it toward a canyon. It traveled for about a mile, unattended, doing major damage. The court held this was a reasonably foreseeable risk that the owners of the bulldozer should have guarded against. In the instant case the bus driver violated a statute and rule passed for the very purpose of protecting passengers from the very danger that developed.

Another interesting case is Fennessey v. Pacific Gas & Elec. Co., 20 Cal.2d 141, 124 P.2d 51, 54. There a public utility truck parked illegally between a safety zone and the adjacent curb while servicing the street lights. A jitney bus swerved onto the streetcar tracks and hit the plaintiff. It was held that the question of proximate cause was one for the jury, citing many cases, and quoting from Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 98, 29 P.2d 781, 782, as follows: "'The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury.'"

The judgment notwithstanding the verdict is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK, J., dissenting



159 Cal.App.2d 38

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Francis Marion OGG, Defendant and Appellant.

Cr. 5972.

District Court of Appeal, Second District, Division 2, California.

March 31, 1958.

Hearing Denied May 27, 1958.

Defendant was convicted of murder in the second degree and from a judgment of the Superior Court of Los Angeles County, Herbert V. Walker, J., the defendant appeals. The District Court of Appeal, Fox, P. J., held that the evidence sustained conviction and that failure to give an instruction on excusable homicide was not error.

Judgment affirmed.

Opinion, 320 P.2d 572, vacated.

1. Criminal Law ⇐535(2)
Homicide ⇐228(1, 2)

In a murder charge, the "corpus delicti" consists of the death of the alleged victim and existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially, but the corpus delicti must be proved by evidence independent of the extrajudicial declarations and statements of the defendant.

See publication Words and Phrases, for other judicial constructions and definitions of "Corpus Delicti".

2. Homicide ⇐228(4)

To prove a prima facie case of corpus delicti, all that was required was to show a reasonable probability that a criminal act of another had been the direct cause of death.

3. Criminal Law ⇐412(1)

In prosecution for wife murder, where the facts establish a reasonable probability that the wife met her death by means of a criminal agency, a prima facie showing of corpus delicti was made, and defendant's extrajudicial statements were admissible.

4. Criminal Law ⇐1160

Before verdict of a jury which has been approved by the trial court can be set aside on ground of insufficiency of evidence, it must clearly appear that upon no hypothesis whatever is sufficient substantial evidence to support the conclusion reached in the court below.

5. Criminal Law ⇐1144(13), 1159(2)

The appellate court must assume in support of judgment of conviction, the existence of every fact which the jury could reasonably deduce from the evidence, and if circumstances reasonably justify the verdict, opinion of the reviewing court that such circumstances might also be reconciled with innocence of the defendant will not warrant a reversal.

6. Homicide ⇐248

Evidence sustained conviction of murder in the second degree on the ground that defendant was criminally responsible for his wife's death, though defendant claimed that the injuries to wife were caused by a fall.

7. Criminal Law ⇐1159(6)

Rule that the circumstances must be consistent with guilt and inconsistent with any hypothesis of innocence is a rule of instruction for the jury, and is not a rule for the guidance of the court on review. West's Ann.Pen.Code, § 195.

8. Homicide ⇐12, 13

"Malice" may be express or implied, it is "express" when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature and is "implied", when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. West's Ann.Pen.Code, § 188.

See publication Words and Phrases, for other judicial constructions and definitions of "Express Malice", "Implied Malice" and "Malice".

9. Homicide ⇐13, 35

Implied malice necessary to support a conviction of second degree murder requires no specific intent to kill, and a distinguishing characteristic between murder and manslaughter is malice rather than the presence or absence of an intent to kill. West's Ann.Pen.Code, § 188.

10. Homicide ⇐254

Evidence authorizing an inference that defendant inflicted a severe beating upon his wife, during which she received nine-inch skull fracture and that death resulted therefrom, established murder in the second degree and not manslaughter. West's Ann.Pen.Code, § 188.

11. Homicide ⇐174(1)

In murder prosecution, in determining whether acts of defendant disclosed an abandoned and malignant heart, thereby establishing implied malice, the jury could consider the defendant's conduct following the fatal injury, defendant's failure to seek assistance of his friends or to obtain medical aid even though he knew his wife was seriously injured. West's Ann.Pen.Code, § 188.

12. Criminal Law ⇐748

It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination.

13. Homicide ⇐297

In murder prosecution, evidence did not warrant the giving of an instruction on excusable homicide. West's Ann.Pen.Code, § 195.

14. Criminal Law ⇐824(4)

Where defendant did not request an instruction on excusable homicide, and the court fully and fairly instructed on first and second degree murder and manslaughter

as well as on presumption of innocence, reasonable doubt, burden of proof and principle for testing the sufficiency of circumstantial evidence, it was not error for the court not to give such an instruction sua sponte. West's Ann.Pen.Code, § 195.

15. Criminal Law ⇐1159(2)

An appellate court cannot reweigh the evidence and draw inferences contrary to those drawn by the jury.

Morris Lavine, Wm. J. Clark, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of murdering his wife on Christmas day, 1956. The jury fixed the offense as murder in the second degree. The jury found the charge that defendant had suffered a prior felony conviction for forgery to be true. Defendant's motion for a new trial was denied and he was sentenced to the state prison. He has appealed from the judgment of conviction.

In seeking a reversal defendant contends (1) that the corpus delicti was not sufficiently established to warrant the introduction of his extrajudicial statements; (2) that the evidence is insufficient to support the conviction of second degree murder; and (3) that the court erred in failing to give an instruction on excusable homicide as defined in section 195 of the Penal Code. In view of defendant's first and second contentions, it is necessary to set forth the evidence in considerable detail.

Defendant's wife died as the result of a fractured skull with intracranial hemorrhage and cerebral lacerations. She was found dead in her home in West Covina by her daughter on December 27, 1956, at approximately 9:00 p. m. Her body way lying on a bed in a spare bedroom, covered by a comforter. There was blood on the davenport in the living room, on a pillow, and on a towel on the davenport. Her Lincoln car was missing from the garage; the mechanism of a lady's wrist watch was on a coffee table, and on her left arm was the band and empty case. A note was found in the handwriting of defendant on the kitchen drainboard; it was written on the back of Christmas wrapping paper and read: "I can't wake Betty up and I'm frightened. I swear I didn't hit her or hurt her. Francis."

The deceased was 46 years old, 5 feet 4 inches in height, and weighed 101 pounds. An autopsy was performed on the body by Dr. Newbarr of the coroner's office. He found multiple superficial abrasions on the left forehead, above and lateral to the right eye and on the left side of the face. There was a reddish purple discoloration with swelling of the soft tissues around the right eye, and a very small abrasion over the bridge of the nose. Also, there were abrasions in the skin over both elbows, the right forearm, and on the anterior surfaces of both legs. The entire right side of the underscalp was discolored, as well as the left frontal area. There was hemorrhage in the right temporal muscle, and the left temporal muscle revealed damage. Two subdural hematoma were found, one extending over the left side of the head and measuring one inch in its thickest portion, the other on the right side being thin and localized. There was widespread damage extending throughout the left side of the brain, and small localized contusions in the right side and in the left rear portion. There was hemorrhage toward the base of the brain. There was a fracture nine inches in length commencing one and a half inches above the right ear; it descended into the base of the skull toward the front of the head, crossing the midline into the left side.

Dr. Newbarr found the discoloration to the right eye difficult to evaluate. It was his opinion that this condition could have been the result of the application of some external force, or the result of the fracture because of its nearness to the right anterior fossa at the base of the skull. The fracture could have been the result of a blow to the head with a hard, blunt object, or the

result of the head projected against a hard object. In the doctor's opinion there was no connection between the external injuries on the left side of the head and those on the right. Also, it was his opinion that the fracture was caused by one injury and that there was no connection between the fracture and the injuries to the left side of the forehead. If the fracture was caused by a fall it must have been a dead weight fall, full length on a hard surface. The doctor did not feel that the fracture could have resulted if the deceased had merely collapsed, folded up and fallen. Considerable force was necessary to cause the fracture.

Deceased's daughter came to her home on Christmas day. At that time, with the exception of an abrasion below her right knee, the deceased had no other marks on her body. The deceased complained that defendant had not come home until 12:00 o'clock on the night before, and that when he came home on Christmas eve he had been drinking and had hit her and knocked her down. She told her daughter that she had sustained the abrasion that night. The daughter further testified that they all visited friends of her mother and defendant; that she stayed there until 1:00 o'clock in the afternoon and then left, taking her younger brother with her. This was the last time she saw her mother alive.

Some time between 4:00 and 4:45 on Christmas day defendant and decedent drove to the home of Clyde Faust in West Covina. Defendant went in but decedent drove off. In the meantime Faust, defendant and one Orville Cook had some drinks in the breakfast room. Defendant told them that he and his wife had been at Bill Bird's for several hours and had had a good time. A few minutes later the deceased walked in. She appeared to have been drinking quite a little. She called defendant a vulgar name and berated him. Cook persuaded her to sit down, and mixed a drink for her. Defendant's attempt to placate her resulted in her quieting down for a few minutes; however, she again began to berate him; among other things she said: "I'm going to tell your probation officer on you. You've been writing some of my checks again." At this point, Cook left to replenish the liquor supply; upon his return he mixed another round of drinks; before they were consumed the deceased threw a glass ash tray at defendant, which broke when he dodged it. Faust thereupon told defendant and his wife that they couldn't fight in his home. Defendant complained to his wife that she was ruining him with his friends, and suggested that she go home. She countered, "Why don't you go home with me?" He replied, "I am going to stay here with my friends." She then said, "Well, I wasn't asked to go home." Thereupon Faust asked her to leave. Cook testified that at this point defendant picked the decedent up in his arms and carried her out. Faust's version of this incident was that defendant put his hands on decedent's shoulders, turned her around and started her toward the living room door, where they disappeared from his view.

The living room adjoins the kitchen; it was 30 feet from the kitchen to the front door; the living room was carpeted, except the entry hall, which contained a cement floor referred to as a slump stone. After defendant and his wife left, Faust and Cook heard a scuffing noise, a dragging of feet, like rubbing one's feet on a rug. Then they heard the front door close. Cook went to latch the front door at Faust's request and discovered fresh blood spots on the slump stone of the entrance hall. Two of these spots were about the size of a baseball; there were one or two other smaller spots; all of these were within two or three feet of the door.

Defendant returned to the Faust home approximately an hour later, around 6:45 p. m. He came into the kitchen where Cook was and said, "I'm afraid I killed her this time, Cookie." Cook said, "Francis, you're kidding." Defendant replied, "Well, if she wakes up—if she comes up with a couple of black eyes tomorrow, just remember she fell and hurt herself." Faust testified that he showed defendant the blood

in the entry hall, and defendant said, "I didn't hit her, Mama took an awful fall."

Defendant and Cook then left in the latter's car and drove to defendant's home, the defendant stating he wanted to see "if Mommie got to bed all right." Defendant invited Cook to see a new sport jacket which the deceased gave him for Christmas. They went into the bedroom and Cook observed the deceased lying in the bed on her side with a comforter covering her to her neck. She appeared to have dried blood on her right nostril, but he did not observe any other mark. She looked natural but there was no movement; he was some 10 or 12 feet from her. After the exhibition of the sport coat, defendant patted the deceased on the cheek, saying, "I love you, baby," and the men left. They had not been there more than five minutes. They proceeded to a friend's house for a drink and then to a bowling alley. While enroute defendant said to Cook: "I'm afraid I hurt her this time," and Cook replied, "Francis, you better quit that * *." At the bowling alley Cook noticed blood on the front of defendant's trousers. Defendant told him "that came from Mama's nose." Defendant and Cook returned to the Faust home a little after 10:00 o'clock. At that time Faust gave defendant his wife's shoes which had fallen off her feet. Cook and defendant left there between 10:30 and 11:00. Defendant's home was only a few blocks from the Faust home.

At 7:30 a. m. on December 26th defendant cashed a check for $50 at a West Covina gas station. The check was payable to cash and purported to be signed by Edna C. Rosedale, Rosedale being the deceased's previous married name. The check, however, was in defendant's handwriting. The defendant was driving a Lincoln automobile. He told the attendant that his mother or mother-in-law was either sick or had passed away.

Harold J. Tucker testified that he was at the home of a neighbor of defendant and decedent by the name of Hamm in the early part of November, 1956, about 8:00 o'clock in the evening, when decedent ran through the house saying "he's after me." Later he heard a "hitting" sound in the back yard, looked out the window, and saw the deceased on the ground and the defendant holding her arm. That about an hour later the deceased knocked on the front door, and when Tucker let her in she ran to the bathroom and locked herself in. In a few minutes the defendant appeared and told Tucker to let his wife come out. When he let defendant in, defendant threatened him and told his wife to come out, but she refused. She did not leave there until defendant had gone and the absent neighbor who lived in the house had returned. On the second occasion when she entered the house she had a scratch and a couple of bruises on her face.

Defendant was arrested in Las Vegas on December 29, 1956. He gave a recorded statement to a representative of the Los Angeles County Sheriff in which he stated that he was 37 years old and had been married to the deceased for approximately eight months; that they lived in West Covina; that one of decedent's three children by a former marriage, a boy seven years of age, was living with them. Defendant told of the visit on Christmas morning of the deceased's daughter, and their later visit that morning to the Bird home, where they had stayed until around 5:00 o'clock. The daughter had previously left with the boy. Enroute to their home, defendant and his wife stopped at the Faust home, which defendant entered while his wife drove away. However, she returned to the Faust home in a few minutes. She kept arguing and finally threw an ash tray at defendant, which angered Faust. Because of this, defendant suggested that they had better go home. He said the living room was dark, and when they went out the deceased, who was staggering drunk, tripped on the carpet; he thought she hit the wall; then he heard her hit the concrete patio. He said she was unconscious after the fall and was bleeding from the nose. He got her home and put her to bed and then went back to the Faust home to get Cook because he thought she was hurt "real bad." He

brought Cook back to his house and asked him to look at her. Cook went into the bedroom and commented to defendant, "She'll be all right." According to defendant, she was then sleeping. He further stated: "I put a towel under her head because her nose was bleeding; I couldn't seem to stop it, so Cookie and I went bowling." After bowling, defendant stated that he came home about 2:00 a. m. and found she was bleeding pretty badly. He then stated that he gave her a cold shower thinking this would wake her up, but it did not; so after that he put her back in bed. He claimed that she was breathing all right and even snoring. Defendant went to bed on the Chesterfield and woke up about 4:00 a. m. After he awoke he got up and glanced in the bedroom at her but did not hear anything. He thought she had a concussion; he was "scared"; at first he said he did not know whether she was dead but later he admitted that he had a pretty good idea that she was. He also admitted leaving the note, previously referred to, on the kitchen sink.

He left the house around 6:30 or 7:00 o'clock that morning. He not only took the deceased's Lincoln car but also her diamond ring from her jewel case. He admitted in this statement writing a check for $50 and signing her name to it. He cashed it at the service station, where he told the attendant that he was going to see his mother, and then drove to Las Vegas where he registered under the name of Michael Doland; he did this because he did not want anyone to know where he was for awhile. He gambled, playing poker and roulette. He got $200 additional money by pledging his wife's diamond ring. He also stated he forged another check in her name. Defendant admitted in this statement that he had beaten his wife twice before, and that on one occasion she went to inquire about a divorce, moved out of the house, and lived with her sister for a week over the Thanksgiving period, but that they became reconciled after that. He further admitted that on one other occasion he had slapped her, but denied that he had ever hit her with his fist.

As a witness in his own behalf, defendant denied using any force on the deceased on the occasion in question. He testified, among other things, that she fell in the entrance hall; that he heard her hit the floor, and when he came up to her she was lying diagonally across the entrance. He knew she was unconscious when he went to lift her; when about a foot from the floor she slipped out of his hands and fell on her face. Defendant admitted that he saw blood after his wife slipped out of his hands; that he felt she was seriously hurt, and that he did not tell either Faust or Cook about it, or ask either of them to 'phone the police or call an ambulance. He admitted that he wrote a check for $50 from his wife's checkbook; that he took her ring from a jewel box on the dresser; that just before he left the house he wrote the note found on the kitchen drainboard; that he then took off for Las Vegas in his wife's Lincoln car, arriving there around 2:00 o'clock in the afternoon; that he registered under a false name; that he lost all his money gambling, and pawned his wife's ring the following day.

He further testified that they had been married about eight months, during which time his wife had complained against him to the police about three times; that she left their home for a week in November and went to live at her sister's house. At that time he promised that he would never hit her again if she came back. He admitted the incident of his wife's locking herself in the bathroom at the home of Mr. and Mrs. Hamm. He also admitted that he had suffered a prior felony conviction.

Defendant testified that he had been a boxer and had engaged in some 60 bouts, fighting at various weights from 160 to 172 pounds.

Was the Corpus Delicti Sufficiently Established to Warrant the Introduction of Extrajudicial Statements of Defendant?

[1, 2] "In a murder charge the corpus delicti consists of two elements: the death

of the alleged victim and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially. [Citation.] * * * However, the corpus delicti must be proved by evidence independent of the extrajudicial declarations and statements of the defendant * * *. But as prerequisite to the reception of such statements in evidence, the corpus delicti need not be established by proof as clear and convincing as is necessary to establish the fact of guilt; rather it is sufficient that only a prima facie showing be made that the alleged victim met death by a criminal agency. [Citations.]" People v. Amaya, 40 Cal.2d 70, 75–76, 251 P.2d 324, 327. "To prove a prima facie case of *corpus delicti,* all that was required was to show a reasonable probability that a criminal act of another had been the direct cause of the death * * *." People v. Ives, 17 Cal.2d 459, 464, 110 P.2d 408, 411; People v. King, 132 Cal.App.2d 642, 647, 282 P.2d 923; People v. Black, 103 Cal.App.2d 69, 75, 229 P.2d 61.

[3] The nature, location and extent of the injury that caused death; the fact that considerable force was necessary to cause such an injury and that it would not have been caused by an ordinary fall; the presence of abrasions, bruises and other injuries on various parts of decedent's body which were disconnected with the injury causing death; the failure of defendant to inform his friends or seek aid at the time of his wife's asserted fall at the Faust home, even though he knew she was seriously injured and unconscious, and the defendant's flight: these facts establish a reasonable probability that decedent met her death by means of a criminal agency. Thus, a prima facie showing of the corpus delicti was made, and defendant's extrajudicial statements were properly received in evidence.[1]

The Sufficiency of the Evidence.

[4, 5] Before the verdict of a jury which has been approved by the trial court can be set aside on the ground of the insufficiency of the evidence it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. We must assume in support of the judgment the existence of every fact which the jury could reasonably deduce from the evidence. If the circumstances reasonably justify the verdict, the opinion of the reviewing court that those circumstances might also be reconciled with the innocence of the defendant will not warrant a reversal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. People v. Frankfort, 114 Cal.App.2d 680, 689, 251 P.2d 401.

[6] Applying these principles, it is clear that there is ample evidence to sustain the verdict and judgment. In addition to the evidence mentioned above touching upon the question of the corpus delicti, the jury had before it the fact of defendant's use of a false name following his flight to Las Vegas, his incriminating statements to Cook and the representative of the sheriff's office in Las Vegas, the decedent's threat to turn him over to his probation officer for writing checks on her account, and his past conduct in striking her. Other circumstances need not be enumerated for these adequately support the verdict that defendant was criminally responsible for his wife's death.

People v. Burns, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9, is, in many of its aspects, similar to the case at bar. There, as here, the defendant claimed the death of his female companion was the result of falls. There was no eye-witness. Her physical condition, however, indicated that she had received a beating. Although the conviction was reversed on other grounds, the court determined that there was sufficient evidence to sustain a verdict of second degree murder. In rejecting defendant's explanation as to the cause of death, the court stated (109 Cal.App.2d at page 534, 241 P.2d at page 314): "Assuming that the

1. No objection was made at the trial to the admission in evidence of the tape recording of defendant's statements to the officer in Las Vegas.

evidence is also susceptible of the inference that her death might have been due to falls, that does not justify us in reversing the verdict. '* * * the mere fact that the evidence is susceptible of two inferences, one of innocence and one of guilt would not warrant a reversal of conviction. * * The appellate court is bound by the findings of the jury where it rejects the hypothesis of innocence if there is substantial evidence to support the finding of guilt as the more reasonable of the two hypotheses. Under this rule, the conviction of the defendant herein is amply supported by the evidence.' People v. Crawford, 41 Cal.App. 2d 198, 205, 106 P.2d 219, 223."

[7] In this connection defendant argues in effect that the evidence in this case is as consistent with the theory that the deceased's injuries were caused by a fall as it is with the theory that she was the victim of foul play. But the rule that the circumstances must be consistent with guilt and inconsistent with any hypothesis of innocence is a rule of instruction for the jury,[2] and is not the rule for the guidance of the court on review. People v. Cullen, 37 Cal.2d 614, 625, 234 P.2d 1; People v. Newland, supra, 15 Cal.2d at page 682, 104 P.2d at page 780; People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631.

Defendant contends that the People's entire case falls because the evidence fails to show any injury to his hand. He asserts: "It would have been impossible to have used any force without some injury or some effect to his hand." In this connection it must be borne in mind that defendant had been a professional prize fighter. In light of this background of training and experience and his wife's frail build, it is a reasonable inference that he could hit her in the head with his closed fist and cause the fatal injury without receiving any injury to his hand. Moreover, the fatal injury may well have been the result of the defendant's deliberate act in causing her to fall and strike her head against a hard surface, which would not necessarily have caused any injury to his hand.

Defendant emphasizes the testimony indicating he displayed tenderness toward his wife when Cook accompanied him to his home prior to their going bowling. In view of defendant's knowledge that his wife was unconscious and severely injured, his failure to seek assistance or medical aid for her, and his leaving her alone in that condition, the jury may well have been convinced that he was "putting on an act."

The Degree of the Crime.

Defendant argues that the verdict of second degree murder cannot be sustained because the evidence fails to establish malice, which is an essential element of that crime; he asserts that the most culpable offense of which he can be convicted is manslaughter. We cannot agree with this conclusion.

[8] Malice may be express or implied. "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Pen.Code, sec. 188.

[9] There is no substantial basis in the evidence for a finding of express malice. Defendant's conviction of second degree murder must therefore rest upon a finding of implied malice. "The implied malice as described in section 188 of the Penal Code requires no specific intent to kill, and the distinguishing characteristic between murder and manslaughter is malice rather than the presence or absence of an intent to kill." People v. Mears, 142 Cal. App.2d 198, 204, 298 P.2d 40, 43. "If the jury found that there was no considerable provocation and that the defendant acted with 'an abandoned and malignant heart' the 'malice' would be 'implied' and the murder would be of the second degree." People v. Bender, 27 Cal.2d 164, 178, 163 P.2d 8, 16.

It is clear from the evidence that there was no showing of "considerable provocation" sufficient to reduce the offense to

2. The jury was so instructed.

voluntary manslaughter. In fact, defendant insists that he did not voluntarily kill his wife.

[10] We must thus examine the evidence attending the killing to ascertain whether the jury was justified in impliedly finding that defendant acted with an "abandoned and malignant heart." The medical evidence discloses that the deceased had sustained numerous injuries on various parts of her body, many of which were unrelated to the fatal skull fracture. From this the jury reasonably could draw the inference that defendant inflicted a severe beating upon his wife, during the course of which she received a nine inch skull fracture. The conclusion that defendant had beaten his wife severely finds support in his own admission that he thought he "killed her this time." That death resulting under such circumstances constitutes murder in the second degree is held in People v. Burns, supra, 109 Cal.App.2d page 534, 241 P.2d page 314. See, also, People v. Tubby, 34 Cal.2d 72, 207 P.2d 51; People v. Cayer, 102 Cal.App.2d 643, 228 P.2d 70.

[11] In determining whether defendant's acts disclosed an abandoned and malignant heart, thus establishing implied malice, the jury was entitled also to consider defendant's conduct following the fatal injury. People v. Johnson, 203 Cal. 153, 164, 263 P. 524; People v. Riggins, 159 Cal. 113, 120, 112 P. 862; People v. Shears, 133 Cal. 154, 158, 65 P. 295; People v. Garnett, 9 Cal.App. 194, 202, 98 P. 247. Defendant's failure to seek the assistance of his friends or to obtain medical aid even though he knew that his wife was seriously injured indicates a heartless attitude and callous indifference toward her. Defendant went bowling that evening, leaving his wife alone; he simply let her die. His flight to Las Vegas the next morning when he was unsure of his wife's condition further reflects his depravity.

The jury could reasonably conclude from all these circumstances that defendant acted with an "abandoned and malignant heart." This establishes implied malice and sustains the verdict of second degree murder. See People v. Burns, supra; People v. Martina, 140 Cal.App.2d 17, 294 P.2d 1015.

[12] Defendant's argument that the evidence does not support the degree of the crime overlooks the well established principle that "it is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination." People v. Isby, 30 Cal.2d 879, 891, 186 P.2d 405, 412; People v. Cook, 15 Cal.2d 507, 515, 102 P.2d 752; People v. Mahatch, 148 Cal. 200, 203, 82 P. 779.

Defendant relies principally upon People v. Munn, 65 Cal. 211, 3 P. 650, in which a conviction of second degree murder for a death resulting from a fist fight was reversed. But the court in the Munn case said (65 Cal. at page 213, 3 P. at page 651): "If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, *and there are no aggravating circumstances*, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice. Without the presence of this element of malice the crime does not reach the higher degree of murder, but amounts simply to manslaughter." (Italics added.) We have already pointed out the aggravating circumstances in the instant case which showed an abandoned and malignant heart on the part of defendant, thus giving rise to the implication of malice.

Defendant also relies upon People v. McManis, 122 Cal.App.2d 891, 266 P.2d 134; People v. Lee, 44 Cal.App.2d 84, 111 P.2d 908; People v. Miller, 114 Cal.App. 293, 299 P. 742; People v. Chutuk, 18 Cal.App. 768, 124 P. 566, and People v. Stokes, 11 Cal.App. 759, 106 P. 251. None of these cases is helpful. In each of them a conviction for manslaughter was affirmed, and the question of malice was not involved. The McManis decision points out (as did the Munn case) that death resulting from

an assault and battery *without aggravating circumstances* is manslaughter. The presence of such aggravating circumstances, if sufficient to raise the implication of malice, makes the killing murder. In the Miller case the court distinguishes manslaughter from murder, stating that the presence of malice makes the crime murder. The other cases merely review the evidence and instructions, and find support for the manslaughter convictions.

The Failure to Give an Instruction on Excusable Homicide.

[13] Defendant contends that the trial court erred in failing to give an instruction defining excusable homicide as set forth in Penal Code section 195.[3] There are two answers to this contention. The first is that the evidence did not warrant the giving of an instruction on that subject. Defendant did not rely on that theory. His claim throughout was that decedent's death was due to an accidental fall; that he was in nowise responsible for the fatal injury. The evidence was insufficient to support a verdict on the theory of excusable homicide.

[14] The second answer is that defendant did not request such an instruction. The court fully and fairly instructed the jury on first and second degree murder and manslaughter as well as on the presumption of innocence, reasonable doubt, burden of proof and the principle for testing the sufficiency of circumstantial evidence. If defendant desired an instruction on excusable homicide he should have requested it. In the premises it was not error for the court not to give such an instruction sua sponte. People v. Klor, 32 Cal.2d 658, 662, 197 P.2d 705; People v. Andary, 120 Cal.App.2d 675, 683, 261 P.2d 791; People v. Williams, 153 Cal.App.2d 5, 314 P.2d 161.

[15] The principal issues in this case are factual. The jury and the court (in denying defendant's motion for a new trial) have determined the facts and the inferences to be drawn therefrom adversely to him. The basic difficulty with defendant's arguments is that he would have this court reweigh the evidence and draw inferences contrary to those drawn by the jury. Under firmly established principles we are not at liberty to do this. People v. Gould, 111 Cal.App.2d 1, 8, 243 P.2d 809.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

3. Penal Code section 195 reads as follows:

"Homicide is excusable in the following cases:

"1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

"2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in cruel or unusual manner."

159 Cal.App.2d 13

Lyle G. WILLIAMS, Plaintiff and Appellant,

v.

James B. RICE, John P. Rice, Biddy James McGeorge, formerly known as Mrs. John James and Biddy James, Defendants and Respondents.

Civ. 9282.

District Court of Appeal, Third District, California.

March 28, 1958.

Action by purchaser of property, who assigned all of his rights, title and interest in property to one of the defendants with

consent of vendor, for declaration of rights in property for possession of property and for reformation of contract. From adverse judgment of the Superior Court, Plumas County, Ben V. Curler, J., the plaintiff appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that plaintiff had no more interest in the property.

Judgment affirmed.

1. Vendor and Purchaser ⇐214(1)

In action by purchaser of property, who assigned all of his rights, title and interest in property to one of defendants with consent of vendor, for declaration of rights in property, for possession of property and for reformation of contract, evidence sustained finding that plaintiff had no more interest in the property.

2. Equity ⇐6

Equity can grant relief for a unilateral mistake.

3. Contracts ⇐93(1), 265

Equitable relief by way of rescission may be given if mistake relates to a material feature of the contract, if it is of such grave consequence that enforcement of contract as made will be unconscionable, if it occurred notwithstanding exercise of ordinary diligence by party making mistake, and if other party can be put in statu quo.

4. Vendor and Purchaser ⇐214(1)

Where purchaser of property paid $2,235 therefor and lived on property for five years during which time he reduced principal amount under original contract less than $800 and was delinquent in his payments at time of assignment, he was not, upon assignment of all his interest in property, including improvements, entitled to recover any money he had expended in improving property while he occupied it.

5. Trial ⇐382

In action tried to the court, it is for court to resolve conflicts in the evidence.

Whitwell & Carpenter, Portola, for appellant.

Wells & Baldwin, Sacramento, for respondents.

SCHOTTKY, Justice.

Lyle G. Williams, plaintiff above named, has appealed from a judgment declaring that he has no interest in certain real property.

[1] In 1946 J. C. Janes and Juanita C. Janes entered into a contract to sell certain real property to Lyle G. Williams and his wife, Gladys I. Williams, for the sum of $2,235. The agreement provided that the Williamses would pay the amount due on the property, after a small down payment, at the rate of $20 per month. Later another parcel of land was added to the agreement and the payments were increased to $25 per month. The contract provided that no assignment would be valid without the written consent of the sellers. J. C. Janes died and Juanita Janes succeeded to his interest. Lyle Williams has succeeded to the interest of his wife.

In January, 1951, Williams entered into a contract of sale of the property for the sum of $4,000 with one Biddy James (now Biddy James McGeorge) and her husband. Shortly thereafter, on April 23, 1951, Mr. and Mrs. James signed an instrument purporting to assign all their interest in the Williams-James contract to James B. Rice. Williams consented to this assignment but the trial court found that James B. Rice did not.

On May 3, 1951, Williams executed an assignment stating that he assigned and transferred to James B. Rice "that certain Agreement for the Sale of Real Property, and all my right, title, and interest in said

real property, which said contract of sale is between the undersigned and Gladys Williams, buyers, and J. C. Janes and Juanita C. Janes, sellers, dated January 15, 1946." This assignment was assented to by Juanita C. Janes, and James B. Rice executed an acceptance of it in which he stated: "I, * * * do hereby accept said Assignment and do further agree to abide by all of the agreements and obligations of the original contract, and do hereby further agree to pay to said Juanita C. Janes the balance of $1,438.27, due under said Agreement, upon the terms and conditions in said original Agreement contained."

Williams did not receive any money or property for this assignment. He had occupied the property for about five years during which time he had made substantial improvements on a house which was on the property. There was testimony that he had been delinquent in his payments at various times and was delinquent at the time of the assignment to James B. Rice. James B. Rice subsequently paid Mrs. Janes the balance due on the Williams-Janes contract and received a deed to the property. Mr. Rice later deeded the property to his son, John Rice.

Williams brought this suit to have the court declare his rights in the property in respect to the defendants James Rice, John Rice, and Biddy James, now known as Biddy James McGeorge. Williams asked that his title to the property be quieted. In a second cause of action he alleged that Rice was in default in the Williams-James contract of which Rice was allegedly the assignee; that the contract had been declared forfeited; that James Rice denied liability; and that the Rices had possession. Williams asked the court to restore him to possession. In a third cause of action Williams sought reformation of the Williams-James contract.

The trial court found that James Rice did not consent to the assignment from Biddy James and therefore was not liable to Williams on the instrument; that all of Williams' rights had been assigned to Rice and, therefore, Williams had no interest in the property. Williams was denied any relief. (Apparently a default was entered against Biddy James and she is not involved in this appeal.)

Williams contends that he assigned his interest in the Janes contract to James Rice under the belief that the James-Rice assignment was a valid instrument and that Rice was liable under it and since he acted under a mistake of fact he should have been granted equitable relief. He also contends that in any event the court should have compensated him for the improvements he made on the property.

[2, 3] While it is true that equity can grant relief for a unilateral mistake, we do not believe that the record in the instant case compels a conclusion that appellant is entitled to such relief. "Equitable relief by way of rescission may be given if the mistake relates to a material feature of the contract, if it is of such grave consequence that enforcement of the contract as made will be unconscionable, if it occurred notwithstanding the exercise of ordinary diligence by the party making the mistake, and if the other party can be put in *statu quo*." (3 Pomeroy, Equity Jurisprudence, 5th Ed., p. 388.)

While appellant may have believed that James Rice was liable under the James-Rice assignment, Rice could only be liable under that assignment if he accepted it and agreed to be bound by it and the court found upon sufficient evidence that Rice did not consent to it or agree to be bound by it. Thereafter, appellant assigned to James Rice all of appellant's interest in the property and in the original contract between himself and J. C. Janes and Juanita C. Janes, and in accepting said assignment James Rice agreed only to abide by the terms of the original contract but did not agree to complete any payments under the contract between appellant Williams and Mr. and Mrs. James.

If appellant assigned his interest in the Janes contract and in the real property in

controversy to Rice under the belief that Rice would complete the payments under the Williams-James contract, it is somewhat strange that nothing to this effect was included either in the assignment from appellant to James Rice or in the acceptance of the assignment by Rice, although both documents were drawn by attorney Bertram D. Janes who testified that he was not aware of any such understanding. We are convinced that there is ample evidence in the record to support the conclusion of the trial court, stated in its memorandum opinion as follows:

"* * * When the original contract with Mrs. Juanita C. Janes was by the plaintiff assigned to James B. Rice and the consent to the same was agreed to by Mrs. Janes and James B. Rice accepted the assignment and agreed to be bound by the agreement—the plaintiff in this suit had no more interest in the property. * * * In view of the Court's belief that James B. Rice did not accept or agree to be bound by the assignment from Biddy James McGeorge the Court can not grant the declaratory relief prayed for by plaintiff, nor can it grant plaintiff any other relief by reason of his action."

[4] We are unable to agree with appellant that in any event the court should have compensated him for the improvements he made upon the property. There was no showing of any unfair dealing on the part of James Rice. While appellant had made substantial improvements on the property it is also true that he had occupied it for five years during which time he had reduced the principal amount under the original Janes contract less than $800 and was delinquent in his payments at the time of his assignment to James Rice. When he made the assignment to James Rice appellant conveyed all of his interest in the property, including the improvements, and was not entitled to recover any money he had expended in improving the property while he occupied it.

[5] Appellant's arguments are predicated principally upon his construction of the evidence, and appellant disregards the evidence which supports the findings of the trial court. It is for the trial court to resolve the conflicts in the evidence, and we are satisfied that the evidence and the law fully support the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



159 Cal.App.2d 63

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jesus Nieto CARRASCO and Lorenzo Barrios, Defendants.

Jesus Nieto Carrasco, Appellant.

Cr. 6088.

District Court of Appeal, Second District, Division 3, California.

March 31, 1958.

Defendant was convicted of unlawful possession of marijuana. The Superior Court of Los Angeles County, John G. Barnes, J., rendered judgment, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction and that fact that two other men were also in defendant's house when he was arrested would not necessarily tend to exculpate him in absence of evidence that other men were addicts or had previously been convicted of a narcotics offense.

Affirmed.

1. Poisons ⇐4

In prosecution for unlawful possession of narcotics, the people must prove that

forbidden substance was under dominion and control of accused, that accused was aware of its presence, and that he knew the substance was a narcotic. West's Ann. Health & Safety Code, § 11500.

2. Poisons ⇐9

Evidence sustained conviction for unlawful possession of marijuana. West's Ann.Health & Safety Code, § 11500.

3. Poisons ⇐4

Fact that two other men were also in defendant's house when defendant was arrested for unlawful possession of marijuana would not necessarily tend to exculpate defendant, in absence of evidence that other men were addicts or had previously been convicted of a narcotics offense. West's Ann.Health & Safety Code, § 11500.

Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Jesus Nieto Carrasco and Lorenzo Barrios were accused by information of the unlawful possession of marijuana, in violation of Health and Safety Code section 11500. In a court trial, Barrios was found not guilty and Carrasco was found guilty as charged in the information. Defendant made a motion for new trial, which was denied. Probation was likewise denied, and Carrasco was sentenced to state prison. He appeals from the judgment and the order denying him a new trial. The sole contention is that the evidence was insufficient to prove the offense of possession.

Florentino Limon, a Los Angeles police officer assigned to the "gang" detail of the Homicide Division, was the only witness for the People. The following is the substance of his testimony. On the afternoon of June 5, 1957, Officer Limon and a fellow officer went to defendant's home at 2819 Alcazar Street in Los Angeles. The officers knocked on the door and defendant answered. Officer Limon said "We are looking for Wero" (a Mexican nickname corresponding to "Whitey") and defendant said "I am Whitey." Limon asked "Can we talk to you?" and defendant said "Yes, come on in." Upon entering the house, the officers identified themselves and told defendant that he was under arrest for selling narcotics to juveniles. When asked by the officers if he had any narcotics in the house, defendant said "No." Upon being asked "Would you mind if we look?" defendant said "No, go ahead."

The officers went into the kitchen where they found a white cannister and some large brown paper bags. One of the bags was open; inside it were a number of Prince Albert tobacco cans. The officers examined the cans and found that some were empty while others contained a green leafy substance that resembled marijuana. There was also a small amount of the same substance on the bottom of the cannister. When asked if he knew what was in the containers, defendant said "No." Officer Limon said that he thought the substance was a narcotic and asked defendant if he had any more around the house. Defendant again denied having any narcotics and said "Go ahead, you won't find anything."

The officers then went into the living room where they found Carrasco's co-defendant Barrios together with another man named Rios. The officers searched the room and discovered the remains of a marijuana cigarette in an ashtray stand and some brown paper wrapping from another marijuana cigarette in the arm of a couch.

Upon being questioned by the officers, Barrios said that he was staying with Carrasco and had only been in Los Angeles for a week. He disclaimed any knowledge of the marijuana and denied being a user of narcotics. In response to the officers' questions, Carrasco said that he had lived in the house for several years and that he did not use narcotics. He told the officers that an old man who dealt in tobacco had left the containers the previous night and had promised to return for them. Officer Limon asked: "Whitey, if somebody leaves some-

thing at your house, don't you try to find out what it is?" and defendant replied: "He told me they were tobacco and I didn't think he was lying."

Defendant, testifying in his own behalf, denied that the containers were his. He stated that an old man named Blackie brought them to the house to be kept overnight. He met Blackie several months previously either in a bar or on the street. He did not know Blackie's address or whether Blackie had a place of business. He knew nothing about the cigarette which the officers found in the arm of the couch. He had some visitors the night before the arrest and did not know how the other cigarette came to be in the ashtray; he did not see anyone smoke the cigarette.

[1] In a prosecution for unlawful possession of narcotics, the People must prove that the forbidden substance was under the dominion and control of the accused, that the accused was aware of its presence, and that he knew the substance was a narcotic. People v. Rodriguez, 151 Cal.App.2d 598, 601, 312 P.2d 272.

[2, 3] There was sufficient evidence to prove defendant guilty of possessing marijuana. Carrasco admitted to the officers that the containers and their contents were under his control, having been left in his care by a man called Blackie. It was a reasonable inference that the cigarettes whose remains were found in the ashtray and the the arm of the living room couch were prepared from the supply of marijuana in the containers. Although defendant denied knowing of the cigarettes, it is not contended that he was absent from the house at any time subsequent to the delivery of the containers, and it was a proper inference that Carrasco smoked the cigarettes or that he permitted someone else to do so. In either case, defendant would have known that they contained marijuana. The fact that Rios and Barrios were also in the house when defendant was arrested would not necessarily tend to exculpate him, for there was no evidence that they were addicts or had previously been convicted of a narcotics offense.

The present case is unlike People v. Antista, 129 Cal.App.2d 47, 276 P.2d 177, which is relied upon by defendant. Antista was convicted of possessing marijuana. There was evidence that he shared an apartment with a Miss Rivers, who was a convicted narcotics addict; Antista allowed his friends to visit the apartment in his absence to watch television; they would enter the apartment with a key he left under a mat outside the door; Antista was away from the premises and did not return until after the arresting officers found marijuana secreted in the apartment; Miss Rivers and another man were in the apartment at the time of the search. We held in that case that the evidence was insufficient to establish that Antista was in possession of marijuana or that he knew the substance was in his apartment. In the instant case, Carrasco admitted possession of the cans and cannister, and the evidence and the reasonable inferences justified a conclusion that he knew them to contain contraband.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



159 Cal.App.2d 93

Bertha V. BROWN, Plaintiff and Respondent,

v.

The FIFTEENTH DISTRICT AGRICULTURAL FAIR ASSOCIATION, Defendant and Appellant.

Civ. 5621.

District Court of Appeal, Fourth District, California.

April 1, 1958.

Hearing Denied May 27, 1958.

Patron brought action against district agricultural fair association for injuries sustained while walking in public freeway

at agricultural fair. The Superior Court of Kern County, Warren Stockton, J., entered a judgment in favor of the patron and entered an order denying the motion of the association for judgment notwithstanding the verdict, and the association appealed. The District Court of Appeal, Barnard, P. J., held that in view of the fact that the Agricultural Code provides that such an association may be sued, with no limitation excluding a tort action, and with no provision requiring the filing of a claim against the association, the action could be brought against the association without filing of a claim as a preceding condition.

Judgment and order denying motion for judgment notwithstanding verdict affirmed, and appeals from other orders dismissed.

1. States ⇐191(2)

Action by patron against district agricultural fair association for injuries sustained by patron at agricultural fair was not a suit against the State within meaning of a law governing suits against the State. West's Ann.Agric.Code, § 80 et seq.

2. Agriculture ⇐4(3)

A district agricultural fair association is liable for negligence in connection with its proprietary activities, when permission to sue may be traced to any statute. West's Ann.Agric.Code, § 80 et seq.

3. Agriculture ⇐4(3)

If patron was injured at agricultural fair as a result of proprietary activities engaged in by district agricultural fair association, claim requirements of the Government Code were not applicable in suit against the district, since such requirements apply only to a suit against the State itself. West's Ann.Agric.Code, § 80 et seq.; West's Ann.Gov.Code, §§ 16041, 16044.

4. Agriculture ⇐4(3)

Mere fact that patron at agricultural fair was injured on public passageway between entertainment features of fair in fairgrounds did not require a finding that injury of patron occurred in connection with a "governmental function" so as to make district agricultural fair association liable for injuries. West's Ann. Agric.Code, § 80 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Governmental Function".

5. Agriculture ⇐4(3)

Sections of the Government Code, which deal with tort actions for injuries caused by dangerous or defective condition of public property, and which are made applicable by their own terms to cities, counties, and school districts, did not authorize suit against district agricultural fair association by patron for injuries sustained at agricultural fair. West's Ann.Gov.Code, §§ 53050, 53051.

6. Agriculture ⇐4(3)

In view of fact that Agriculture Code provides that district agricultural fair association may be sued, without making any limitation excluding a tort action, and without any provision requiring a filing of such a claim, patron could maintain action against association for injuries sustained at agricultural fair. West's Ann.Agric.Code, §§ 80 et seq., 86.

Borton, Petrini, Conron & Brown, Bakersfield, for appellant.

Conron, Heard & James, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The defendant has appealed from a judgment based on a jury's verdict awarding the plaintiff $4,000 damages for personal injuries, and from an order denying its motion for a judgment notwithstanding the verdict. The appeal is taken upon

a clerk's transcript and an agreed statement.

The accident occurred on October 1, 1954, on the grounds of the defendant while it was conducting an agricultural fair. The plaintiff was a patron at the fair, having purchased a ticket for admission. The complaint alleged, among other things, that the plaintiff was in the process of walking in a public freeway maintained by the defendant leading to the horse show arena; that the defendant so negligently maintained this passageway as to allow an open ditch to traverse a portion of said freeway; and that as a result the plaintiff tripped and fell while passing over the same. In the agreed statement the parties agreed that this accident took place on the public grounds of the defendant district during the progress of a fair; that the fair and the public grounds were under the direction, supervision and maintenance of the defendant; that the plaintiff was a business visitor at the fair; that just prior to the accident the plaintiff had purchased a coca cola drink at a private concession; that at the time of the fall she was walking upon the public grounds of the defendant and proceeding directly toward the horse show; and that the horse show grandstand and arena were located about a block and a half from the point where the plaintiff tripped by reason of the presence of a ditch. It is conceded that no notice of a claim was or has been filed with the defendant district or with the State of California.

It is first contended that the defendant district is the State of California within the meaning of the law governing suits against the state; that as such it is immune from suit if it was acting in a governmental capacity; and that if it was operating in a proprietary capacity it cannot be sued without the prior presentation of a claim. It is argued that the defendant district is in fact and reality the State of California, since its directors are appointed by the governor and its operations are largely controlled by the Department of Finance of the state as provided for in section 80 and subsequent sections of the Agricultural Code; that it is a state institution and state agency, citing People ex rel. Post v. San Joaquin Valley Agricultural Ass'n, 151 Cal. 797, 91 P. 740, and Bettencourt v. State of California, 123 Cal.App.2d 60, 266 P.2d 201, 43 A.L.R.2d 545, and as such is immune from suit insofar as its governmental activities are concerned; and that if the injury here in question arose from an activity which was proprietary in nature the prior filing of a claim was required by sections 16041 and 16044 of the Government Code.

[1] The contention that the defendant district is the State of California within the meaning of the law governing suits against the state itself cannot be sustained. While such districts are agencies of the state for certain purposes, they are not such a part of the state itself as to require that a suit against one of them be considered as a suit against the state. No cases are cited, and we have found none which would support that contention. Suits against various districts which act as agencies of the state, and in which the state itself was not made a party, have long been recognized in many decisions in this state.

[2, 3] It is now well settled that such agencies of the state are liable for negligence in connection with their proprietary activities when permission to sue may be traced to any statute. Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3; Pianka v. State of California, 46 Cal.2d 208, 293 P.2d 458. And if the plaintiff was injured as a result of proprietary activities engaged in by the defendant at the time in question the claim requirements of sections 16041 and 16044 of the Government Code would not be applicable in a suit against such a district, since those provisions apply only to a suit against the state itself.

It is next contended that if the defendant district is not "the state" it is an agency of the state, and the maintenance

of its streets is a governmental function and it is therefore immune from suit since there is no enabling act permitting a suit against it. It is argued that there is no enabling act permitting a suit against an agricultural fair association because the general enabling provisions contained in sections 53050 and 53051 of the Government Code apply, by their own terms, only to cities, counties and school districts; that the undisputed evidence here is that plaintiff's injuries were the result of a depression or ditch in the "public freeway" or street on the public grounds of the defendant district during the progress of a fair; that it thus appears that her fall took place as a result of a defective condition upon a public freeway or street maintained by the defendant for all fair visitors; and that under all the authorities the maintenance of public streets is exclusively a governmental and not a proprietary function.

[4] This was not merely a public street in the usual sense of streets and roads, in connection with which counties and cities are charged with the responsibility of maintenance. While it was a public passageway maintained on the grounds of the defendant it may be assumed on the record before us that it was maintained to enable the public to go from one part of the grounds to another in connection with both proprietary and governmental activities carried on by the defendant district. Such a district may, and usually does, carry on both proprietary and governmental activities (Guidi v. State of California, supra). The fact that the place where this injury occurred was referred to in the complaint as a public freeway is not conclusive that this injury occurred in connection with a governmental activity. All of the evidence is not before us, and the agreed statement merely states that the injury took place on the fair grounds during the progress of a fair while the plaintiff was on her way from a concession where drinks were sold, with the intention of visiting the horse show at the location of the grandstand and arena. So far as shown by the record this injury may have occurred in connection with the amusement and entertainment activities of the fair, and under the authorities cited this agency would be subject to suit. In the absence of other evidence, it may be assumed in support of the judgment that this "public freeway" was merely a passageway between the entertainment features of the fair.

[5, 6] Sections 53050 and 53051 of the Government Code do not authorize a suit against a district agricultural fair association since by their own terms they are made applicable only to cities, counties and school districts, and for the same reason the requirement for filing a verified claim with the legislative body of the agency within 90 days, contained in section 53052, is not here applicable. However, section 86 of the Agricultural Code, which is a part of the statutory provision for the organization of the defendant district, provides that such a district may be sued, with no limitation excluding a tort action, and no provision requiring the filing of such a claim is contained in that code. As was said in Harper v. Vallejo Housing Authority, 104 Cal.App.2d 621, 232 P.2d 262, 267: "* * * if the Legislature has not seen fit as to any public agency to require the filing of a claim precedent to action then no such condition is imposed." There is a statute authorizing the bringing of this action and no statute requiring the filing of a claim as a preceding condition. Neither of the points raised by the defendant can be sustained. The defendant expressly disclaims any intention to question the finding of the jury as to the existence of the defective condition, the occurrence of the accident, or that the plaintiff's injuries were a proximate result of the accident.

The defendant attempted to appeal from four other orders which are not appealable, and those appeals should be dismissed. The judgment and the order denying the defendant's motion for a judgment notwithstanding the verdict are affirmed, and the appeals from the other orders are dismissed.

GRIFFIN and MUSSELL, JJ., concur.

158 Cal.App.2d 534

Bun A. LOGSDON, Plaintiff and Appellant,

v.

Earle L. HENDRICKS and Myra L. Hendricks and Bank of America National Trust and Savings Association, a national banking association, Defendants and Respondents.

Civ. 22908.

District Court of Appeal, Second District, Division 2, California.

March 19, 1958.

Rehearing Denied April 2, 1958.

Hearing Denied May 14, 1958.

Proceeding to vacate judgment taken eight years before. The Superior Court of Los Angeles County, Kenneth N. Chantry, J., denied motion and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that question raised by allegation that judgment should be vacated because attorneys who executed answer for two defendants had not been granted power of attorney by defendants to execute answers in their place and answer of defendant bank and another defendant had been executed by assistant secretary of bank without power of attorney being attached thereto, was patently frivolous and allegation was not factually supported by record, but, even if question had possessed merit, it could not be raised for first time after trial upon merits.

Affirmed.

1. Judgment ⇐343

Question raised by allegation that judgment should be vacated because attorneys who executed answer for two defendants had not been granted power of attorney by defendants to execute answers in their place and answer of defendant bank and another defendant had been executed by assistant secretary of bank without power of attorney being attached thereto, was patently frivolous and allegation was not factually supported by record but even if question had possessed merit it could not be raised for first time after trial upon merits. West's Ann.Code Civ.Proc. §§ 416.3, 585.

2. Appeal and Error ⇐863

Where judgment was appealable and grounds upon which vacation was sought existed before entry of judgment, correctness of judgment could not be reviewed upon appeal from an order refusing to vacate it.

Bun A. Logsdon, in pro. per.

Voorhees, Stewart & Voorhees, Los Angeles for respondents Hendricks.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Winfield Jones, Los Angeles, and George Ritner, Beverly Hills, for respondent Bank of America National Trust and Savings Association.

ASHBURN, Justice.

Another appeal taken in propria persona which does not present any semblance of merit.

Appellant in 1957 sought to vacate a judgment taken in 1949 against him as plaintiff in this action, and to set aside the defendants' answers and to enter their defaults,—all because of alleged defects in the verification of each answer. The motion being denied, he appeals.

On January 7, 1949, plaintiff sued to foreclose a mechanic's lien. The named defendants were Earle L. Hendricks, Myra L. Hendricks and Bank of America National Trust and Savings Association. The Hendricks and the bank answered separately and the Hendricks filed a cross-complaint, their pleadings being filed in January, 1949 and that of the bank in March, 1949. The transcript at bar states that each pleading was verified but does not disclose the form of verification or the name of the person who verified the pleading. The case was tried upon the merits and findings and judgment filed on September 13, 1949, denying plaintiff any relief and awarding defendants Hendricks judgment against him on their cross-complaint in the amount of $3,250 and costs. The judgment became

final and was satisfied through execution sale on October 25, 1954.

On July 2, 1957, plaintiff filed his motion "for an order Vacating and Setting Aside the Answers and all proceedings of said defendants entered in the above entitled matter, and permitting the said plaintiff and the Clerk or the Judge of the Court to file Default against all the above named defendants, on the grounds of mistake, inadvertence and neglect." It was supported by his own affidavit alleging that "[t]he Court Records indicate that all defendants failed and refused to comply with above Code," reference being made to Code of Civil Procedure, § 585, "and Section 416.3 of this Code." Affiant also says: "Thereafter or about August or September of 1954 Collusion and Collateral Attack had presented itself. * * * Thereafter this Affaint consulted the Original Files in the Superior Court Records, * * * That in view of the fact that the answers and pleadings of the defendants were never legally signed and executed by the makers nor did they ever grant their power of attorney to execute for them. That the attached authorities herewith indicating that no Court proceeding were [sic] ever legal and that all Court proceedings were without legal power and effect" The motion to vacate, etc., was argued and denied on July 8, 1957, and the appeal is from that order.

[1, 2] In his opening brief appellant says: "That both Respondents Earle L. Hendricks and Myra L. Hendricks made their Answers by way of proxy, without granting their power of attorney to their attorneys to execute in their place and stead. That R. G. Wheeler of the Bank of America National Trust and Savings Association was served with a copy of the Complaint and Summons about Febuary 28th. 1949. About March 5th. 1949 the Answer of R. G. Wheeler and Bank of America was made and executed by A. J. Robillard an assistant secretary for some Bank and without the required power of attorney attached thereto." The point is patently frivolous and not factually supported by the record. If it possessed merit it could not be raised for the first time after trial upon the merits, as is attempted here. McCullough v. Clark, 41 Cal. 298, 302; City and County of San Francisco v. Itsell, 80 Cal. 57, 60, 22 P. 74; Chalmers v. Sheehy, 132 Cal. 459, 461, 64 P. 709; 39 Cal.Jur.2d § 272, p. 395. Moreover, the judgment was appealable and the grounds upon which vacation is sought existed before entry of judgment hence the correctness of the judgment cannot be reviewed upon appeal from an order refusing to vacate it. Uppman v. Eyraud, 151 Cal. App.2d 728, 312 P.2d 57.

Appellant makes numerous arguments which have little, if any bearing upon the issue raised by the motion and the order now under review. He cites a large number of authorities which he obviously does not understand and presents nothing which warrants the time and space devoted to this ruling.

Order affirmed.

FOX, P. J., and HERNDON, J., concur.



158 Cal.App.2d 730

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul C. LOEBER, Defendant and Appellant

Cr. 1329.

District Court of Appeal, Fourth District, California.

March 26, 1958.

Rehearing Denied April 25, 1958.

Hearing Denied May 21, 1958.

Defendant was convicted on three separate counts of complaint charging him with issuing checks without sufficient funds. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment, and defendant appealed and filed motion to correct alleged errors or omissions in reporter's transcript. The District Court of

Appeal, Mussell, J., held, inter alia, that ordering that sentences on two of three counts should run consecutively was not abuse of discretion.

Motion to correct reporter's transcript denied and judgment affirmed.

1. Criminal Law ⇐1128(2, 4)

Facts outside the record and affidavits which were not before trial court cannot be considered on appeal.

2. Criminal Law ⇐1128(2)

Statements in briefs are not part of the record on appeal.

3. Criminal Law ⇐1116

On appeal from conviction on three separate charges of issuing checks without sufficient funds, record did not discharge defendant's burden of proving that plea of guilty to such charges had been entered in reliance upon agreement by deputy district attorney to drop charge of grand theft and two of the charges of issuing checks without sufficient funds in exchange for plea of guilty to one such charge and in belief that he was pleading guilty to charge carrying a lesser penalty. West's Ann.Pen. Code, § 476a.

4. Criminal Law ⇐1114(1)

On appeal from conviction based on plea of guilty to charges of issuing checks without sufficient funds, record did not support contention that defendant had been detained by police for 38 hours and refused legal counsel during such time and that such detention constituted coercion, fraud, duress and deception. West's Ann.Pen.Code, § 476a.

5. Criminal Law ⇐1128(2)

Briefs are not the basis of an appeal and a record on appeal is not made by filing brief with narratives about which trial court knew nothing.

6. Criminal Law ⇐1116

On appeal from conviction on three charges of issuing checks without sufficient funds, contention that judgments were pronounced without pleas by defendant who stood mute while public defender entered pleas of guilty, which were illegal and prejudicial to defendant, was without merit, in view of transcript of proceedings certified by official court reporter showing that defendant in person entered plea of guilty to all three charges. West's Ann.Pen.Code, § 476a.

7. Criminal Law ⇐641(1)

Record on appeal from conviction on charges of issuing checks without sufficient funds did not support contention that attorney appointed as counsel for defendant was inexperienced in practice of criminal law and did not satisfy constitutional guarantee of assistance of counsel, in view of showing that in both municipal and superior courts, defendant, personally and by his attorney, entered plea of guilty to such charges and absence of any showing that attorney appointed by superior court failed to properly represent defendant. West's Ann.Pen.Code, § 476a.

8. Criminal Law ⇐369(1)

In prosecution on three separate charges of issuing checks without sufficient funds, whether defendant had also committed crime of grand theft was immaterial. West's Ann.Pen.Code, § 476a.

9. Criminal Law ⇐268

That defendant may have committed a crime other than those charged does not give him the right to designate the charge he would prefer to answer.

10. Criminal Law ⇐273

Before accepting plea of guilty to charges of issuing checks without sufficient funds, trial court was not required to advise defendant of the consequences of a plea of guilty or to ask him whether any promise, reward or immunity had been offered or granted, particularly where defendant was represented by counsel when he entered plea of guilty in municipal court. West's Ann.Pen.Code, § 476a.

11. Criminal Law ⇐1166½(12)

On appeal from conviction on charges of issuing checks without sufficient funds, record did not support contention that prejudice of trial court was shown by remark

made at time of reducing bail. West's Ann. Pen.Code, § 476a.

12. Criminal Law ⇐982

Where one convicted of a criminal offense believes that report of probation officer is insufficient, vague or indefinite, he is entitled to present witnesses to testify in mitigation of his punishment at time of hearing on application for probation.

13. Criminal Law ⇐982

Granting or withholding probation rests entirely in the sound discretion of trial court.

14. Criminal Law ⇐982

Probation is an act of grace and clemency and applicant for probation is entitled only to have his application considered by court and he is not entitled to probation as a matter of right.

15. Criminal Law ⇐982

On appeal from conviction on three separate charges of issuing checks without sufficient funds, record disclosed no abuse of discretion in denying application for probation, particularly in view of failure to urge objections to probation officer's report at hearing before trial court. West's Ann. Pen.Code, § 476a.

16. Criminal Law ⇐1177

Where defendant did not reply to inquiry as to whether he had any legal cause to show why judgment should not be pronounced, statement in commitment that defendant replied to such inquiry that he had none was not prejudicial error.

17. Criminal Law ⇐101(4)

Order made in municipal court, referring to complaint attached thereto and certifying defendant to superior court for further proceedings following entry of plea of guilty to charges of issuing checks without sufficient funds, was not invalid as being vague and indefinite. West's Ann.Pen. Code, § 476a.

18. Criminal Law ⇐980(1)

Whether sentences imposed upon entry of plea of guilty to three separate counts of complaint charging issuance of checks without sufficient funds should run concurrently or consecutively was discretionary with trial court, and ordering that sentences on two of three counts should run consecutively was not abuse of discretion. West's Ann.Pen.Code, § 476a.

19. Criminal Law ⇐1110(1)

Defendant could not have matters which were not properly a part of record on appeal included therein by motion to correct alleged errors or omissions in reporter's transcript and to examine reporter's notes and records.

Paul C. Loeber in pro per.

Edmund G. Brown, Atty. Gen., and Albert Bianchi, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

In a complaint filed in the Municipal Court in the San Diego Judicial District appellant was charged with three separate counts of issuing checks without sufficient funds in violation of Section 476a of the Penal Code. He appeared in said court in person and through his attorney and entered a plea of guilty of the offense charged in the complaint. He was then certified to the Superior Court of San Diego County for further proceedings and, upon his arraignment in said Superior Court, he again personally and through his then attorney entered a plea of guilty to the three counts in the complaint. Probation was denied and appellant was ordered committed to the state prison, the sentence to run "consecutively with relation to counts Nos. 1 and 3, and concurrently with relation to count No. 2."

[1–3] Appellant states in his notice of appeal that he "appeals from the sentence imposed in and from the judgment of conviction in this action." His first contention is that a deputy district attorney "made a 'deal' to drop a charge of grand theft and two counts of NSF checks in exchange for a plea of guilty from the appellant to one count of NSF checks, and further District

Attorney (deputy) lead the appellant to believe that he was pleading guilty to a charge carrying a lesser penalty." In support of this contention appellant attaches to his opening brief a letter written to him on September 11, 1957, by a deputy district attorney, and also refers to conversations allegedly had between appellant, his counsel and the deputy district attorney. The letter does not indicate that a "deal" as described by appellant was made. The appellant was advised therein that the District Attorney's office had dismissed a grand theft charge in consideration of appellant's plea of guilty to the three counts charged in the complaint; that the deputy district attorney had talked with appellant's attorney, who stated to him that the District Attorney's office had never agreed to dismiss any of the check charges against appellant. No motion for a new trial was made by appellant and no affidavits or other evidence was presented to the trial court to sustain his contention. In People v. Croft, 134 Cal.App.2d 800, 804, 286 P.2d 479, it was held that no facts outside the record and no affidavits which were not before the trial court can be considered on appeal, and that statements in briefs are not part of the record on appeal. In People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657, 667, it is said:

> "The state will not, through its courts, pronounce judgment on a plea which has been procured by fraud or duress or by any force which operates to preclude the exercise of free will and judgment by the party. Neither will it permit a scheming criminal to trifle with its processes. He may gamble only at his own risk on the result of a plea of guilty when that plea is entered through the exercise of his judgment unvitiated by fraud, duress, or similar motivating influence. If he claims such overreaching he must bear the burden of proof."

Appellant has failed to bear the burden of proving a "deal" as claimed.

[4, 5] Appellant next claims that he was detained by the police for a period of thirty-eight hours and was refused legal counsel during that time and that this constituted coercion, fraud, duress and deception. This claim is unsupported by the record and, as is said in People v. Henderson, 121 Cal.App.2d 298, 300, 262 P.2d 871, 872, "Merely because a prisoner fills his brief with narratives about which the court below knew nothing, a record on appeal is not thereby made. Briefs are not the basis of an appeal. They discuss the record contained in the reporter's transcript and in the minutes of the clerk." It is also said in 121 Cal.App.2d on page 300, 262 P.2d at page 872:

> "There is nothing a reviewing court can do about talk outside of a court proceeding in the absence of an appropriate record thereof by affidavit or otherwise. If we were obliged on every appeal to try the merits of conversations participated in by litigants outside the presence of the court there would be no end of most appeals. Our only concern is with what was said to the court or in its presence when actually investigating the facts of a controversy or with what is said by an accused person in making his plea of guilty or by his own or opposing counsel and the remarks of the court, if any."

[6] Appellant next argues that "judgments were pronounced without pleas by appellant who stood mute while the public defendant entered pleas of guilty which were illegal and prejudicial to appellant." This contention is without merit. The transcript of the proceedings in the Superior Court on June 6, 1957, contains the following questions and answers:

"The Court: People against Paul C. Loeber.

"Mr. Mills: Ready, your Honor.

"The Clerk: Your true name is Paul C. Loeber?

"The Defendant: Yes.

"The Clerk: You are represented by Mr. Mansfield A. Mills?

"The Defendant: That is correct.

"The Clerk: Mr. Loeber, you have heretofore on May 31, 1957, in Municipal Court Number 3, entered a plea of guilty to three counts of issuing checks without sufficient funds. What is your plea at this time?

"The Defendant: Guilty.

"The Clerk: As to all three counts?

"The Defendant: Yes, sir.

"Mr. Mills: We would like to make an application for probation at this time, your Honor. * * *"

This transcript was certified by the official court reporter as a true and correct transcript of the proceedings held at the time.

[7] The next contention is that the attorney appointed as counsel for appellant was inexperienced in the practice of criminal law and "did not satisfy appellant's constitutional guarantee." This contention is likewise not supported by the record for it appears therefrom that appellant, in both the Municipal and Superior courts, personally and by his attorney entered a plea of guilty to the three counts charged in the complaint. There is no showing that the attorney appointed by the Superior Court failed to properly represent appellant.

[8, 9] Appellant further contends that the only charge which could properly have been made against him was the crime of grand theft and that even if the proper charge was made, it would have included only one count, as he deposited all of the checks on one deposit slip. However, we are not here concerned with the charge of grand theft as the complaint charged appellant with the fraudulent utterance of three different checks for different amounts and at a time when he knew he had insufficient funds to meet them upon presentation. He pleaded guilty to these charges and the fact that he may also have committed another crime did not give him the right to designate the one he would prefer to answer. People v. Harris, 105 Cal.App.2d 701, 704, 233 P.2d 633.

[10] It is further claimed by the appellant that the court erroneously failed to admonish him of the consequences of a plea of guilty and failed to ask him whether any promise, reward or immunity had been offered or granted. The trial court was not required to so "admonish" the appellant or to ask him the question stated. Furthermore, the record also shows that when appellant entered his pleas in the Municipal Court he was represented by counsel, who presumably informed him of the consequences of the plea entered.

[11] Appellant claims that prejudice was shown by the court at the time of reducing appellant's bail in remarking "no doubt the defendant will be sentenced to prison." The record fails to substantiate this charge for it shows the following:

"Mr. Mills: * * * If the Court please, I would like to * * * ask if it would be possible for the Court to grant a reduction of bail. He is unable to make twenty-five hundred. * * *

"The Court: Well, I don't know. He will probably be doing some time anyway.

"Mr. Mills: I realize that * * *

"The Court: I will reduce it to fifteen hundred."

[12–15] Appellant claims that the probation officer improperly rendered two reports to the court; that he was prejudiced by numerous errors and misleading statements found in the report; that the probation officer was prejudiced against appellant and deliberately omitted from his report many letters of recommendation; that the court abused its discretion by not allowing appellant to correct errors in the report; that the court was improperly influenced by "vague statements" found in the probation report and that the court abused its discretion by not granting probation to appellant. These objections to the probation officer's report were not urged at the hearing before the trial court. If appellant believed the report to be insufficient, vague or indefinite, he was entitled to present witnesses to testify in mitigation of his punishment at the time of his hearing on application for probation. Peo-

ple v. Escobar, 122 Cal.App.2d 15, 20, 264 P.2d 571. Furthermore, the granting or withholding of probation is a matter that rests entirely in the sound discretion of the trial court. Probation is not a right given to a defendant in a criminal proceeding who has either pleaded guilty to the commission of an offense or who has been convicted thereof. It is an act of grace and clemency granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted, and the only right which an applicant for probation possesses is that his petition shall receive consideration by the court. He may not demand clemency as a matter of right. People v. Frank, 94 Cal.App.2d 740, 211 P.2d 350. The record shows that appellant's petition for probation was considered by the trial court and no abuse of discretion appears.

[16] Appellant claims that the "commitment to state prison" was incorrect and illegal in that it incorrectly related that appellant was asked whether "he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none." The transcript shows the following: "The Clerk: * * * Have you any legal cause to show why judgment should not be pronounced? The Defendant: (No answer)." Under these circumstances there was no prejudicial error in the wording of the commitment.

[17] Appellant claims that the order made in the Municipal Court was "vague, indefinite and without bounds" and was therefore invalid. The order refers to the complaint attached thereto and there is nothing vague or indefinite in it.

[18] Finally, appellant claims that the trial court abused its discretion in ordering the sentences on two of the counts to run consecutively and that this resulted in a denial of due process of law. This argument likewise has no merit. It is within the trial court's discretion whether the sentences shall be served consecutively or concurrently. People v. Tipton, 124 Cal.App. 2d 213, 217, 268 P.2d 196. No abuse of discretion appears in this connection.

[19] Appellant filed in this court a motion to correct alleged errors or omissions in the reporter's transcript and to examine the reporter's notes and records. This motion was deferred to be considered in connection with the submission of the cause on its merits. It is apparent from a reading of the motion made that appellant seeks to include in the record on appeal many matters which are not properly a part of the record. The motion is denied.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER, J., dissenting.



158 Cal.App.2d 537

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arnold WEBB, Defendant and Appellant.

Cr. 6049.

District Court of Appeal, Second District, Division 2, California.

March 19, 1958.

Hearing Denied May 14, 1958.

Defendant was convicted under Section 288 of the Penal Code of lewd or lascivious acts on the body of a child under 14 and under Section 288a of the Penal Code of sexual perversion. The Superior Court of Los Angeles County, H. Burton Noble, J., entered a judgment and an order denying a motion for new trial, and the defendant appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained convictions, but since both convictions were based on the same act, defendant could not be punished under both sections, and that judgment of conviction for sexual perversion, the less

severely punishable offense, would be reversed.

Judgment and order as to first count affirmed, and judgment and order as to second count reversed.

1. Infants ⇐20

Evidence sustained conviction under section of the Penal Code dealing with lewd or lascivious acts on the body of a child under 14. West's Ann.Pen.Code, § 288.

2. Sodomy ⇐6

Evidence sustained conviction for sexual perversion. West's Ann.Pen.Code, § 288a.

3. Criminal Law ⇐1159(2)

Though reviewing court will not uphold judgment of conviction or verdict of guilty based on evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category.

4. Criminal Law ⇐1159(4)

To warrant rejection by reviewing court of statements given by witness who was believed by trial court in criminal prosecution, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

5. Criminal Law ⇐260(11), 1159(3, 4)

Conflicts and even testimony, which is subject to justifiable suspicion, does not justify reversal of judgment of conviction, since it is exclusive province of trial judge or jury to determine credibility of witnesses and truth or falsity of facts on which determination depends.

6. Criminal Law ⇐200(1)

Where both conviction of lewd or lascivious acts on the body of a child under 14 and conviction for sexual perversion are based on the same act, conviction for one of the offenses bars a concomitant conviction for violation of the other, and defendant cannot be punished for both offenses. West's Ann.Pen.Code, §§ 288, 288a.

7. Infants ⇐13

Act of defendant in placing his arm around shoulder of 11½ year old boy as defendant was taking the boy into bungalow did not constitute lewd or lascivious acts on the body of a child under 14, regardless of any intent which defendant may have had with respect to the boy when they should arrive at the bungalow. West's Ann.Pen.Code, § 288.

8. Infants ⇐13

In view of the fact that defendant cannot be convicted of both lewd and lascivious acts on the body of a child under 14 and of sexual perversion, if convictions are based on the same act, act of defendant in placing his hands on 11½ year old boy just prior to forcing act of sexual perversion on boy, for which defendant was convicted, did not constitute lewd or lascivious acts on the body of a child under 14, since such touching was merely preparatory to commission of offense of sexual perversion and was therefore a part of that offense. West's Ann.Pen.Code, §§ 288, 288a.

9. Criminal Law ⇐1181

Where both convictions of defendant for lewd or lascivious acts on the body of a child under 14 and for sexual perversion could not stand, because both were based on the same act, judgment of conviction of the less severely punishable offense, which was the sexual perversion, would be reversed, and judgment of conviction for lewd or lascivious acts on the body of a child under 14 would be affirmed. West's Ann. Pen.Code, §§ 288, 288a.

Walter L. Gordon, Jr., Los Angeles, and James L. Garcia, Jr., Compton, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of violating Penal Code section 288 (count one), and

section 288a (count two). He appeals from the judgment and order denying his motion for a new trial.

John, the victim in this case, was approximately 11½ years of age when the incident took place on August 30, 1956. John lived at a boys' home. Adjacent to the home is a public school which is enclosed by a fence. Boys were not allowed on the school grounds during the summer. Defendant was a custodian of the school. John knew the defendant and talked to him "at the fence" practically every day during the summer. Just after lunch on the day in question John and two other boys from the home (Terry and Jim) went over to the school. Defendant's car, which he had washed during the noon hour, was parked near one of the school bungalows. Defendant was there talking to Mr. Stiers, a plumber, who was doing some work at the school. According to the testimony for the prosecution, defendant came over to the gate, stated that he wanted John to do a job for him, and unlocked the gate. Terry was riding a bike at the time. Jim started to enter but defendant said to him, "You wait here," so Jim stayed at the gate.[1] John came in. As he and John entered one of the bungalows defendant had his arm around John's shoulder. They went to a restroom where defendant closed and locked the door. There defendant forced John to commit an act denounced by section 288a of the Penal Code.[2] When defendant opened the door John ran out and went to the gate where Terry and Jim were waiting. John was "spitting all the way home," according to Terry, who had seen defendant and John walk down by the bungalow after defendant let John into the school grounds. John told the boys what had happened and went directly to the superintendent of the boys' home and complained to him.

Defendant denied going into any of the bungalows with John and denied any misconduct with him. The school principal testified that he had not had any complaints that defendant had molested any of the school children, and that defendant's reputation among persons employed at the school was good as to morals and sex habits.

[1, 2] Defendant's first contention is that "The evidence was highly improbable, and therefore insufficient to justify the judgment of conviction." There is no merit in this contention.

[3–5] In People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759, the court stated: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of

1. Defendant's testimony as to this phase of the incident was as follows:
"What took place after you saw the boys?
"Well, it was about a little after 12:00, and I was there drying my car. I had washed it. Mr. Stiers and I was there, and the boys was at the fence. He called, and Mr. Stiers said, 'There is a boy,' which I knew.
I went down there to see what he wanted, and he said he wanted to come in the playground and play with the other two little boys.
So I opened the gate and let him in. One little boy was on the bike, and he was riding around on the outside, and this other little boy who was with him stayed there, too, and John * * * he came in and went down on the sidewalk on the other side of the building, and I went around and came back to Mr. Stiers, and we went down in the basement and started to work."

2. Penal Code section 288a provides, in part: "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment * * *."

a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"

Tested by these principles, it is clear that the testimony of the victim in this case is not inherently improbable. The trial judge believed it and there is no legal reason why he should not have done so. He simply exercised his judgment in determining where the truth lay. Such determination is binding on appeal. The story of John thus having been given credence, it follows that the evidence amply sustains the conviction.

Defendant's second contention is that he was improperly convicted of violating both section 288 and section 288a of the Penal Code. He argues that under the rule expressed in People v. Greer, 30 Cal.2d 589, 184 P.2d 512, he should have been convicted only of a violation of one of these sections. In the Greer case the defendant was convicted of violating Penal Code section 261 (1) (statutory rape) and 288 (lewd or lascivious conduct). The Supreme Court held that although section 288 specifically includes acts constituting other crimes mentioned in part one of the Penal Code, a person could not be convicted of both a violation of section 288 and a violation of section 261(1) *for the same act.* The reasoning of the Greer case applies directly to the case at bar even though this case involves a different section of the Penal Code. The court stated (30 Cal.2d at page 603, 184 P.2d at page 520): "Section 288 now specifically includes acts constituting other crimes and permits a greater penalty for those acts, if they are committed with the specified intent, upon a child under 14 years of age. The intent could normally be inferred from the very nature of the acts now under consideration. Had the Legislature wished to punish defendant once for statutory rape and once for lewd and lascivious conduct, for the same act, it could have done so in plain language. Instead, the crime of statutory rape is included within section 288 by that section's own terms, and the rape forms the basis for the prosecution under section 288. There is no indication on the face of the amended statute that the policy contained in the old statute forbidding double punishment has been changed. The mischief caused by the old language cannot arise under the amendment. Now statutory rape committed upon the body of a child under 14 years of age can be punished as a lewd and lascivious act. It cannot, however, be punished twice, as statutory rape and as lewd and lascivious conduct. Doubts as to the meaning of the amended section are resolved against double punishment for the same act."

[6] Section 654 of the Penal Code provides: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either bars a prosecution for the same act or omission under any other * * *." When the victim is a child under the age of 14, an act of sexual perversion is expressly made punishable in different ways[3] and by different provisions of the code—namely, sections 288 and 288a. Therefore, a conviction for violation of one of these sections bars a concomitant conviction for violation of the other when both convictions are based upon the same act. See People v. Slobodion, 31 Cal.2d 555, 561–562, 191 P.2d 1. The defendant's act under such circumstances may be punished either as sex perversion or as lewd and lascivious conduct, but not as both. See People v. Greer, supra, 30 Cal.2d at page 603, 184 P.2d at page 520.

[7] The attorney general does not quarrel with the principles set forth above. However, he argues that the two convictions in the instant case are based upon

3. A violation of section 288 carries with it a maximum penalty of life imprisonment whereas the maximum penalty under section 288a is imprisonment for 15 years

separate acts. It it asserted that while the conviction for violation of section 288a was based upon defendant's act of sexual perversion, his conviction for violation of section 288 was based upon defendant's entirely separate act of placing his arm around the boy's shoulder at the time he was taking the boy into the bungalow. We cannot agree with this contention. The elements comprising the offense defined in section 288 are: (1) a lewd or lascivious act, that is, an act which is lustful, immoral, seductive or degrading; (2) the commission of such act upon the body, or any part thereof, of a child under 14 years of age; and (3) the act must be committed with the intent of arousing or appealing to the lust or sexual desires of the accused or the child. People v. Romersa, 111 Cal.App. 2d 173, 178, 244 P.2d 98; People v. Showers, 90 Cal.App.2d 248, 253, 202 P.2d 814. Regardless of any intent which defendant might have had when he put his arm around the shoulder of the boy on their way to the bungalow, that act does not come within the meaning of "lewd" or "lascivious." Placing one's arm around the shoulder of a boy under the circumstances present in this case cannot be said to be lustful, immoral, seductive or degrading. The act took place in broad daylight before defendant and the boy had withdrawn to the privacy of the bungalow. Such a casual act would not be considered so unnatural as to invite the scrutiny of even the most suspicious mind. It is inconceivable that any court would convict a man of a violation of section 288 upon the mere proof of an act such as this. The cases cited by the attorney general in this connection all involved acts which came clearly within the meaning of "lewd" or "lascivious" as those words are used in section 288.

[8] Nor may defendant's conviction for violation of section 288 be based upon his placing his hands on the boy just prior to forcing the act of sexual perversion upon him. Such touching was merely preparatory to the commission of the act denounced by section 288a, and was, therefore, a part of that offense. See People v. Greer, supra, 30 Cal.2d at page 604, 184 P.2d at page 521; cf. People v. Slobodian, supra, 31 Cal.2d at page 563, 191 P.2d at page 5.

The attorney general also relies upon People v. Slobodian, supra, in which convictions of violating both section 288 and section 288a were sustained. The facts in that case showed that the defendant committed four separate acts upon the body of the prosecutrix, all within a short period of time. Two of these acts violated section 288a (although also punishable under section 288) and, the other two acts constituted a violation or attempted violation of section 261(1) (although these also were punishable under section 288). Thus, even though all the acts were committed within a relatively short time, Slobodian was properly convicted of violating both section 288 and section 288a since he had committed acts separately denounced in two code sections independent of section 288. The case has no application to the case at bar because here defendant committed but one unlawful act. While this act was punishable under either section 288 or section 288a, it was not punishable under both.

[9] It is thus clear that defendant's two convictions cannot stand. The judgment of conviction of the less severely punishable offense (i. e., violation of section 288a) should be reversed. People v. Brown, 49 Cal.2d 577, 320 P.2d 5.

For the reasons above stated the judgment and order as to count 1 are affirmed and the judgment and order as to count 2 are reversed.

ASHBURN, J., and KINCAID, J. pro tem., concur.

158 Cal.App.2d 634

Vernon R. FORTNA, Individually and doing business as Valley Termite Company, Plaintiff and Respondent,

v.

E. L. MARTIN, Defendant and Appellant.

Civ. 9214.

District Court of Appeal, Third District, California.

March 24, 1958.

Action to enjoin former employee from making use of confidential information or trade secrets of employer who engaged in structural pest control work. The Superior Court, Sutter County, E. T. Manwell, J. pro tem., granted injunction and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence disclosed that the identity of former employer's customers, which were real estate companies and lending institutions requiring termite clearance for many types of loans, was not confidential, that materials and services performed in termite control were not confidential and that former employer's methods of pricing and bidding were not secret.

Reversed.

1. Injunction ⇐56

Provision in employment contract that employee, for period of five years following termination of employment, would not solicit or cater to any of employer's customers would not support injunction restraining former employee from competing with employer in the structural pest control business, in view of statute invalidating, except to extent provided therein, every contract restraining one from engaging in lawful profession, trade or business. West's Ann.Bus. and Prof.Code, § 16600.

2. Master and Servant ⇐60

Equity will protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life.

3. Master and Servant ⇐60

Every individual possesses, as a form of property, the right to pursue any calling, business or profession he may choose, and has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of former employer, provided such competition is fairly and legally conducted.

4. Trade-Marks and Trade-Names and Unfair Competition ⇐77

The courts regard as "unfair competition" and will enjoin the use, by an employee to the prejudice of his former employer, of the confidential information gained by employee during his prior employment as to business secrets of such employer.

See publication Words and Phrases, for other judicial constructions and definitions of "Unfair Competition".

5. Injunction ⇐128

In action to enjoin former employee from making use of confidential information or trade secrets of employer who engaged in structural pest control work, evidence disclosed that identity of former employer's customers, which were real estate companies and lending institutions requiring termite clearance with many types of loans, was not confidential, that materials and services performed in termite control work were not confidential and that former employer's methods of pricing and bidding were not secret.

6. Evidence ⇐20(2)

It is common knowledge that financial institutions require a termite clearance before they will make loans on improved property.

7. Evidence ⇐5(2)

It is common knowledge that average purchaser of real property must secure loan in order to complete purchase.

8. Master and Servant ⇐60

A former agent may use, after termination of his employment, methods of doing business and processes which are but skillful variation of general processes known to the particular trade.

Steel & Arostegui, Marysville, for appellant.

Bradford, Cross, Dahl & Hefner, Sacramento, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment enjoining defendant, for a period of five years, from "entering into competition, directly or indirectly, with plaintiff * * * and/or soliciting structural pest control work, all in the exterminating business, Branch 3, Group D termite control work," in a specified area of the Sacramento Valley, and from "making use of confidential information or trade secrets of said plaintiff, * * * and in particular from making any disclosure whatsoever as to said plaintiff's methods of bidding for structural pest control work."

On December 21, 1953, defendant Martin and plaintiff Fortna entered into a contract of employment which contained the following provision:

> "(c) That he [the employee] will not for a period of five years after the end or termination of his employment, irrespective of the time, manner or cause of the said termination, directly or indirectly, either as principal, agent, employee, employer, stockholder, copartner, or in any other individual or representative capacity whatever, solicit, serve, or cater to or engage, assist, be interested in or connected with any other person, firm or corporation soliciting, serving or catering to any of the customers served by him or by any other employee of the company or any of its branches during his employment with the Company."

Martin continued in the employ of Fortna until August 30, 1955. During the last thirty days Martin made plans to engage in business for himself, and immediately after the termination of the employment he established his own business and entered into competition with Fortna.

Fortna then sought an injunction to prevent Martin from competing with him. Fortna alleged in his complaint that Martin had solicited customers, and that while in his (Fortna's) employ Martin became familiar with certain trade secrets and confidential information of the business, particularly the names of customers, the materials used and services performed in termite control work and other information pertaining to the conduct of Fortna's business, and that after Martin terminated the employment he had used the information to solicit business for himself.

The testimony disclosed that Martin had been in the termite control business for about 18 years and that at one time he had his own business in Los Angeles. Prior to the time Martin was employed by Fortna he had no contacts in the Sacramento Valley. Fortna described Martin as his manager. Martin made inspections, reports, issued the reports to the proper persons, negotiated the work and handled it; he became familiar with Fortna's prices, his methods of bidding, and those persons with whom Fortna did business. Fortna was most careful never to allow his employees to learn the amount he received for any job, and the customer only was given a total bid price for any job. Fortna considered this information a trade secret and confidential. Martin testified that there was no difference in the prices charged by Fortna and those charged in Los Angeles.

Termite inspection is examining the substructure of a building and determining if there is damage and what is needed to correct it. To engage in the business one must have a license issued by the state of California. The biggest portion of the business comes from real estate companies and lending institutions, a termite clearance being required with many types of loans. When a clearance is needed either the realtor or

the financial institution calls a termite inspection company to make the inspection. Fortna testified that he had many contacts who called only him. He stated that if work was necessary the bank or the real estate company would inform him to do the work without the necessity of a bid. He has a standard price formula that he uses. As stated, the estimates are presented to the customer as a lump sum figure, but anyone who has become familiar with Fortna's pricing method can determine how the estimate is arrived at. Fortna claimed that the identity of those customers who called only him, and his pricing methods are trade secrets and confidential information. He further stated that in some of the institutions there was one officer who controlled the business, and the identity of this officer could not be determined by the average solicitor. As a result of his employment, Martin learned the identity of the person who controlled the business in each institution. After Martin left Fortna's employ he called at the offices of these customers and left his card. He denied soliciting them but he did admit that he told them that if he could be of service to them he would. Since Martin left Fortna's employ certain old customers have not referred any business to Fortna.

Fortna claimed to have had only minor competition in the area served by his firm. There was a man by the name of Bechhold in Chico who worked out of his own home. He did not advertise and he never bid against Fortna on a job. In 1954 a firm by the name of Garankill was established. Fortna testified this was only minor competition.

As grounds for reversal of the judgment appellant contends (1) that the contract is void as a contract in restraint of trade; (2) that the injunction exceeds the contract between the parties; (3) that the findings do not recite any information gained by appellant which constitutes a trade secret; and (4) that the evidence is insufficient to sustain the judgment.

[1] We do not believe that the injunction can be based on the contractual provision hereinbefore set forth. Section 16600 of the Business and Professions Code provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." None of the exceptions is applicable to the instant case.

[2–4] As stated in Continental Car-Na-Var Corporation v. Moseley, 24 Cal.2d 104, at page 110, 148 P.2d 9, 12:

> "Equity will to the fullest extent protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary to follow any of the common occupations of life. Every individual possesses as a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted. New Method Laundry Co. v. MacCann, 174 Cal. 26, 33, 161 P. 990, Ann.Cas. 1918C, 1022.
>
> "Under this salutary rule, the question then is whether defendants were guilty of unfair competition in soliciting the customers of plaintiff for business in competition with the latter. It is the law that equity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice. Pasadena Ice Co. v. Reeder, 206 Cal. 697, 702, 275 P. 944, 276 P. 995. The courts regard as unfair competition, and will enjoin, the use by an employee to the prejudice of his former employer of the confidential information gained

by the employee during his prior employment as to the business secrets of such employer." See also California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 188 P.2d 303; Morris v. Harris, 127 Cal.App.2d 476, 274 P.2d 22; Mathews Paint Co. v. Seaside Paint Co., 148 Cal.App.2d 168, 171, 306 P.2d 113; American Alloy Steel Corp. v. Ross, 149 Cal.App.2d 215, 308 P.2d 494.

Whether or not equity will enjoin a former employee from using information acquired while in such employ to the disadvantage of the former employer depends on whether or not in a given case the information gained is secret and confidential. If it is, a former employee may not use it, but, if it is not, a former employee may do so. An employee may, after termination of the employment, use anything that is not the property of the employer. But the employee may not use for his own benefit trade and business secrets and confidential information which are the property of the employer. California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 188 P.2d 303; Mathews v. Seaside Paint Co., supra.

[5–7] We do not think that the evidence produced in this case disclosed the use of any information by Martin which can be considered to be a trade secret or confidential. The identity of Fortna's customers cannot be considered confidential. It is common knowledge that financial institutions require a termite clearance before they will make loans on improved property. It is also common knowledge that the average purchaser of real property must secure a loan in order to complete the purchase. Realtors usually inform prospective sellers of the necessity of a termite clearance. It follows that both realtors and financial institutions are often in a position to give termite inspection firms leads to business or to give them business. Certainly any person engaged in the business would consider both banks and real estate companies as potential sources of business and contact them. The names and addresses of such firms are found in the yellow pages of any telephone directory. Their identity cannot be confidential.

Nor do we think that even if there was one man in each firm who controlled the business, such information would be confidential. Any solicitor could ascertain who that person would be. While Fortna describes these men as key contacts of a secret nature, we cannot understand nor does the evidence disclose what the secret nature was.

The materials used and the services performed in termite control work cannot be confidential either. Each person who desires to engage in such a business must obtain a license from the state. Martin had a Group D license authorizing him to engage in the practice relating to the control of wood destroying pests by the use of insecticides or structural repairs and corrections, excluding fumigation with poisonous or lethal gases. It is reasonable to conclude that Martin, having passed the examination necessary to obtain such a license, would be familiar with the materials used and the services performed in such work.

[8] Fortna also claimed that his methods of pricing and bidding were secret. The evidence does not show that Fortna devised any secret or improved method of making estimates or computing costs. At most, the evidence discloses that Fortna utilized a system which considered his costs, but any successful business man must do the same. A former agent may use, after the termination of his employment, "methods of doing business and processes which are but skillful variation of general processes known to the particular trade." (Restatement of Agency, sec. 396, comment, cl. (b).) The mere fact that Fortna did not disclose the information to other employees would not make it secret and confidential.

Injunctive relief should be granted only upon convincing proof of a harmful violation of the plaintiff's right. It should not be given an application that would overemphasize the employer's right to the detri-

ment of the employee by treating as confidential and secret all information that might be useful to the employee. Mathews Paint Co. v. Seaside Paint Co., supra. The evidence produced did not warrant the trial court in granting an injunction.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.



158 Cal.App.2d 644

William BURROWS and Hilda Randall, Plaintiffs and Respondents,

v.

Lillian C. JORGENSEN and Hans C. Jorgensen, Defendants and Appellants.

William BURROWS and Hilda Randall, Plaintiffs and Respondents,

v.

Lillian C. JORGENSEN, Hans C. Jorgensen, Patricia Franke, and Joyce C. Camozzi, Defendants and Appellants.

Civ. 17596.

District Court of Appeal, First District, Division 1, California.

March 25, 1958.

Suit to set aside transfers allegedly made in fraud of creditors. From an order of the Superior Court, City and County of San Francisco, Twain Michelsen, J., appointing a receiver the defendant appealed. The District Court of Appeal, Bray, J., held inter alia, that where transfers of leaseholds were made by debtors day after they were served with order of examination in original action by creditors, and transfers were of almost all of debtors' nonexempt property, and transferees were a daughter and son-in-law, transfers were made to delay, hinder or defeat creditors.

Affirmed.

1. Appeal and Error ⇐419(1)

Where order to show cause why a receiver should not be appointed was heard together with motion for appointment of receiver and a minute order granting appointment of receiver was entered in each proceeding and thereafter another judge signed a formal order appointing a receiver, defendants' notices of appeal were valid as to both orders. West's Ann.Rules on Appeal, rule 2(c).

2. Fraudulent Conveyances ⇐277(1)

A transfer of leases in consideration of transferees' assumption of loans and obligations under leases was not in fraud of creditors where creditors failed to prove disparity between value of property transferred and debt assumed.

3. Fraudulent Conveyances ⇐305

Fact that there was consideration for transfer of property by debtors did not make appointment of receiver void since even where transfer is made upon consideration transfer may be set aside if it was made to delay, hinder or defeat creditors.

4. Fraud ⇐58(1)

A fraud must be proved by clear and convincing evidence because there is a presumption of fair dealing and against fraud.

5. Fraudulent Conveyances ⇐107

Where transfers of leaseholds were made by debtors day after they were served with order of examination in original action by creditors, and transfers were of almost all of debtors' nonexempt property, and transferees were a daughter and son-in-law transfers were made to delay, hinder or defeat creditors. West's Ann.Code Civ. Proc. § 564, subds. 1, 4, 7.

6. Fraudulent Conveyances ⇐15

A judgment debtor's transfer of almost all of nonexempt property is an indication of fraud.

7. Fraudulent Conveyances ⇐15

That transferees of judgment debtors were a daughter and son-in-law was an indication of fraud.

8. Fraudulent Conveyances ⇐305

Covenants of leases against involuntary assignment were not sufficiently strong to prevent the taking of possession by receiver of leased premises which lessees transferred with intent to delay, hinder and defeat lessees' judgment creditors since receiver acquires no title but only the right to possession as an officer of the court and hence his appointment is not a violation of the type of covenant against assignment. West's Ann.Code Civ.Proc. § 564, subds. 1, 4, 7.

9. Fraudulent Conveyances ⇐305

A provision in lease giving landlord option of terminating lease upon appointment of a receiver did not give lease status of exempt property so as to preclude appointment of a receiver where lessees transferred property with intent to hinder, delay or defeat judgment against them since it becomes a matter within discretion of court as to whether it will appoint a receiver and chance a possibility that landlord may not exercise his right to terminate. West's Ann.Code Civ.Proc. § 564, subds. 1, 4, 7.

10. Fraudulent Conveyances ⇐305

Where court had power to turn over management and control of leased apartment houses to receiver because they were transferred by lessees with intent to delay and defeat a judgment against them, under doctrine that the greater includes the lesser, court had power to authorize receiver to receive from the lessees all rents which they might receive over the actual minimum running expenses and order them to pay such income to the receiver.

11. Fraudulent Conveyances ⇐305

The appointment of a receiver of monies collected by lessees of apartment houses for benefit of lessees' judgment creditors was not erroneous on ground that lessees, and not their transferees, were occupying the premises, that landlord had not terminated leases because of receivership, and that lessees were in effect compelled to labor in behalf of judgment creditors. West's Ann.Code Civ.Proc. § 564, subds. 1, 4, 7.

Sugarman, Bernheim & Gilbert, Irving C. Sugarman, San Francisco, for appellants.

Joseph A. Brown, San Francisco, for respondents.

BRAY, Justice.

Defendants appeal from an order appointing a receiver upon proceedings heard together (1) under a complaint in equity to set aside transfers allegedly in fraud of creditors; (2) under supplementary proceedings in the original case.

Questions Presented.

1. Was the appointment of a receiver of the leased apartment houses improper (a) because the transfer of the leases were for consideration, (b) because of the provision providing for cancellation in the event of the appointment of a receiver?

2. Was the appointment of a receiver to receive future income proper?

Record.

[1] Plaintiffs filed an action for fraud in the sale of a certain leasehold. Defendants defaulted and judgment was entered in favor of plaintiffs for $8,075 damages and $20,000 exemplary damages.[1] Plaintiffs moved for appointment of a receiver to take over the management and control of defendants' property to satisfy the judgment. Theretofore plaintiffs filed an action to set aside transfers in fraud of creditors. An order to show cause why a receiver should not be appointed was heard together with the above mentioned motion for appointment of receiver. On August 14, 1956, a minute order of the Hon. Twain Michelsen, Judge of the Superior Court of San Francisco, granting the appointment of a receiver was entered in each proceed-

1. An action was brought by defendants to set aside this judgment. A judgment of nonsuit was granted therein upon the opening statement of defendants (plaintiffs there). Upon appeal we reversed this nonsuit judgment. See Jorgensen v. Burrows, 157 Cal.App.2d 638, 321 P.2d 465.

ing. On August 24, defendants appealed in each proceeding from said order. However, on August 15, in the action to set aside transfers, Hon. Theresa Meikle, judge of said court, signed a formal order appointing a receiver in said action, which order was entered on August 27.[2] At defendants' request and pursuant to rule 2(c), Rules on Appeal, we deem defendants' notices of appeal valid as to both orders. See Larrus v. First National Bank, 1954, 122 Cal.App. 2d 884, 886, 266 P.2d 143.

In the original case defendants Lillian and Hans Jorgensen appeared before a referee in an examination into their assets. It appeared they consisted of a joint checking account, balance $50, $1,000 in Federal Savings & Loan Co. which had been assigned to their attorneys for services, and a 1950 Plymouth. Prior to May 19, 1956, said defendants were in the business of operating leaseholds (apartment buildings). Judgment was entered in the original action July 27, 1955. On May 19, 1956, the Jorgensens transferred three leaseholds to their daughter and son-in-law Joyce and Gene Camozzi. No money was paid for these transfers. One lease had ten months to run, one had four years, and the third three years left. All three leases contain provisions restricting assignment and for termination in the event of transfer by operation of law. The lease of 925 Geary Street provides for cancellation in the event of the appointment of a receiver. Lillian testified that the transfers were made on advice of the landlords who consented thereto. The furniture at two of the leaseholds is security for a loan of $7,800 from Morris Plan. The furniture at the third leasehold is security for the performance of that lease. The Camozzis assumed the obligations of the leases and of the Morris loan, their names being now on the leases and note with the Jorgensens. There is no agreement that the Jorgensens are to receive any income from the leased properties.

1. Receivership. (a) Consideration.

Defendants contend that all the transfers were for consideration and not in fraud of creditors; hence the appointment of a receiver was improper. They contend that the consideration was the assumption of the Morris Plan loan by the transferees and of the obligations under the leases. Mrs. Camozzi testified that the leases were not worth over the $8,000 loaned by Morris Plan. There was no contrary testimony. However, plaintiffs' attorney made an offer to prove that they were worth $25,000. The court did not rule on the offer as the parties became sidetracked on an unaccepted offer of settlement. Plaintiffs offered no evidence on the subject nor was the court ever asked to rule upon said offer of proof.

[2, 3] In Peterson v. Wilson, 88 Cal. App.2d 617, 626, 199 P.2d 757, 763, 6 A. L.R.2d 258, we quoted from Mix v. Yoakum, 138 Cal.App. 290, 294, 31 P.2d 1071; "'A conveyance, in consideration of the assumption of a mortgage on the property, is based on a valid consideration. There is authority for the proposition that where the property conveyed is of value in excess of the mortgage, an agreement on the part of the grantee to pay the same is not a valuable consideration as against the grantor's creditors. It has been held in this state that the disparity between the value of the property and the encumbrance must be such as to show gross inadequacy of consideration. [Citation.] * * *'" and held that the burden of proving disparity between the value of the property and the debt assumed is on the creditor. In view of plaintiffs' failure to prove such disparity we cannot find that there was not consideration for the transfer. But that fact alone does not make the appointment of the receiver void. Even where a transfer is made upon consideration, nevertheless the transfer may be set aside if it was made with intent to delay, hinder or defeat cred-

2. Apparently after Judge Michelsen entered the minute order the matter was presented to Judge Meikle for formulation of the formal order.

itors. Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838.

Peterson v. Wilson, supra, 88 Cal.App.2d 617, 199 P.2d 757, cited by defendants, is not in point. There the court expressly found that the conveyance in question was not made in anticipation of an adverse judgment against the grantor nor to hinder, delay or defraud the creditor.

[4–7] "In such a case, the fact that the transferee gave consideration is immaterial." Heffernan v. Bennett & Armour, 110 Cal.App.2d 564, 584, 585, 243 P.2d 846, 859; Chichester v. Mason, 43 Cal.App.2d 577, 586, 111 P.2d 362; Puccetti v. Girola, 63 Cal.App.2d 240, 252, 146 P.2d 714; see also Civ.Code, § 3439.07. The fraud must be proved by clear and convincing evidence because there is a presumption of fair dealing and against fraud. See Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114. In our case the fact that the transfers were made to delay, hinder or defeat plaintiffs' judgment clearly and convincingly appears. The transfers were made the day after the Jorgensens were served with order of examination in the original action. When Mrs. Jorgensen was asked if this was not so, defendants' counsel interrupted and stated: "That is the reason why she had to do it. There is no question about it." Mrs. Jorgensen practically admitted the same thing. The transfers were of almost all of Jorgensens' nonexempt property (an indication of fraud—see Keeley v. Anderson, 14 Cal.App.2d 467, 471, 58 P.2d 410). The transferees were a daughter and a son-in-law (also an indication of fraud—Menick v. Goldy, 131 Cal.App.2d 542, 547, 280 P.2d 844). Section 564, subdivisions 1, 4 and 7, Code of Civil Procedure, authorize the appointment of a receiver in actions of this kind. See also Heffernan v. Bennett & Armour, supra, 110 Cal.App.2d 564, 588, 243 P.2d 846; Murray v. Murray, 115 Cal. 266, 274–275, 47 P. 37, 37 L.R.A. 626; Sibert v. Shaver, 113 Cal.App.2d 19, 247 P.2d 609.

As the trial court impliedly found that the transfers were made with the intent to delay, hinder and defeat plaintiffs' judgment, the appointment of the receiver was proper unless affected by the other grounds urged.

(b) Cancellation provisions.

[8] The only lease providing for cancellation in the event of appointment of a receiver is that of 925 Geary. It and the other two leases provided that an assignment without the landlord's consent either voluntary or involuntary or by operation of law or otherwise would be void and cause for termination of the lease. Defendants contend that these provisions present a situation analogous to a debtor's *exempt* property as to a transfer of which it is well settled that a creditor may not complain. See Prudential Ins. Co. of America v. Beck, 39 Cal.App.2d 355, 103 P.2d 241; In re Johnson, D.C., 97 F.Supp. 779; American State Bank v. Butts, 111 Wash. 612, 191 P. 754, 17 A.L.R. 168. However, the leases are not analogous to exempt property because the leases can be reached if the lessor consents to a transfer either by sale or by the court order appointing a receiver. As most leases contain such restrictions on transfer, such a ruling practically would make all leases exempt property. Elson v. Nyhan, 45 Cal.App.2d 1, 113 P.2d 474, is not in point. It dealt with the refusal of the trial court to appoint a receiver to take possession of cab licenses. The case did not hold that a receiver could not be appointed. It held that as the appointment of a receiver rests entirely within the discretion of the trial court, and the transfer of such licenses required the consent of the Police Commission whose policy was to refuse to recognize involuntary transfers, the trial court did not abuse its discretion in denying a receiver. With the possible exception of the Geary Street lease, the covenants of the leases against involuntary assignment are not sufficiently strong to prevent the taking of possession by the receiver of the leased premises. While the question of the effect of such covenants has not been decided in California, it appears from the following cases in other jurisdictions that the receiver acquires no title but only the right to possession as an offi-

cer of the court and hence his appointment is not a violation of the type of covenant against assignment here. See Bell v. American Protective League, 1895, 163 Mass. 558, 40 N.E. 857, 28 L.R.A. 452; Durand & Co. v. Howard & Co., 2 Cir., 1914, 216 F. 585, L.R.A.1915B, 998; Fleming v. Fleming Hotel Co., 1905, 69 N.J.Eq. 715, 61 A. 157; Gazlay v. Williams, 1908, 210 U.S. 41, 28 S.Ct. 687, 52 L.Ed. 950. See H. D. Roosen Co. v. Pacific Radio Pub. Co., 123 Cal.App. 525, 534, 11 P.2d 873, 876: "The receiver does not occupy the status of an assignee. His function is that of a minister of the court in possession of the property, to the end of conserving the rights of everybody having any interest * * *".

[9] Even as to the provision in the Geary Street lease giving the landlord the option of terminating the lease upon appointment of a receiver, we do not consider that it gives the lease the status of exempt property. It becomes a matter within the discretion of the court as to whether it will apoint a receiver and chance the possibility that the landlord may not exercise his right to terminate. At oral argument it was conceded that the landlords have consented to the possession by the receiver.

2. Future Income.

As to the Geary Street property, the order appointing the receiver does not give the receiver the power to take possession of the lease or the property. It expressly provides that the receiver is not to take charge or possession of the apartment house. It provides that the receiver is to receive from Mr. and Mrs. Camozzi all rents which they may receive from the apartment house over the actual minimum running expenses of the house and orders them to pay the same to the receiver. Apparently the order was limited to avoid the possibility of the landlord attempting to terminate the lease because of the receivership clause.

[10] Defendants contend that the order is erroneous in that it is a receivership of defendants' future earnings. Defendants rely upon the rule in other jurisdictions that under proceedings supplementary to execution a court may not appoint a receiver to collect the debtor's future salary or earnings. See In re Trustees of Board of Publications and Sabbath School Work, 1898, 22 Misc. 645, 50 N.Y.S. 171; Kroner v. Reilly 49 App.Div. 41, 63 N.Y.S. 527; Archer v. Whiting, 1889, 88 Ala. 249, 7 So. 53; Hand v. Ortschrieb Bldg. Corp., 136 Misc. 692, 240 N.Y.S. 589. However, we are dealing here, not with the debtor's salary or earnings, but with income from his property which may be being fraudulently held by his grantees, which income is impounded by the order made in the proceedings to set aside the transfers. If the action is successful the apartment houses will be subject to the lien of plaintiffs' judgment in the original action. The court could have appointed the receiver to take charge of the apartment houses, operate them, and withhold the net income, if any, to await the determination of the case. See J. M. Overell Furniture Co. v. Superior Court, 1918, 36 Cal.App. 745, 173 P. 176 (where the receiver was appointed to take possession of an apartment house, manage it, and conserve the profits pending the decision of the court); Pacific Bank v. Robinson, 1881, 57 Cal. 520 (where the order directed the judgment debtor to assign his patent to a receiver who was to sell it and apply the proceeds to the satisfaction of the judgment); Habenicht v. Lissak, 1889, 78 Cal. 351, 20 P. 874, 5 L.R.A. 713 (affirming an order appointing a receiver, directing the judgment debtor to assign seats in the stock exchange, and empowering the receiver to sell such seats to satisfy the judgment); Neider v. Dardi, 1955, 130 Cal. App.2d 646, 279 P.2d 598 (where a receiver was appointed to protect and conserve the assets in an action for an accounting in a joint venture); Heffernan v. Bennett & Armour, supra, 110 Cal.App.2d 564, 243 P. 2d 846 (where a receiver was appointed, in a suit to set aside a fraudulent conveyance, to take possession of the conveyed business and assets to conserve such property). As the court had power to turn the entire man-

agement and control of the apartment houses over to the receiver, we can see no reason why the greater does not include the lesser, and why the court would not have the power to impound the profits, if any. We are dealing here with property which the court may find was illegally transferred and should have been available for application to the plaintiffs' judgment. Thus the court could have ordered the property and its income preserved to await the final determination of the court. It is the earnings of the property which may ultimately be determined to be subject to plaintiffs' judgment that the receivership is dealing with and not the earnings of any of the defendants.

The order provided that as to the Geary Street property whoever of the defendants may be in possession must make no repairs without the receiver's consent, must keep good and sufficient books of account open to the receiver's inspection and give him a detailed statement of all moneys collected and expenses paid each week and turn over to him any surplus remaining over the amount expended for the expenses of operating the house, and shall apprise the receiver in the weekly account of any vacancies, of the renting of any apartment, and the amount of rent received therefor.

[11] It was agreed at the oral argument that the Jorgensens were occupying and operating the house and that the Camozzis at no time were in possession or operating the house, and that the landlord had not objected to the receivership nor attempted to terminate any of the leases because thereof. Defendants contend that as the lease requires the lessees to maintain the premises as an apartment house in a business-like manner, the effect of the order is to compel the Jorgensens to labor in behalf of the plaintiffs. To a limited extent this may be true. However, the Jorgensens are living in the premises and whatever surplus there is from the rental of the property will ultimately either belong to them or their grantees outright or subject to a lien in favor of plaintiffs for the amount of any judgment they may ultimately obtain. Inasmuch as the receiver could have been authorized, as we have heretofore shown, to have taken over the entire operation of the house, we see no reason why the fact that the Jorgensens are not required to deliver possession and are permitted to operate the premises themselves, makes the order erroneous.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



158 Cal.App.2d 578

Cyril H. HEUSNER, Theodore B. Heusner and Bernadina R. Skinner, Plaintiffs and Appellants,

v.

William Emil FLECK, Defendant and Respondent.

Civ. 9311.

District Court of Appeal, Third District, California.

March 20, 1958.

Action to cancel or reform written contract. From a judgment of the Superior Court, El Dorado County, McGee, J., in favor of grantee, grantors appealed. The District Court of Appeal, Warne, J. pro tem., held that where grantee formerly had easement over land for road purposes and grantor wishing to use part of easement for another purpose agreed to construct new road for part of the way and convey land on which entire roadway was situated to grantor, and deed was without limitation, grantor could not deny that grantee had fee simple title to land.

Affirmed.

1. Estoppel ⇐32(1)

Where grantee formerly had easement over land for private road purposes

and grantor wishing to use part of easement for another purpose agreed to construct a new road in so far as was necessary, and conveyed land on which entire roadway was situated without limitation, grantors could not subsequently deny that grantee had fee simple title to land.

2. Deeds ⇐124
Estoppel ⇐15

A grant, bargain, and sale deed operates to pass title in fee unless it contains in itself some limitation, exception or reservation, and it estops grantor thereafter from claiming any right or estate in land so conveyed.

3. Pleading ⇐94

Where all of the allegations of complaint were controverted either by a specific or general denial, defendant was not required to separately and specifically answer each and every allegation.

4. Reformation of Instruments ⇐38

Where action was brought to reform or cancel written contract under which plaintiffs had conveyed private road to defendant and allegation of complaint was to effect that land of plaintiffs and defendant had for long time been served jointly by specific road which at all times had been used jointly by the plaintiffs and the defendant, answers specifically denied allegations and in addition alleging that roadway serving defendant's lands was owned in fee simple by defendant, was sufficient answer to complaint.

H. D. Jerrett, Sacramento, for appellants.

Albert L. Wagner and E. R. Vaughn, Sacramento, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment in favor of the defendant in an action brought to cancel or reform a written contract whereby appellants conveyed a private road to respondent.

It appears that for many years prior to 1951 respondent had an easement in an old road on appellants' property. The road ran from a highway, across appellants' property, and then into and over respondent's adjoining property thereby affording both appellants and respondent access to the highway although appellants, but not respondent, had other means of entrance to their property. In 1950 appellants desired to build a reservoir which would inundate a portion of the road. Appellants also desired to construct and maintain a spillway upon respondent's land in connection with the dam. Appellants discussed the matter with the respondent who orally agreed to quitclaim his easement in the road and grant an easement for the spillway to appellants provided that they build a new road and grant him an easement therein. It was further agreed that appellants would bear the entire cost of the maintenance of the new road for a period of two or three years after its construction. In accordance with such understanding, a written agreement was prepared by respondent's attorney. Appellants refused to sign the written agreement because of the maintenance provision. Respondent then agreed to reduce the period during which appellants were to bear the entire cost of maintenance from two or three years to one but insisted that thereafter appellants should be jointly liable with him for maintenance of the road. When appellants objected to the joint maintenance provision, respondent agreed to a deletion thereof but demanded that he be given a deed to the road. Thereafter, respondent's attorney drafted an agreement which was executed by the parties under date of April 13, 1951, and recorded at the request of respondent's attorney on August 6, 1952.

The executed agreement described the parties' properties, recited that respondent had an easement in the road extending across appellants' property, and declared that appellants intended to construct a dam and spillway which would destroy the road. The agreement further declared that respondent would permit the proposed construction provided that appellants "grant

to" respondent "the fee title to" the new road, and that "as a further consideration" to appellants for construction of the new road, respondent would grant to appellants "the right to construct" upon respondent's property "a spillway as an appurtenant to said land." The agreement then provided that the respondent did "by these presents remise, release, and quit claim" to appellants all his "right, title and interest * * * in and to the existing roadway" and that appellants did thereby "grant and convey unto" respondent a specifically described strip of land upon which appellants agreed to construct the new road and to gravel and maintain it during the entire first year following its construction. In accordance with the agreement appellants built the dam and spillway and constructed the new road which was approximately 2,400 feet in length and connected with that portion of the old road which was not replaced, which portion, 405 feet in length, bridged the gap between the new construction and the highway. The parties used the new road, as they had the old road, until the latter part of 1953 when respondent chained and padlocked the gate at the entrance to the highway. Appellants cut the chain and continued to use the road. However, at the request of respondent his attorney protested appellants' action and notified them that they had conveyed the fee to the strip of land upon which the road was located to the respondent and that appellants had no right to use the road or interfere with the gate. Nothing further transpired until 1956 when respondent personally, and in abusive language, ordered one of the appellants off the road, telling him he had no right to use it. Following this occurrence, appellants brought this action seeking to cancel or reform the aforementioned written agreement which was pleaded in *haec verba*. The complaint alleged as ground for relief that there was no delivery or conveyance with intent to convey a fee title to respondent; that appellants had no knowledge of the recording of the agreement prior to June 4, 1956; that if the agreement were left outstanding there was "reasonable apprehension" that it would "cause serious injury to" appellants; that the agreement was void; and that if respondent were "allowed to retain the fruits of his own fraud, he would be unjustly enriched * * *" No facts in support of these conclusionary allegations were pleaded and no evidence was introduced in support thereof. Appellants did not contradict the facts as above set forth but merely testified that they did not read in detail the agreement which they signed and that they had not intended to include or cover the 405 feet of the old road which was not replaced.

[1, 2] The grant was without a reservation of any kind. Respondent gave up his easement in the old road and appellants agreed to build a new road on the land they conveyed in fee to the defendant. The reference in the deed to the conveyance for roadway purposes was merely descriptive of consideration. As stated in Taylor v. Avila, 175 Cal. 203, at page 206, 165 P. 533, at page 534, concerning appellants' claim to an easement: "The rule that a grant, bargain, and sale deed operates to pass the title in fee, unless it contains in itself some limitation, exception, or reservation, and that it estops the grantor thereafter from claiming any right or estate in the land so conveyed, is too well settled to require citation of authority. We find in the above deed no limitation or qualification whatever upon the fee simple estate granted. The plaintiff, having made such conveyance, is estopped from asserting that it did not convey the entire estate in the land described."

The trial court found that prior to the 13th day of April, 1951, the appellants and respondent were the owners of particular parcels of real property, and that on said day they entered into an agreement in writing by the terms of which the appellants granted to the respondent in fee the real property involved in this action.

[3] Appellants' contention that the findings are contrary to the admissions in

the pleadings is without merit. All of the allegations of the complaint are controverted either by a specific or general denial. Respondent was not required, as is contended by appellants, to separately and specifically answer each and every allegation. Section 437 of the Code of Civil Procedure, as amended in 1927, provides in part that the denials may be stated (a) "by reference to specific paragraphs or parts of the complaint"; or (b) "by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted"; and (c) "a statement of any new matter constituting a defense * * *." See Edger v. Foster, 48 Cal.App.2d 580, 583, 120 P.2d 134; Reinert v. Proud, 8 Cal.App.2d 169, 170, 47 P.2d 491; 2 Witkin California Procedure (1954) 1512–1513.

[4] Nor is there any merit in appellants' contention that respondent's answer to paragraphs III and IV of the complaint are insufficient. Paragraph III alleges that the lands of the appellants and respondent "have for a long time hitherto been served jointly" by a specifically described road leading from state highway 50, thence over appellants' land to respondent's adjoining land and that "said roadway had at all times been used jointly by plaintiffs and defendant and their respective predecessors in interest, continuously and uninterruptedly, * * * in said location, and in any new location, until on or about the 4th day of June, 1956." Paragraph IV alleges that on the 13th day of April, 1951, appellants signed a "document designated as 'Agreement' purporting to be in part a conveyance between" the respondent and the appellants. The document is then set out in *haec verba*. The answer specifically denies said allegations and in addition alleges that the roadway serving the lands of respondent is owned by respondent in fee simple. Paragraph IV is also answered.

The judgment is supported by substantial evidence and we find no errors in the record. We conclude that it is not necessary to discuss other matters presented in the briefs.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



158 Cal.App.2d 658

John EVOLA, Plaintiff and Appellant,

v.

WENDT CONSTRUCTION COMPANY, a corporation, and United Pacific Insurance Company, a corporation, Defendants,

United Pacific Insurance Company, Respondent.

Civ. 18116.

District Court of Appeal, First District, Division 1, California.

March 26, 1958.

Civil action by plaintiff seeking judgment from two defendants. From adverse judgment of the Superior Court, County of Contra Costa, Homer W. Patterson, J., plaintiff appealed and defendant moved to dismiss. The District Court of Appeal, Peters, P. J., inter alia, held that where notice of appeal was filed prior to rendition of judgment after the judge had announced his intended ruling, even though notice referred to an appeal from order sustaining demurrer which was a nonappealable order, under rule stating that a notice of appeal filed prior to rendition of judgment but after judge has announced it, may, in discretion of reviewing court, be treated as filed immediately after entry of judgment, appeal would not be dismissed.

Motion to dismiss appeal denied.

1. Appeal and Error ⇐102, 105

An order sustaining a demurrer without leave to amend is a nonappealable

order and appeal can only be taken from the judgment of dismissal.

2. Appeal and Error ⊜428(2)

Where notice of appeal was filed before rendition of judgment but after court had announced its intended ruling, even though notice referred to an appeal from a nonappealable order, appeal would not be dismissed under rule providing that a notice of appeal filed prior to rendition of judgment but after intended ruling had been announced by judge, may, in the discretion of the reviewing court, be treated as filed immediately after entry of judgment. West's Ann.Rules on Appeal, rules 2(a), 2(c).

3. Appeal and Error ⊜807

Where, upon appellant's motion, trial court vacated abandonment of appeal jurisdiction of appeal was revested in appellate court. West's Ann.Rules on Appeal, rule 19(a).

4. Appeal and Error ⊜439

When a case is pending in the appellate court, the trial court is without jurisdiction to vacate the judgment.

5. Appeal and Error ⊜807

Where appellant filed notice of appeal, and thereafter filed an abandonment of appeal in belief that no judgment had been entered, and upon discovery that a prior judgment had been entered immediately moved to vacate abandonment of first appeal and abandonment was vacated by trial judge, abandonment revested jurisdiction of appeal in trial court which then had jurisdiction to vacate abandonment and revest jurisdiction in appellate court. West's Ann.Rules on Appeal, rules 2(c), 19(a).

Sol S. Judson, Pittsburg, for appellant.

Weinstock, Anderson, Maloney & Chase, San Francisco, for respondent.

PETERS, Presiding Justice.

This is a motion to dismiss the appeal either because the order appealed from is nonappealable, or because the appeal, in any event, has been abandoned.

The plaintiff filed a two count complaint, the first count seeking judgment against Wendt Construction Company and its surety, United Pacific Insurance Company, and the second seeking judgment against Builders' Control Service. After a first amended complaint had been filed, the court on July 12, 1957, sustained, without leave to amend, a demurrer of the United Pacific Insurance Company to the first cause of action. On August 9, 1957, judgment by default was entered in favor of plaintiff and against Wendt Construction Company. On August 12, 1957, the plaintiff appealed "from the Order Sustaining Demurrer Without Leave to Amend plaintiff's First Amended Complaint to First Cause of Action." On September 6, 1957, the court entered its judgment dismissing the complaint against United Pacific Insurance Company. On November 13, 1957, the plaintiff filed an abandonment of his appeal with the county clerk "without prejudice to any future appeal." On the same day, he induced the trial court to enter a second judgment on its order of July 12th sustaining the demurrer without leave to amend. On November 14, 1957, plaintiff purported to appeal from that judgment.

Plaintiff then acquired knowledge of the entry of the first judgment. He now realized that the abandonment of his first appeal had been a mistake. On November 22, 1957, he filed a notice of motion to correct the date of entry of the judgment from September 5, 1957 (should be September 6th) to November 13, 1957, and to vacate the abandonment of the appeal. On December 4, 1957, the trial court denied the motion to correct the date of the judgment but granted the motion to vacate the abandonment of the appeal. After the plaintiff had filed his opening brief on the appeal defendant moved to dismiss the appeal on the grounds stated.

[1] Without reference to what effect, if any, the abandonment of the appeal may have had, the first question presented is whether the appeal of August 12, 1957, can be considered an appeal from the judgment of September 6, 1957. There can be no

doubt that the notice of appeal of August 12, 1957, was an attempt to appeal from a nonappealable order. An order sustaining a demurrer without leave to amend is a nonappealable order. Jeffers v. Screen Extras Guild, Inc., 107 Cal.App.2d 253, 237 P.2d 51; Kennedy v. Owen, 85 Cal.App.2d 517, 193 P.2d 141; Futlick v. F. W. Woolworth Co., 149 Cal.App.2d 296, 308 P.2d 405; Lavine v. Jessup, 48 Cal.2d 611, 311 P.2d 8. The appeal can properly be taken only from the judgment of dismissal. Such a judgment was not entered until September 6, 1957. No appeal was taken from that judgment within the 60 days provided by Rule 2(a) of the Rules on Appeal. Prior to 1951 there can be no doubt that under such circumstances the appeal from the order sustaining the demurrer would have to be dismissed. Schmidt v. Townsend, 103 Cal.App.2d 185, 229 P.2d 488. Prior to 1951 relief from the filing of a premature notice of appeal could only be granted under Rule 2(c) as it then read. The rule then provided:

"A notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry." Of course, when the appeal is taken from the order sustaining a demurrer before judgment has been entered, this rule could not protect the appellant, because the then rule only applied where the notice of appeal was filed "prior to entry of the judgment, but after its rendition." That was the precise holding of Schmidt v. Townsend, 103 Cal.App.2d 185, 229 P.2d 488. But in 1951 a new sentence was added to Rule 2(c). That new sentence reads: "A notice of appeal filed prior to rendition of the judgment, but after the judge has announced his intended ruling, may, in the discretion of the reviewing court for good cause, be treated as filed immediately after entry of the judgment."

[2] The rule, as thus amended, would seem to apply to the situation here presented. The notice of appeal was certainly filed "prior to rendition of the judgment." It is also clear that this was "after the judge has announced his intended ruling" because he had already entered his order sustaining the demurrer without leave to amend. Thus, the instant situation falls directly and literally within the language of the rule.

Respondent urges, however, that the rule as amended was only intended to apply when the premature notice of appeal can be reasonably interpreted to describe the judgment subsequently entered, and cannot be used when the premature notice of appeal describes an order which is itself nonappealable. In the instant case the premature notice of appeal did state that the appeal was from the order sustaining the demurrer and there is no language in the notice that can be interpreted to refer to the judgment subsequently entered.

We do not agree with respondent. There may be many situations where a notice of appeal from a nonappealable order cannot and should not be treated to be a notice of appeal from a judgment subsequently entered. In many situations there might be doubts as to just what the appellant was seeking to have reviewed. But there is no doubt in the instant case. Clearly, the appellant was seeking to have reviewed the propriety of the order sustaining the demurrer without leave to amend. In fact, he so stated in the notice of appeal. He should have waited until a judgment was entered. But by incorrectly stating that he was appealing from the order instead of from the judgment, he should not be precluded from securing a review of what all concerned knew he was seeking to have reviewed. No one was misled. No prejudice to the respondent appears. Respondent is simply trying to take advantage of a mistake made by appellant. While respondent is not to be censured because of making this attempt, this court should not aid respondent unless compelled to do so by controlling principles of law. Even before 1951 this court held that an incorrect designation of the order appealed from and a wrong date would not invalidate a notice of appeal. Holden v. California Emp. Stabilization Comm., 101 Cal.App.2d 427, 225 P.2d 634.

There is case authority to support the position here taken. In Smith v. Smith, 126 Cal.App.2d 194, 272 P.2d 118, the trial court on May 20, 1953, sustained a demurrer. Notice of appeal from that order was filed July 10, 1953. The judgment was not entered until October 15, 1953. The court very briefly disposed of the point here involved with the following comment (126 Cal.App.2d at page 195, 272 P.2d at page 119):

> "Since no appeal lies from an order sustaining demurrer [citing a case], we interpret the notice of appeal as intended to take an appeal from the judgment as that is what the parties have assumed."

It is true that there is contrary authority. In Futlick v. F. W. Woolworth Co., 149 Cal.App.2d 296, 308 P.2d 405, 406, the factual situation was precisely like the situation here presented and also similar to that presented in the Smith case, supra. The appellate court dismissed the appeal, holding that since the order sustaining the demurrer was not appealable "this court must therefore dismiss the appeal." The court made no reference to Rule 2(c), and did not refer to the prior case of Smith v. Smith, supra. It placed its main reliance on the case of Schmidt v. Townsend, 103 Cal.App.2d 185, 229 P.2d 488, quoting from that case at some length. But the Schmidt case was decided under Rule 2(c) as it read prior to the 1951 amendment to that rule. The court was careful to point out that the "January, 1951, amendments to Rule 2(c) are not applicable to this case." (103 Cal.App.2d at page 187, 229 P.2d at page 489.) For these reasons the Futlick case cannot be considered determinative of the present motion.

It is our opinion that Rule 2(c) is here applicable. Exercising the discretion conferred on this court by that rule, we therefore hold that the notice of appeal from the order sustaining the demurrer should be treated as a notice of appeal from the judgment subsequently entered on September 6, 1957.

[3] Respondent next contends that the appeal has been abandoned. It is true that on November 13, 1957, the plaintiff, under Rule 19(a) filed an abandonment of the appeal. That rule provides that at any time before the filing of the record in the reviewing court the appellant may file with the county clerk an abandonment of the appeal. Such filing "shall operate to dismiss the appeal and to restore the jurisdiction of the superior court." Thereafter, on November 22, 1957, appellant moved to vacate the abandonment of the appeal. It is averred by appellant in the accompanying affidavit that the abandonment was filed after a search of the file had failed to disclose the existence of the judgment of September 6, 1957, and in the belief, based upon reasonable grounds fully set forth in the affidavit, that no judgment had been entered. This is substantiated by the fact that appellant convinced the trial court that no such judgment had been entered because the trial court entered a second judgment. Then when it was discovered a prior judgment had been entered appellant immediately moved to vacate the abandonment of his first appeal. The trial court obviously believed that the abandonment had been filed under a reasonable misapprehension and because of excusable neglect because, on December 4, 1957, it entered its minute order granting the motion to vacate. This minute order recites that "the Court having fully considered same and being duly advised in the premises, orders that said motion to vacate abandonment of appeal be and the same is hereby granted." By so vacating the abandonment, jurisdiction of the appeal was revested in the appellate court.

[4, 5] Respondent contends that the notice of appeal filed November 14, 1957, from the judgment of November 13, 1957, operated to deprive the trial court of jurisdiction over the proceeding so that it had no power to vacate the abandonment of the appeal taken from the order of July 12, 1957, citing Kalmus v. Kalmus, 103 Cal. App.2d 405, 230 P.2d 57. But while it is true that when a case is pending in the ap-

pellate court the trial court is without jurisdiction to vacate the judgment, that rule is not here applicable. The judgment of November 13, 1957, was a nullity. A judgment had already been entered on September 6, 1957. The notice of appeal from that second judgment was also null and void. In November of 1957 the only thing pending was an appeal from the order of July 12, 1957, which we have interpreted as an appeal from the judgment of September 6, 1957. The abandonment revested jurisdiction of that appeal in the trial court. Thus, the trial court had jurisdiction to vacate the abandonment because it still had jurisdiction of the appeal. As already held, such actions revested the jurisdiction of this court.

The motion to dismiss the appeal is denied.

BRAY and FRED B. WOOD, JJ., concur.



158 Cal.App.2d 685

Edith HARVEY, Plaintiff and Respondent,

v.

George H. WHYTE, Joe Pepi, Mike Levin, and Allied Building Supply Co., a California Corporation, sued herein as Doe I, Defendants,

George H. Whyte, Appellant.

Civ. 22547.

District Court of Appeal, Second District, Division 2, California.

March 26, 1958.

Action in the nature of a creditor's bill to enforce judgment against personalty belonging to judgment debtor corporation sold at execution sale to enforce judgment against principal stockholder of corporation. The Superior Court of Los Angeles County, Roger Alton Pfaff, J., rendered judgment for plaintiff, and purchaser at execution sale appealed. The District Court of Appeal, Herndon, J., held, inter alia, that action was not an improper collateral attack on execution sale and was not barred by laches.

Judgment affirmed.

1. Corporations ⇐548(10)

In action in nature of creditor's bill to enforce money judgment against personalty of judgment debtor corporation sold under execution issued on judgment against principal stockholder of corporation, amount recoverable included interest on plaintiff's judgment from date of entry. West's Ann.Code Civ.Proc. § 720.

2. Interest ⇐39(3)

All final judgments for recovery of money bear interest from date of entry.

3. Corporations ⇐548(1)

Action in nature of creditor's bill commenced in September of 1954 to enforce judgment against personalty of judgment debtor corporation sold in October 1951 under execution issued on judgment against principal stockholder of corporation was not barred by "laches," though two-year statute of limitations had run against action on levying officer's bond for wrongful execution sale. West's Ann.Code Civ.Proc. §§ 339, 720.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

4. Equity ⇐72(1)

Delay alone does not constitute "laches," in absence of resultant injury or prejudice.

5. Execution ⇐271, 287

Rule of caveat emptor applies to execution sales, and purchaser at such sale is chargeable with notice that he acquires no better title than judgment debtor had and he cannot recover from levying officer because of any defect in title.

6. Execution ⇐103
Judgment ⇐518

Action in nature of creditor's bill to enforce judgment against personalty of

judgment debtor corporation sold under execution issued on judgment against principal stockholder of corporation was not an improper collateral attack upon judgment against stockholder or upon execution to enforce such judgment. West's Ann.Code Civ.Proc. § 720.

7. Execution ⇐262

Sale of personalty belonging to corporation under execution issued on judgment against principal stockholder of corporation did not affect corporation's title to such personalty.

8. Corporations ⇐548(1)

That judgment against corporation was not rendered until after personalty belonging to corporation had been sold under execution issued on judgment against principal stockholder of corporation did not preclude maintenance of action in nature of creditor's bill to enforce judgment against corporation against personalty sold at execution sale to enforce judgment against stockholder. West's Ann.Code Civ.Proc. § 720.

9. Judgment ⇐847

Payment of adequate consideration for assignment of judgment against corporation for attorneys' fees was not a prerequisite to enforcement of judgment by assignee for collection purposes only by action in nature of creditor's bill to enforce judgment against personalty of judgment debtor corporation sold under execution issued on judgment against principal stockholder of corporation. West's Ann.Code Civ.Proc. § 720.

10. Assignments ⇐126

Ordinarily, defense that assignment was made without consideration cannot be raised by debtor in action by assignee.

11. Assignments ⇐132

Issue as to adequacy of consideration for an assignment can properly arise only where there is some substantial question concerning validity of assignment or assignee's ownership.

Roland Maxwell, Paul H. Marston, and Richard W. Olsen, Pasadena, for appellant.

Roy B. Woolsey, Los Angeles, for respondent.

HERNDON, Justice.

Respondent is the assignee of a money judgment rendered on December 20, 1951, against Allied Building Supply Co., a corporation, hereafter called "the corporation." Appellant is the purchaser of certain property at an execution sale held on October 18, 1951, to enforce a judgment rendered against one Lee H. Stroble in an unrelated action entitled "Ennis v. Stroble". The property so purchased by appellant actually was owned by the corporation and not by the judgment debtor Stroble. Both appellant and the marshal who conducted the sale had been so informed prior to the sale.

Respondent brought the instant action in the nature of a creditor's bill resting appellant's liability on the factual premise that appellant held property of the corporation, respondent's judgment debtor, and claimed it adversely. This action invokes section 720 of the Code of Civil Procedure, which so far as here material provides: "If it appears that a person * * * alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the judgment creditor may maintain an action against such person * * * for the recovery of such interest or debt; * * *"

Stroble was the principal stockholder of the corporation, which became inactive in 1951. Thereafter Stroble carried on a contracting business as an individual at the same address, using the fictitious name "Allied Building Supply Company". As above indicated, the Ennis judgment ran against Stroble individually whereas respondent's judgment ran against the corporation. Immediately before the marshal commenced the execution sale pursuant to a writ issued under the Ennis judgment, Stroble announced to all persons present

the fact that none of the property on the premises belonged to him but was the property of the corporation. Nevertheless, the marshal proceeded with the sale and appellant purchased certain items of the personal property for the sum of $626.50. There was testimony at the trial of the instant case that the property was actually worth from $12,000 to $25,000.

Appellant does not question the sufficiency of the evidence to support the finding of the trial court that the property which he purchased under the judgment against Stroble was not owned by Stroble, but was in fact the property of the corporation, respondent's judgment debtor. Neither does appellant question the fact that the value of said property clearly exceeded the amount of the instant judgment.

We find appellant's contentions on this appeal to be unsubstantial and wholly without merit. They are as follows: (1) That the judgment is erroneous in amount; (2) that respondent was guilty of laches; (3) that the instant action involves a collateral attack upon the execution sale at which appellant purchased the property; (4) that respondent could not properly attack the execution sale because her judgment was rendered after the sale; (5) that payment of an adequate consideration for the judgment was essential to respondent's right to recover in equity.

[1, 2] Appellant's assertion that the judgment is excessive in amount is not borne out by the record. The error in appellant's computation arises from his failure to add the amount of interest which accrued upon the original judgment between December 20, 1951, and September 29, 1952. All final judgments for the recovery of money bear interest from the date of entry. Mulligan v. Wilson, 94 Cal.App.2d 286, 292, 210 P.2d 526.

[3] Appellant's plea of laches clearly was not sustainable. The judgment sought to be enforced herein was rendered on December 20, 1951. Execution was levied against appellant upon all property of the corporation in his possession or under his control. Appellant made a negative response to the writ and it was returned *nulla bona* in May of 1953. This action was commenced in September of 1954. It is not contended that the action is barred by any applicable statute of limitations.

[4] Delay alone does not constitute laches. There must be present the additional element of resultant injury or prejudice. Kirkpatrick v. Tapo Oil Co., 144 Cal.App.2d 404, 412, 301 P.2d 274; Lubin v. Lubin, 144 Cal.App.2d 781, 794, 302 P.2d 49. The only claim of prejudice asserted by appellant is stated in his opening brief as follows: "The Statute of Limitations against a Sheriff or Marshal for a wrongful Execution Sale is two years. Code of Civil Procedure Section 339. Had the present action been filed within the two years, the defendant could have cross-complained or joined the Marshal in this action, seeking to make him liable on his bond."

[5] The fallacy in this argument is self-evident. The purchaser at an execution sale cannot recover from the levying officer because of any defect in title. Dreisbach v. Braden, 40 Cal.App. 407, 181 P. 262. A purchaser at an execution sale is chargeable with notice that he acquires no better title than the judgment debtor has; the rule of *caveat emptor* applies with all its force to such sales. Noble v. Beach, 21 Cal.2d 91, 94, 130 P.2d 426; Anglo-California Trust Co. v. Oakland Railways, 193 Cal. 451, 468–469, 225 P. 452; Bullard v. McArdle, 98 Cal. 355, 357, 33 P. 193; 19 Cal.Jur.2d 571, Sec. 158. Since appellant could have had no cause of action against the marshal this claim of prejudice is clearly without foundation.

[6, 7] Appellant contends that the instant action constitutes a collateral attack upon the execution sale which cannot be maintained unless the sale is void on its face. Milstein v. Turner, 89 Cal.App.2d 296, 299, 200 P.2d 799, the only authority cited in support of this contention, does not sustain it. The cited case involved a collateral attack upon the judgment and upon the order for the issuance of the writ. Nothing of the kind is involved

here. There is no question here concerning the validity either of the judgment in "Ennis v. Stroble" or of the writ issued thereon. The evidence in this case simply showed that the property sold under the writ was owned not by Stroble but by the corporation. Hence, the title of the corporation was unaffected by the sale.

[8] Equally without merit is the contention that respondent's cause of action was defective because the judgment which she sought to enforce was rendered subsequent to the date of the execution sale at which appellant was the purchaser. We have here no problem of determining priorities among several executing creditors as was the situation in R. Walter & Company v. Bickham & Moore, 122 U.S. 320, 7 S.Ct. 1197, 30 L.Ed. 1185, the only authority cited by appellant in support of this contention.

[9–11] Finally, we must reject the meagerly argued contention that respondent's right to enforce the judgment was dependent upon pleading and proof that she paid an adequate consideration for it. The defense that an assignment was made without consideration is not one which ordinarily may be raised by the debtor in an action by the assignee. Caulfield v. Sanders, 17 Cal. 569, 572; Moore v. Waddle, 34 Cal. 145, 148–149; 4 Am.Jur. 296, 297. The issue as to the adequacy of the consideration for an assignment can properly arise only where there is some substantial question concerning its validity or concerning the assignee's ownership. 6 C.J.S. Assignments § 132, p. 1184. In the instant case there can be no question about the validity of the assignment. It is undisputed that respondent was and is an assignee for collection purposes only. The judgment which she here seeks to enforce represents a recovery for attorneys' fees rendered by respondent's assignor, who is her attorney in this action and on this appeal.

The judgment is affirmed.

FOX, P. J., and KINCAID, J. pro tem., concur.

R. W. AGNEW, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation, and Grover Wintz, Chief of the Electrical Division of the Department of Building and Safety of the City of Los Angeles, Defendants and Respondents.*

Civ. 22713.

District Court of Appeal, Second District, Division 1, California.

March 24, 1958.
Rehearing Denied April 22, 1958.
Hearing Granted May 21, 1958.

Suit by an electrical contractor, challenging the constitutionality of and to obtain an injunction restraining the defendants from enforcing the provisions of the Electrical Code of the City of Los Angeles. Judgment for the defendants in the Superior Court of Los Angeles County, Frank G. Swain, J., and the contractor appeals. The District Court of Appeal, White, P. J., held that the licensing of contractors is not a matter of state wide concern so as to preclude local regulations by chartered city; that the provisions of the Municipal Code are not unconstitutional as impinging upon the general laws; and fact that there could be prosecution and subsequent possible imprisonment for failure to pay the business license tax, did not constitute imprisonment for debt.

Judgment affirmed.

See also, 319 P.2d 400.

1. Municipal Corporations ⇐592(1)

While it was legislative intent to declare that licensing and regulation of contractors by the state should be the only licensing and regulation, such did not limit a local government from protecting property and life through the enforcement of local regulations as to quality and character of the installations. West's Ann.Bus. & Prof.Code, §§ 7000 et seq., 7110.

2. Licenses ⇐6(2)

A city has power to prescribe the quality of electrical materials and methods to be used for the installation thereof and for the inspection thereof and to collect proper fees therefor.

* Opinion vacated 330 P.2d 385.

3. **Municipal Corporations** ⇐592(1)

Provisions of the Electrical Code of Los Angeles respecting electrical installations, constituted a valid exercise of power by the city to establish and enforce local regulations as to the quality and character of installations by an electrical contractor who is licensed by state law and are not invalid on the ground that the general law has fully occupied the field. West's Ann. Bus. & Prof.Code, § 7000 et seq.; West's Ann.Const. art. 11, §§ 6, 8, 11.

4. **Municipal Corporations** ⇐592(1)

While a particular matter may be a state affair and subject to state regulation, it is not immune from local taxation for revenue purposes where the tax does not interfere with the field preempted by the state.

5. **Licenses** ⇐6(1)
Municipal Corporations ⇐592(1)

Power of Los Angeles to collect a license tax for revenue purposes was conferred upon it by the charter framed for its government, pursuant to the Constitution and such power is a "municipal affair" within the Constitution and cannot be withdrawn or abrogated by general laws enacted by the Legislature. West's Ann. Const. art. 11, §§ 6, 8.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affair".

6. **Licenses** ⇐11(5)
Municipal Corporations ⇐592(1)

The State Contractors Licensing Act was not intended to diminish a city's power to tax for revenue purposes, but was enacted primarily to protect the general public against imposition respecting structural improvements to real property where special skills are required, and its licensing requirements were adopted for the same purpose. West's Ann.Bus. & Prof.Code, § 7000 et seq.

7. **Municipal Corporations** ⇐592(1)

Requirement of Electrical Code of Los Angeles that contractor will furnish the city with his license registration certificate number, is not invalid as impinging upon the provisions of the general laws licensing electrical contractors. West's Ann.Bus. & Prof.Code, § 7000 et seq.

8. **Constitutional Law** ⇐83(3)

Prosecution and subsequent possible imprisonment for failure to pay business license tax imposed by the city of Los Angeles is not violative of the Constitution as constituting an imprisonment for debt. West's Ann.Bus. & Prof.Code, § 7000 et seq.; West's Ann.Const. art. 1, § 15.

9. **Licenses** ⇐5½

Municipalities have power to impose business license taxes for revenue purposes and to make a violation thereof a misdemeanor.

R. W. Agnew, in pro. per.

Roger Arnebergh, City Atty., Ralph J. Eubank, Deputy City Atty., Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff is an electrical contractor duly licensed by the state pursuant to the provisions of the Business and Professions Code. As was said in Agnew v. City of Los Angeles, 110 Cal.App.2d 612, 616, 243 P.2d 73, 75:

"The Business and Professions Code, div. 3, ch. 9, sometimes called the 'Contractors' License Act,' creates a 'Contractors' State License Board,' referred to as the board, Bus. & Prof.Code, § 7000; defines those coming within the jurisdiction of the board, including electrical contractors, § 7026; prohibits any person from engaging in the business or acting in the capacity of a contractor without first having obtained a state license, and makes it a misdemeanor to do so, §§ 7028, 7030; provides for investigation and examination of applicants for license, § 7072; requires the payment of an application fee, annual renewal fees, and penalties, § 7137; makes elaborate provision for investigation of the acts of contractors, accusations against them, causes for disciplinary action, hearings, review, discipline, prosecution of vio-

lations of any law, and renewal or reissuance of suspended or revoked licenses, §§ 155, 7090–7122; and vests broad powers in the board relative to the licensing and regulation of contractors. §§ 7000–7145.

"Wilful or deliberate disregard and violation of the building laws of the state, or of any political subdivision thereof, constitutes a cause for disciplinary action. § 7110. Section 7071.5 provides that before reinstatement after disciplinary action the board may require the applicant to give a surety bond or make a cash deposit conditioned upon his compliance with the provisions of the Act. Every person injured by the unlawful acts or omissions of such contractor may maintain an action on the bond or a claim on the deposit."

This action was instituted by plaintiff, challenging the constitutionality of and to obtain an injunction restraining defendants from enforcing against him the provisions of Sections 93.0201, 93.0204, 93.0205(2), 93.0501, 93.0504 and 93.0505 of the Electrical Code of the City of Los Angeles, and Sections 11.00, 21.03, 21.06, 21.08, 21.09, 21.12(a), 21.12(b), 21.188 and 21.190 of the Municipal Code of defendant city.

Section 93.0201 provides that no person shall install, alter, reconstruct or repair any electric wiring regulated by defendant city's Electric Code without a permit from the Department of Building and Safety (hereinafter referred to as the Department).

Section 93.0204 requires that an application for such permit shall be made to the department on a form furnished by the latter. The required information consists of a description of the proposed electric wiring, plans, and specifications and a suitable diagram, and "such additional information as may be considered necessary by the department for the proper enforcement of the provisions of this Code".

Section 93.0205 enumerates those to whom permits may be issued, including (Section (a)–2) Electrical contractors "registered" with the department.

Section 93.0501 is entitled "Contractor Registration" and provides in Subdivision (a) that "Before any contractor licensed by the State of California shall be issued any permits, he shall be registered with the Department. The applicant shall provide sufficient information to enable the Department to determine if there is compliance with all applicable City and State Laws.

"(b) To register as a contractor, the responsible managing officer or responsible managing employee shall personally appear at an office of the Department and provide the following information:

"1. The business name and address as listed by the Contractors State License Board; and

"2. The names of the owners or officers of a corporation; and

"3. The Contractors State License with the number and classification; and

"4. The signature of the responsible managing officer or the responsible managing employee as listed by the Contractors State License Board; and

"5. License Tax Registration Certificate number.

"(c) The registrant shall notify the Department within 10 days of any change in the facts required by Subsection (b).

"(d) No registration shall authorize any person to do work which is not within the specific classification of the registration.

"(e) Every such registration shall expire on June 30 of each year."

Section 93.0504 defines the regulations to which the foregoing certificate of registration shall be subject:

"1. Certificates of Registration shall not be transferable.

"2. Certificates of Registration shall become void 30 days after the holder who qualified by examination or experience ceases to have effective control over the work performed.

"3. Every Certificate of Registration shall expire on December 31 of each year

unless sooner revoked or suspended by the Board. A Certificate of Registration may be renewed within 30 days after expiration without examination upon the payment of the annual registration fee as prescribed in this Code.

"4. The Board may revoke or suspend any Certificate of Registration for failure, refusal, or neglect of the holder to comply with the provisions of this Code or any provision of this Code or any provision of Section 98.00 of the Municipal Code as set forth therein.

"5. No Certificate of Registration shall authorize any person to do work which is not within the specific classification of the Certificate of Registration."

Section 93.0505 has no application to the issue presented on this appeal.

Before proceeding to a discussion of appellant's attack on the provisions of the Municipal Code, we shall give consideration to his contention that the foregoing sections of the Electrical Code of defendant city are in conflict with the general laws relating to state licensed contractors.

Appellant contends that the licensing of contractors throughout the state is a matter of general and statewide concern and is not a municipal affair that concerns only the inhabitants of a chartered city and which is subject to local regulations. That the general law has fully occupied the field; that his license from the state grants him permission to conduct his business at any place within the state and that this permission cannot be circumscribed by local authorities.

Appellant relies heavily upon the cases of Horwith v. City of Fresno, 74 Cal.App. 2d 443, 168 P.2d 767; City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32; Collins v. Priest, 95 Cal.App. 2d 179, 212 P.2d 269; Lynch v. City of Los Angeles, 114 Cal.App.2d 115, 249 P.2d 856; Agnew v. City of Los Angeles, 110 Cal.App.2d 612, 243 P.2d 73; and Agnew v. City of Culver City, 147 Cal.App.2d 144, 304 P.2d 788.

It is undeniably true, as urged by appellant, that these cases support his claim that while Article XI, section 11 of our State Constitution authorizes a city to "make and enforce within its limits all such local, police, sanitary and other regulations", the constitutional provision restricts such power to regulations "not in conflict with general laws". And the cited cases sustain appellant in his position that a local ordinance is in conflict with general law if it attempts to impose additional requirements in a field which is fully occupied by the general law.

[1] However, the foregoing cases point out that while it was clearly the intention of the legislature to declare that the licensing and regulation of contractors by the state shall be the only licensing and regulation in the state, nevertheless, as was stated in Horwith v. City of Fresno, supra, 74 Cal.App.2d at page 449, 168 P.2d at page 770, "This does not limit the right of local governmental agencies to protect property and life through the enforcement of local regulations as to the quality and character of the installations. The right to enforce local ordinances is still in the hands of municipalities through the power of inspections and permits".

Conceding that the general laws were intended to be the only licensing and regulation of contractors in the state nevertheless, as declared in Agnew v. City of Los Angeles, supra, 110 Cal.App.2d at page 616, 243 P.2d at page 75, "This does not limit the right of a city or county to protect life and property by the enforcement of local regulations as to the character and quality of electrical installations. (Bus. & Prof.Code, sec. 7110.)".

The question then arises, do the challenged provisions of the Electrical Code of defendant city attempt to provide the means by which an electrical contractor with a state license may be denied the right to contract or work in the City of Los Angeles or do they come within the category of valid enactments by a municipality designed to protect property and

life through the medium of local regulations as to the quality and character of electrical installations? We are inclined to the latter view.

[2] Appellant concedes that, "the city has the power to prescribe the quality of electrical materials and the methods to be used for the installation of that material, and of inspection concerning the electrical installation (save in the exceptions announced in Hall v. City of Taft, 47 Cal.2d 177 [302 P.2d 574]), and the right to collect reasonable and proper fees for inspection, and for the purpose of receipting for such inspection fees * * *"

While appellant objects to the fact that the ordinance denominates the requirements of the Electrical Code as "Permits", it is at once manifest that if the "permit" provisions of the ordinance (Sections 93.0201, 93.0204, and 93.0205(2)) relate to the quality and character of electrical installations, then such provisions are valid irrespective of the particular name by which they are designated.

[3] If defendant city is to protect itself against electrical installations inimical to life and property then surely it has a right to know who contemplates such installations. To us it clearly appears that is all Section 93.0501 requires. It provides that the state licensed contractor or his representative shall furnish the department with five simple and purely informational facts within the applicant's knowledge, and which are hereinbefore narrated. Except for the requirement that the contractor shall furnish his "License Tax Registration Certificate number", (a business license tax, the validity of which will hereafter be considered), Section 93.0501 and its related sections here under attack, merely provide a procedure whereby the contractor can reasonably secure a permit and defendant city and its department be assured that the applicant is a person lawfully authorized by the state to do the electrical work in a manner that will not endanger the life and property of residents of the municipality. No fee is required, no bond exacted, no examination of contractor is demanded, no investigation is conducted. To summarize, no regulatory measures previously condemned in the cases relied upon by appellant are present in the provisions of the electrical ordinance here under attack. We therefore conclude that the challenged Electrical Code provisions constitute a valid exercise of the power of defendant city to establish and enforce local regulations as to the quality and character of installations by an electrical contractor who is licensed by state law.

We come now to a consideration of appellant's contention that certain sections of the Municipal Code of defendant city (Article I, chapter 2) entitled "Licenses and Sales Taxes" are unconstitutional because they impinge upon the general laws that have preempted the field of licensing electrical contractors.

The following will serve as an epitome of the general scheme of the taxing legislation here under consideration. A Los Angeles city license tax must be paid in advance annually by every person who is engaged within the city in a great variety of business activities. (Section 21.03.) Contractors and independent contractors are among the businesses specified. (Sections 21.188, 21.190.) In the case of these businesses the tax is measured by annual gross receipts commencing with a license fee in the sum of $12 per calendar year for the first $12,000 or less of gross receipts. Upon the payment of the tax the City Clerk issues a "License Tax Registration Certificate" which remains in force and effect thereafter until suspended or revoked for the licensee's failure to pay such tax as may validly accrue in each subsequent year. (Section 21.08(b).) Such revocation or suspension can be effected only after appropriate notice and hearing. (Section 21.12.)

[4–6] It is now well established that while a particular matter may be a state affair and subject to state regulation it is not immune from local taxation for revenue purposes where the tax does not inter-

fere with the field preempted by the state (In re Galusha, 184 Cal. 697, 699, 195 P. 406; City of San Mateo v. Mullin, 59 Cal. App.2d 652, 654, 139 P.2d 351). The power of the City of Los Angeles to collect a license tax for revenue purposes was conferred upon it by the charter framed for its government, pursuant to the provisions of Section 8 of Article XI of our State Constitution. Such power is a "municipal affair" within the meaning of that phrase as used in Section 6 of Article XI of the Constitution, and therefore, cannot be withdrawn or abrogated by general laws enacted by the legislature (Ex Parte Braun, 141 Cal. 204, 213, 74 P. 780; Ainsworth v. Bryant, 34 Cal.2d 465, 469, 211 P.2d 564). Therefore, it cannot be said that the State Contractors Licensing Act (Bus. & Prof. Code, Sec. 7000 et seq.) was intended to have the effect of diminishing defendant city's power to tax for revenue purposes. The contractors license law was enacted for the basic purpose of protecting the general public against imposition respecting structural improvements to real property in cases where special skill, training and ability are required, and its licensing requirements were adopted for the same purpose (Bowline v. Gries, 97 Cal.App.2d 741, 743, 218 P.2d 806; Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 632, 204 P.2d 37).

Answering the same contention advanced by appellant herein, this court said in Franklin v. Peterson, 87 Cal.App.2d 727, 731, 197 P.2d 788, 790, "Conceding that a license requirement cannot be imposed upon a lawyer, nor his business be regulated by ordinance, the tax provided for in the ordinance here under consideration is levied upon the business of practicing law, rather than upon a person because he is an attorney at law. A license to practice law does not carry with it exemption from taxation." And, at page 732 of 87 Cal.App.2d, at page 790 of 197 P.2d we further stated, "The Los Angeles ordinance does not attempt to regulate the professions, business or occupations which are subject to the tax. It provides only for a license for revenue purposes, and is not a regulatory measure affecting the business or profession so taxed." The ordinance under consideration in the case just cited was the same Section 21.190 of the Los Angeles Municipal Code that is in issue here. And, the case was cited with approval by the Supreme Court in City of Los Angeles v. Rancho Homes, Inc., 40 Cal.2d 764, 771, 256 P.2d 305.

Since defendant city's license tax registration certificate, as stated therein, "* * * signifies that the person named on the face hereof has fulfilled the requirements of section 21.03 L.A.M.C., by registering with the City Clerk for the purpose of paying license taxes for the classification of business for which the certificate is issued * * *", it cannot be said that it purports either to authorize or prohibit anything in connection with the licensee's conduct of a lawful business in a lawful manner, nor does it seek to regulate the activities of a contractor in a field fully occupied by the state.

[7] The requirement of the Electrical Code of defendant city (Section 93.0501, supra) that the contractor shall furnish defendant city with his "License Registration Certificate number" does not therefore, impinge upon the provisions of the general laws licensing electrical contractors.

[8] Appellant next contends that if defendant city is empowered to impose a business license tax, it cannot enforce the provisions thereof by "criminal sanctions", but is restricted to recovering the amounts thereof in a civil action. Section 11.00 of defendant city's Municipal Code provides, among other things, that a violation of its terms may be prosecuted and punished as a misdemeanor.

We are not in accord with appellant's contention that such prosecution and subsequent possible imprisonment for failure to pay the business license tax, is a violation of Section 15, Art. I of our State Constitution in that it constitutes imprisonment for debt.

As was said in In re Nowak, 184 Cal. 701, 708, 195 P. 402, 405, "Ordinance No. 39,600 (New Series) provides that this tax

may be recovered in a civil action as a debt. It also provides that the act of doing business without the payment of the tax shall be a crime, and shall be punishable as such. For the commission of this crime petitioner has been imprisoned. This imprisonment does not violate his constitutional right not to be arrested for debt."

And in In re Diehl, 8 Cal.App. 51, 55, 96 P. 98, 100, we find the following pertinent language: "The misdemeanor consists in a *refusal to obey the provisions of the ordinance*, and the fine authorized to be imposed upon conviction is not intended as a payment of the license tax, but as a punishment for defying the commands of the ordinance."

To us there appears to be no inherent difference between carrying on the business of a state-licensed electrical contractor and carrying on any other business pursuit (In re Johnson, 47 Cal.App. 465, 469, 190 P. 852).

"The levy *and collection* of taxes by a city having a charter under our Constitution is a municipal affair. The power is broad, being limited *only* by the charter and the Constitution." City of Glendale v. Trondsen, 48 Cal.2d 93, 98, 308 P.2d 1, 3. (Emphasis added.) It cannot therefore, be said that the State Contractors Licensing Act in any way limits or restricts the constitutional and charter right of defendant city to collect a business license tax for revenue purposes.

The case of Sivertsen v. City of Menlo Park, 17 Cal.2d 197, 109 P.2d 928, involved a state-licensed painting contractor who sought to enjoin a criminal prosecution against him for failure to pay a business license tax. A reading of pages 198 and 199 of 17 Cal.2d, at pages 929 and 930 of 109 P.2d of that case reveals a strikingly similar factual background in that case to the one now engaging our attention. Since the issue before the Supreme Court was the correctness of the trial court's order dismissing the action after a general demurrer was sustained, it is implicit in the decision of the Supreme Court that a proceeding to enjoin the criminal prosecution of a state licensed contractor for failure to pay a municipal business license tax, cannot be maintained on any theory, including the one advanced herein. Otherwise the order sustaining the general demurrer would have been erroneous.

We perceive no invasion upon the general law, which is the only "regulation" authorized for state licensed contractors, by a prosecution for failure to pay a business license tax, as no such invasion would be present in a prosecution of a state licensed contractor for violation of a municipal ordinance prohibiting the blocking of streets with trucks, barriers or other paraphernalia used in the contracting business, without first obtaining a permit from the municipality so to do, or of a state licensed contractor who established and conducted his business in violation of a municipal ordinance, restricting the area to single family residences.

[9] And finally, an unbroken line of decisions in this state has consistently sustained the power of municipalities to impose business license taxes for revenue purposes, and making the violation thereof a misdemeanor. Among such cases, see City of Los Angeles v. Belridge Oil Co., 42 Cal. 2d 823, 271 P.2d 5; City of Los Angeles v. Rancho Homes, Inc., supra; In re Nowak, supra; In re Galusha, supra; Ex parte Braun, supra; City of Los Angeles v. Southern Pacific Railroad Co., 61 Cal. 59; Rexall Drug Co. v. Petersen, 113 Cal. App.2d 528, 248 P.2d 433; Franklin v. Peterson, supra.

For the foregoing reasons, the judgment is affirmed.

FOURT, J., and DRAPEAU, J. pro tem., concur.

158 Cal.App.2d 801

Loraine D. HIRTZ, Plaintiff and Appellant,

v.

Robert C. PORTER and San Carlos Feed and Fuel Company, a corporation, Defendants and Respondents.

Civ. 17428.

District Court of Appeal, First District, Division 2, California.

March 28, 1958.

Action for injuries sustained by plaintiff when her automobile was struck from rear by defendant's truck. The Superior Court, County of San Mateo, A. R. Cotton, J., rendered judgment in favor of defendant and truck driver, and plaintiff appealed. The District Court of Appeal, Draper, J., held that instructions that burden of proof was met as to contributory negligence if it were shown by evidence regardless of who introduced it, and that if plaintiff were guilty of slightest amount of negligence which proximately contributed to accident verdict must be for defendant were erroneous, but not prejudicial in view of other instructions.

Affirmed.

1. Automobiles ⇐246(26, 60)
Trial ⇐296(4)

In action for injuries sustained by plaintiff when her automobile was struck from rear by defendant's truck, instructions that burden of proof was met as to contributory negligence if it were shown by evidence regardless of who introduced it and that if plaintiff were guilty of slightest amount of negligence which proximately contributed to accident verdict must be for defendant were erroneous, but not prejudicial in view of other instructions.

2. Automobiles ⇐246(14)
Trial ⇐296(3)

In action for injuries sustained by plaintiff when her automobile was struck from rear by defendant's truck, instruction that defendant was not required to anticipate that plaintiff might violate the law, if jury found that plaintiff did, erroneously failed to advise that assumption that another would obey law is available only to one who himself is obeying the law but was not prejudicial in view of other instructions.

3. Automobiles ⇐172(7)

A driver is not necessarily guilty of negligence because his vehicle strikes the rear of another vehicle.

Low & Duryea, San Francisco, for appellant.

Ropers & Majeski, Redwood City, for respondents.

DRAPER, Justice.

This is an action for damages for personal injuries sustained by plaintiff when her automobile was struck from the rear by a cement mixer truck of defendant corporation, driven by defendant Porter. The two vehicles were in the center lane of three northbound lanes on El Camino Real in Redwood City. The accident occurred in the early afternoon of a clear day in August. There was evidence from which the jury could conclude that plaintiff stopped her car rather suddenly some 25 feet short of the crosswalk on James Avenue, first applying her brakes at a time when the signal for El Camino traffic was still green. Jury verdict was in favor of defendants, and plaintiff appeals from judgment thereon.

[1] Plaintiff asserts error in the giving of each of three instructions. Two of the challenged instructions read as follows:

"* * * Ordinarily, the burden rests upon the defendant to prove contributory negligence, the exception being where such contributory negligence appears from the testimony offered on behalf of the plaintiff. In other words, the burden of proof is met as to contributory negligence if it is shown by the evidence in the case

regardless of who introduces the evidence."

and

"If you find from the evidence that the plaintiff was guilty of the slightest amount of negligence which proximately contributed to the accident in question and the resulting damage, your verdict must be for the defendant."

Precisely the same instructions are fully considered in Hickenbottom v. Jeppesen, 144 Cal.App.2d 115, 122–123, 300 P.2d 689, and are held to be erroneous, although not prejudicially so. Here the jury was otherwise given full and correct instructions as to the burden of proof of contributory negligence and, as in Hickenbottom, was properly instructed as to the definition of contributory negligence and proximate cause. Plaintiff emphasizes that the instructions are the same as those presented by the same counsel in Hickenbottom. However, the decision on appeal in that case was not rendered until after trial of the case at bar. Thus no inference of calculation or misconduct can be drawn from that disapproval of the instructions here offered.

Plaintiff also assigns as error the giving of the following instruction:

"I instruct you that under the law a person operating a motor vehicle is not bound to anticipate that another person operating a vehicle will violate the law; and in this case I instruct you that the defendant was not required under the law to anticipate that plaintiff might violate the law, if you find that plaintiff did."

[2] This instruction is erroneous in failing to advise that the assumption that another will obey the law is available only to one who himself is obeying the law. Fowler v. Allen, 49 Cal.App.2d 214, 219, 121 P.2d 41. However, the error is not prejudicial where, as here, a proper instruction (BAJI 138.1) was given. Read as a whole, the instructions were not misleading upon this point, and no prejudice appears. Fowler v. Allen, supra; Freeman v. Nickerson, 77 Cal.App.2d 40, 61, 174 P.2d 688; Powers v. Shelton, 74 Cal.App.2d 757, 763, 169 P.2d 482.

[3] Plaintiff's contention that the three errors are prejudicial is based upon her view that the evidence of negligence is very strong, and that of contributory negligence very weak. But a driver is not necessarily guilty of negligence because his vehicle strikes the rear of another. Karageozian v. Bost, 139 Cal.App.2d 874, 877, 294 P.2d 778. In view of the correct and detailed instructions also given upon the subject matter of each of the three erroneous instructions, we are satisfied that the instructions as a whole did not mislead the jury, and that the cumulative effect of the errors was even less than in Hickenbottom v. Jeppesen, supra, 144 Cal.App.2d 115, 300 P.2d 689.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



158 Cal.App.2d 718

GUY S. ATKINSON CO., a corporation, and J. E. Kettler, doing business as North Chester Heights Development Company, Plaintiffs and Respondents,

v.

HIGHLAND PARK PUBLIC UTILITY DISTRICT, a body corporate, and Ray W. Iness, Kenneth Z. Leimbach, Charles B. Anderson and Sam C. Baker, Directors thereof, Defendants and Appellants.

Civ. 5647.

District Court of Appeal, Fourth District, California.

March 26, 1958.

Action for declaratory relief and for injunction against public utility district, which was a political subdivision of state, brought by plaintiffs, who were engaged in

development of subdivision on a tract of land, which was annexed to defendant district, which passed a resolution requiring a connection charge of $175 for each new house in the tract connected for water service. From adverse judgment of the Superior Court, Kern County, Gordon L. Howden, J., the utility district appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that such charge was confiscatory, unreasonable, unlawful and void but that the trial court did not have power to prescribe how water rates should be fixed.

Judgment affirmed as modified.

1. Declaratory Judgment ⇐345

In action for declaratory relief and for injunction against public utility district, which was political subdivision of state, brought by plaintiffs, who were engaged in development of subdivision on tract of land, which was annexed to defendant district, which passed a resolution requiring a connection charge of $175 for each new house connected for water service in the tract, evidence sustained finding that such charge was confiscatory, unreasonable, unlawful and void. West's Ann. Public Utility Code, § 15501 et seq.

2. Waters and Water Courses ⇐203(12)

In action against public utility district, which was political subdivision of state, for declaratory relief and for injunction brought by plaintiffs, who were engaged in development of housing subdivision on tract of land which was annexed to district, trial court had power to determine whether connection charge of $175 for each new house for water service was unreasonable and unfair, but it did not have power to prescribe how rate should be fixed. West's Ann.Public Utility Code, § 15501 et seq.

Baker, Palmer, Wall & Raymond, Bakersfield, for appellants.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondents.

MUSSELL, Justice.

This is an action for declaratory relief and for an injunction.

Defendant Highland Park Public Utility District is a political subdivision of the State of California organized under the provisions of the Public Utility District Act (Division 7, Public Utilities Code).

Plaintiffs were engaged in a joint venture in the county of Kern, which venture consisted of the development of a housing subdivision on a tract of land in what was known as Highland Manor and which tract was annexed to the defendant district prior to the time this action was filed.

On October 10, 1947, the defendant district passed a resolution providing for the purchase by the district of the complete water system, wells and pumps owned and then being operated by the Highland Manor Water Company, a corporation, in said Highland Manor. The purchase price of this system was $35,000, which sum was to be raised by a bond issue of the district and the funds required to pay off the indebtedness incurred by such bond issue were to be raised from the revenue derived from the operation of the water system in the territory proposed to be annexed, or by taxation of the property within the said territory. This resolution further provided that in the event that extensions of the water system now in the territory proposed to be annexed are necessary to serve the inhabitants thereof, the cost of such extensions shall be borne by the owners or subdividers of the property to which such water system is extended; that the Highland Park Public Utility District will reimburse such owners or subdividers the cost of such extensions to the said water system in the ratio that each connection bears to the total number of connections which may be required to serve the parcel of land within such extended area, such reimbursement being made at the time of such connections; that the rates, rentals and charges for the furnishing of water to the inhabitants of the territory proposed to be annexed shall be the same as the

rates, rentals and charges for the furnishing of water within the balance of such district.

On October 15, 1947, the board of directors of the Highland Park Public Utility District passed another resolution approving the annexation of Highland Manor and made it a part of the Highland Park Public Utility District, subject to the conditions set forth in the said resolution of October 10, 1947.

Subsequent to the completion of the annexation proceedings and the acquisition of the water system in Highland Manor by the defendants, the plaintiffs, under supervision of defendants, caused a system of water to be installed in their tract in the annexed territory, expending therefor the sum of $11,987.38, and the mains were connected by defendant district to its water system. Thereafter plaintiffs notified defendant district that they desired reimbursement from it for the cost of extending the water mains into their tract. The defendant district then adopted a resolution requiring a connection charge of $175 for each new house connected for water service in that tract and requiring that said payment be made at the same time application for water service was made.

Plaintiffs commenced the present action to enjoin the defendants from taking such legislative action by fixing a connection charge against the consumers and also for the purpose of collecting from the district the costs of the extensions to the system installed by plaintiffs. The parties stipulated at the trial that the only issue before the court was whether the connection charge which the defendants fixed through its board of directors was a reasonable one and the trial was held on that basis. The court found, inter alia, that plaintiffs connected eleven houses to defendant district's system for which connection the district made no charge; that on March 12 the defendant company shut off all the water to all the houses in said tract except the eleven houses occupied by buyers and refuses to furnish water to the remaining houses in said tract until a connection charge of $175 a house has been paid; that on March 7, 1956, the board of directors of the defendant district adopted a resolution which for the first time established a connection charge for any house in the district in the sum of $175, and that prior thereto there was never any connection charge for the connection of any house in the district to the water system of the defendant established by resolution in excess of the sum of $5; that the proposed connection charge of $175 per unit bears no relation to the actual costs of turning the water into the houses of the plaintiffs; that said charge was designed to recoup the rebate which the defendant district by Ordinance 12 is obliged to make to plaintiffs, and was designed by defendant district, and will in fact apply only to houses of plaintiffs in tract 1826; that said charge of $175 per house, if paid by plaintiff, will exact from him $11,375; that the proposed connection charge amounts to a tax or assessment for the purpose of raising funds for capital acquisition in the form of the distribution system on plaintiff's tract 1826; that what is or is not a reasonable rate for such a connection charge is a matter which in the first instance is delegated to the board of directors of the defendant district to be fixed by said board consistent with the actual cost of said district of the labor and material actually expended and reasonably necessary to cause the water to flow from the water mains theretofore installed in the street into the house to be connected thereto, but excluding from such connection charge all costs of any kind whatsoever to the district for the bringing of the water to the point where it is to flow from the said mains and into the houses connected thereto.

The court concluded, inter alia, "That the connection charge of $175 established by the defendant, Highland Park Public Utility District, by resolution of its Board of Directors adopted March 7, 1956, is confiscatory, unreasonable, unlawful and void, and said defendant district, its officers, servants, agents and employees, should be enjoined and restrained from collecting or attempting to collect the same."

Judgment was entered as follows:

"It Is Hereby Ordered, Adjudged and Decreed that the connection charge of $175.00 established by the defendant Highland Park Public Utility District, by resolution of its Board of Directors adopted March 7, 1956, is confiscatory, unreasonable, unlawful and void, and said defendant district, its officers, servants, agents and employees, should be and are enjoined and restrained from collecting or attempting to collect the same.

"It Is Further Ordered, Adjudged and Decreed that the defendant, Highland Park Public Utility District, and its Board of Directors, should be enjoined and directed, *or* or before December 1, 1956, to rescind and cancel said resolution of March 7, 1956.

"It Is Further Ordered, Adjudged and Decreed that the defendant, Highland Park Public Utility District and its Board of Directors should be and are hereby enjoined and directed on or before December 1, 1956, to adopt a connection charge consistent with the actual cost to said defendant district of the labor and materials actually expended and reasonably necessary to cause the water to flow from the water mains theretofore installed in the street, into the house to be connected thereto, but excluding from such connection charge all costs of any kind whatsoever to the district for the bringing of the water to the point where it is to flow from the said mains and into the houses connected thereto."

[1] The principal question to be here determined is whether the trial court's determination that the connection charge of $175 is confiscatory, unreasonable, unlawful and void is supported by the record.

In Durant v. City of Beverly Hills, 39 Cal.App.2d 133, 139, 102 P.2d 759, 763, the city council had fixed the rates to be charged for water service and one outside the city sought to secure service at the same rate charged for service within the city. The court said:

> "But, in the absence of any showing of any character that the charges were unreasonable, unfair or fraudulently or arbitrarily established, the trial court had no case for any relief to respondent. In short, the respondent has sought to substitute the court for the city council and have the court fix the charges which he should pay. The universal rule is that in these circumstances, the court is not a rate-fixing body, that the matter of fixing water rates is not judicial, but is legislative in character, and that the limit of its function and jurisdiction is to find, upon a proper showing, that the rates fixed are unreasonable and unfair. (Citations.) If upon such finding it is adjudged that the established rates shall not be collected, the court is not permitted to fix another and different rate, but this function must be left with the proper rate-fixing body."

In Nourse v. Los Angeles, 25 Cal.App. 384, 143 P. 801, the court held that the city of Los Angeles, under its charter had assumed the duty of operating a water system for the purpose of supplying water to its inhabitants; that in the performance of this duty it acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business; that like a private corporation, it is the duty of the city to furnish without discrimination to all its inhabitants who apply therefor a supply of water upon such applicants complying with such reasonable rules and regulations as it may lawfully establish for the conduct of the business. In that case appellant Nourse refused to pay a water charge due for water supplied to a former occupant of the premises involved and the city sought to exact payment of this charge by refusing to supply water to Nourse until he had paid the charge. The court there said (25 Cal.App. at page 387, 143 P. at page 802): "Our conclusion is that the regulation in question is unreasonable in that, without statutory authority therefor, it makes one person liable

for the debts of another and contravenes the duty assumed by the city to serve all its inhabitants without discrimination. This view is sustained by overwhelming authority. (Citations.)"

Appellants state in their reply brief that the fixing of rates and charges by the board of directors of a public utility district is a legislative function which has been delegated to it by the legislature and will not be interfered with by the courts in the absence of a positive showing that the rates fixed are unreasonable or unfair. They contend that the connection charge of $175 for each connection made was reasonable and fair under the circumstances. However, we are of the opinion that there is substantial evidence to the contrary and that the trial court's finding in this connection is supported by the record.

Mr. Anderson, who was a member of the board of directors of the defendant district, testified that the connection charge of $175 was a method of getting money to pay for the line in front of each place and that it was not a charge for making the connection. The record shows that the plaintiffs claim they are entitled to a refund of $184.42 per house, as provided in their contract with the defendant district and defendants refused to pay this amount unless plaintiffs pay a connection charge of $175 per house.

Mr. Hobson, a certified public accountant, testified that the connection charge was against the consumer and not against the owner of the property "unless the owner happened to be a tenant to the consumer."

Mr. Leimbach, secretary and director of the defendant district, testified that since the inception of the district, the district made a connection charge of $5 where the lines and mains were in; that this was a flat nominal fee which they had had for years. The record supports the inference that the connection fee charge in effect represented an assessment in the form of a tax against a limited number of the properties in the district; that plaintiffs' tract No. 1826 would bear most of this tax and that the purpose of the tax was to get back from this tract the money which the district had agreed to refund to the subdividers under their contract with them.

[2] The trial court had the power to determine whether the connection charge was unreasonable and unfair, but the matter of fixing water rates is legislative in character and the court was limited to a finding that the rate fixed was unfair. Durant v. City of Beverly Hills, supra. It therefore appears that the court exceeded its jurisdiction in providing in the judgment that:

> "It Is Further Ordered, Adjudged and Decreed that the defendant, Highland Park Public Utility District and its Board of Directors should be and are hereby enjoined and directed on or before December 1, 1956, to adopt a connection charge consistent with the actual cost to said defendant district of the labor and materials actually expended and reasonably necessary to cause the water to flow from the water mains theretofore installed in the street, into the house to be connected thereto, but excluding from such connection charge all costs of any kind whatsoever to the district for the bringing of the water to the point where it is to flow from the said mains and into the houses connected thereto."

The judgment is modified by striking out this quoted portion thereof. The motion filed herein by respondents to dismiss the appeal is denied.

Judgment affirmed as modified. Respondent to recover costs.

BARNARD, P. J., and GRIFFIN, J., concur.

158 Cal.App.2d 612

Rosemary SCARANO, by and through Floyd Scarano, her guardian ad litem, and Floyd Scarano, Plaintiffs and Appellants,

v.

Thomas SCHNOOR, Defendant and Respondent.

No. 17263.

District Court of Appeal, First District, Division 2, California.

March 24, 1958.

Action against surgeon for alleged negligence in performing operation on eye. The Superior Court, Alameda County, Donald K. Quayle, J., rendered judgment for surgeon and plaintiff appealed. The District Court of Appeal, Dooling, J., held that instruction that if evidence in case left it just as probable that injury was result of one cause as much as another, plaintiff could not recover, was not improper.

Affirmed.

1. Physicians and Surgeons ⇐18(10)

In action against surgeon for alleged negligence in performing operation, instruction that if evidence in case left it just as probable that injury was result of one cause as much as another, plaintiff could not recover, was not improper on basis that it would be understood by jury to mean that if they found injury proximately resulted from both causes, one of which would render surgeon liable, they must nevertheless find for surgeon, in view of other instructions.

2. Appeal and Error ⇐1064(4)

Although use of "competent" in instruction that plaintiff must show by competent evidence that injury was result of cause which would render defendant liable might technically have been error, reversal was not required where jury were given usual instructions on their powers and duties in weighing evidence.

3. Trial ⇐296(3)

In action against surgeon for alleged negligence in performing operation, instruction that in order to recover plaintiff must prove that surgeon had acted in manner that physicians and surgeons of ordinary skill, care, and diligence engaged in same kind of work would not have done, although incorrect, was not basis for reversal in view of immediately preceding instructions.

4. Physicians and Surgeons ⇐14(4)

In determining whether physician negligently performed operation, test is whether surgeon exercised that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in locality.

5. Trial ⇐295(1)

In determining whether a particular instruction is erroneous, instructions must be read as a whole.

6. Trial ⇐296(3)

In action against surgeon for alleged negligence in performing operation, instruction that where there is more than one recognized method of treatment surgeon is not negligent if, in exercising his best judgment, he selects one of approved methods which later turns out to be a wrong selection, was not improper on the basis that it provided surgeon with opportunity to escape liability merely by conforming to some recognized method used by practitioners somewhere, in view of repeated instructions that standard to be applied was standard measured by practice of doctors in good standing in same community.

7. Physicians and Surgeons ⇐18(10)

In action against surgeon for alleged negligence in performing operation, instruction that in determining whether surgeon's learning, skill and conduct fulfill duties imposed on him jury was not permitted to set up its own standard was not improper on ground that use of verb fulfill in present, instead of past, tense set up standard as of time of trial instead of time of operation, in view of fact that entire trial was directed to question of surgeon's conduct in performing operation and his antecedent diagnosis.

8. Evidence ⇐558(11)

Although use of medical books is proper in cross-examination of medical witnesses who have relied upon them, medical books are not admissible on direct examination, and if their use on cross-examination results in medical witness modifying his testimony as to standards in community it is still the witness' testimony, not the medical text, which is to be looked to to determine standard in particular community.

9. Physicians and Surgeons ⇐18(8)

Testimony of lay witnesses cannot be considered upon any question relating to skill and care, or want of it, possessed and exercised by surgeon, but when it is a matter of common knowledge that danger is involved in certain conditions, in failure to maintain certain conditions, or in failure to take certain precautionary measures, expert testimony is not required to establish such fact.

10. Trial ⇐260(8)

In action against surgeon for alleged negligence in performing operation, requested instruction that plaintiff could establish her case by testimony of surgeon if it established negligence was correct statement of law, but refusal thereof was not improper, in view of other instructions. West's Ann.Code Civ.Proc. § 2055.

11. Trial ⇐260(1)

Where jury is instructed fully and correctly on a subject, a party cannot complain of failure to instruct in particular language.

12. Physicians and Surgeons ⇐18(7)

In action against surgeon for alleged negligence in performing operation on eye, question put to surgeon as to whether he would perform such surgery on the other eye on the basis of what he knew immediately after the operation and questions of similar tenor were improper.

13. Physicians and Surgeons ⇐15(12)

Circumstances to be considered in deciding whether surgeon negligently performed operation are those which evidence shows might reasonably be supposed to have been known to surgeon and to have influenced his mind and action at the time, and negligence cannot be determined by hindsight nor by what surgeon subsequently learns.

14. Evidence ⇐558(1)

In action against surgeon for alleged negligence in performing operation on eye, cross-examination question put to medical witness for surgeon as to whether in case of vision of 20/50 or 20/60 he would recommend surgery on subluxated lens or a near-sighted condition just because of vision alone and no other reason was objectionable as compound.

Charles P. Scully, Jack H. Werchick, San Francisco, for appellant.

Joseph F. Rankin, Oakland, Peart, Baraty & Hassard, Salvatore Bossio, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff Rosemary Scarano, through her guardian ad litem, appeals from a judgment for defendant Dr. Thomas Schnoor.

In September 1950 appellant was having visual difficulties and was referred to defendant by Dr. Peters, an optometrist. Defendant, an ophthalmologist, diagnosed the difficulty as "a questionably displaced lens with nasal pigments" (lens improperly centered behind the pupil with pigment on the nasal side of the lens).

Appellant's mother testified that defendant recommended surgery on both eyes for a fee of $1,000 and when it was determined that the parents could not afford this amount, he sent appellant to the University of California Hospital. Defendant testified that he informed Mrs. Scarano that surgery might be advisable and that it would be an expensive procedure. He denied quoting any fee and stated that he sent appellant to the University of California Hospital for a thorough check or "work-up."

Defendant testified that he received a verbal report from Dr. Hogan of the University of California Hospital stating that

surgery was advisible. A letter from a member of the hospital staff dated November 9, 1950, received by defendant diagnosed appellant's condition as bilateral subluxated lenses of congenital origin (displaced lenses in both eyes). The letter further stated:

"It was our feeling that this patient should be handled conservatively since her eyes are quiet and in fairly good condition * * * In the future, she has about a fifty percent chance of having either iritis or glaucoma. If either of these complications should arise, surgical intervention would be indicated. Meanwhile, watchful waiting might be the best plan."

Defendant next saw appellant in July, 1953. His diagnosis was that appellant had a congenital bilateral displacement condition with cataractous changes (opacity of the lenses). Defendant testified that the latter condition was not present at the first examination in 1950. He did not consult with any other ophthalmologist and recommended surgery as the only method of correcting appellant's vision.

Although appellant's parents testified that defendant had assured them that the operation would not result in any poorer vision he denied this. Surgery was advised at this time because the child was 7½ years of age and since vision develops until approximately 8 years of age, to improve vision the surgery must take place before that time.

Appellant's left eye was operated upon on July 16, 1953. Of the three possible operating procedures defendant chose the intracapsular extraction. This method consists of the removal of the entire lens including the capsule (which contains the lens substance). The lens is held in place by zonular fibers and in removing the lens these fibers must be broken. Where there is a displaced lens in a child the fibers are usually stretched on one side and very strong on the opposite side. Defendant testified that while he expected this condition the zonular fibers proved tougher than he anticipated. He was unable to break these strong fibers by pulling or twisting the lens and had to use a loop. This instrument is placed under the lens to give greater traction.

On August 15, 1953, appellant's vision in her left eye was 20/40 to 20/50 which was an improvement from that prior to surgery. Due to a "hammocking" of the pupil (the iris drawing up and closing the pupil) a visual iridectomy was performed by defendant on October 8, 1953. This operation consists of cutting a hole in the iris to permit vision.

Appellant's vision did not improve and she was taken to Dr. Pischel. Dr. Pischel found marked inflammation in the eye with poor light perception. He also found early signs of phthisis bulbi or shrinkage of the eyeball. These conditions were due to a loss of the vitreous substance of the eye and it was finally decided that the eye would not improve and it was removed and a prosthesis installed.

Appellant's action was based on alleged negligent diagnosis and treatment. She attempted to prove that surgery should not have been performed and that the operative procedure used was wrong, in that the defendant should have expected such procedure would cause a vitreous loss.

Expert witnesses for defendant agreed that for a patient with a dislocated lens plus early cataract formations the optimum time for surgery would be between six and a half and seven years of age. There was testimony that as to the diagnosis and the operative procedure the defendant exercised a "lot better than average care." The intracapsular procedure was stated to be a standard technique in the community and the practice of being assisted by a trained nurse rather than an ophthalmological surgeon was stated to be standard in the community. Defendant had previously performed two or three intracapsular procedures on children. Dr. Pischel testified that he would not do an intracapsular procedure in the case of a child with a displaced lens and all the zonular fibers attached.

Appellant relies on the following grounds for reversal:

1. The trial court gave erroneous instructions.

2. The trial court refused necessary and proper instructions offered by plaintiff.

3. The trial court abused its discretion in restricting the cross-examination and examination of medical witnesses by plaintiff.

The court instructed the jury:

"In order for plaintiff to recover, it is not necessary that she prove that the negligence of the defendant was the sole proximate cause of the injuries received by her, for liability for injuries may be imposed upon a defendant where his negligence is one of several contributing factors, each of which is a proximate cause of the injuries.

"But where there are two or more possible causes of an injury for one of which the defendant is not responsible, the plaintiff, in order to recover, must show by competent evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as much as the other, the plaintiff cannot recover."

[1] Appellant argues that the last sentence of this instruction would be understood by the jury to mean that if they found that the injury proximately resulted from both causes, one of which would render the defendant liable, they must nevertheless find for the defendant. Reading the instruction as a whole it is not reasonably subject to this construction. The jury was plainly told that the negligence of the defendant need not be the sole proximate cause and that the defendant is liable "where his negligence is *one of several* contributing factors, each of which is a proximate cause." They were then told that to recover plaintiff must prove "that the injury was wholly or *partly* the result of that cause which would render the defendant liable." In the face of these clear statements of the law they cannot have understood the last sentence in the sense for which appellant contends. They had previously received the standard instruction that when the evidence "is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party" having the burden of proof. In the light of the whole instruction they can only have understood the last sentence to have reference to a particular application of this general rule on the burden of proof, which was the evident purpose of the court in giving it.

[2] Appellant criticizes the use of the word "competent" to qualify "evidence" in this instruction. While technically this may be error (McNamara v. Emmons, 36 Cal.App.2d 199, 206, 97 P.2d 503), the jury cannot have been misled by it. They were given the usual instructions on their powers and duties in weighing the evidence and we cannot suppose that they disregarded them or would undertake to determine the "competency" of the evidence which the court had permitted to be introduced for their consideration.

Appellant complains of an instruction which told the jury that the action was one predicated on a claim of "want of skill or negligence" and that in order to recover plaintiff must prove that defendant acted in a manner "that physicians and surgeons of ordinary skill, care and diligence, engaged in the same kind of work or specialty" would not have done.

[3, 4] It is correct, as appellant points out, that the true test is not "ordinary care and skill" but "that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality" (Sansom v. Ross-Loos Medical Group, 57 Cal.App.2d 549, 552, 134 P.2d 927, 929), and to determine this standard "we are not permitted to aggregate into a common class the quacks, the young men who have no practice, the old ones who have dropped out of the practice, the

good, and the very best, and then strike an average between them. This method would evidently place the standard too low." Sim v. Weeks, 7 Cal.App.2d 28, 42, 45 P. 2d 350, 357.

[5] However the instructions must be read as a whole. The jury had just previously been instructed that defendant must "exercise reasonable and ordinary care in applying that degree of learning and skill ordinarily possessed by doctors of good standing in the same or similar locality"; that it is his duty to possess "that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing, practicing in the same locality"; that if he undertakes service in a special branch of medicine or surgery, "and if at that time and in the same locality * * * there are members of his profession who specialize in * * * that particular branch of the healing profession, it is his duty to possess that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing who engaged in that special practice in the same locality"; that he must possess "that reasonable degree of professional learning and skill generally possessed by physicians and surgeons in the vicinity in which he practices, in like situation" and "exercise reasonable and ordinary care and skill in the application of such knowledge, to accomplish the purpose for which he is employed"; and that "[i]f a physician and surgeon undertakes the treatment of a case which comes within the field of specialists practicing in the same locality" and if he "does not possess the special ability required by the case in question" and there are specialists in the locality possessing such special ability, it is his duty "to inform the patient of his lack of skill and knowledge" and "if the condition requires, to refer the patient to a specialist." The instructions summarized immediately preceded the instruction complained of. Taking the instructions together the jury must have understood the particular instruction to be qualified by those which preceded it and cannot have been misled into applying a lower standard of conduct than the previous instructions had repeatedly specified.

The court gave BAJI instruction 214–A, California Jury Instructions, Civil, 4th Revised Edition, page 780.

"Where there is more than one recognized method of * * * treatment, and no one of them is used exclusively and uniformly by all practitioners of good standing, it is not negligence for a physician and surgeon if, in exercising his best judgment, he selects one of the approved methods, which later turns out to be a wrong selection, or one not favored by certain other practitioners."

[6] Appellant complains that the instruction was nowhere limited to the community in which defendant was practicing and that it "provides the defendant with an opportunity to escape liability merely by conforming to some recognized method used by practitioners *somewhere* in good standing and approved by *someone*."

The instruction must be read with the other instructions and the jury was repeatedly instructed that the standard to be applied was the standard measured by the practice of doctors in good standing in the same community and in a case of this nature by specialists practicing in the same community. Under the circumstances the jury must have understood these qualifications to apply to this instruction.

The jury was given BAJI instruction No. 214–B, California Jury Instructions, Civil, 4th Revised Edition, pages 783–784. In the first sentence of this instruction the jury was told:

[7] "In determining whether defendant Thomas Schnoor's learning, skill and conduct *fulfill* the duties imposed on him by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own." (Emphasis ours.) Appellant complains that the use of the verb "fulfill" in the present instead of the past tense set up a standard as of the time of the trial instead of the time of the operation. We cannot believe that the jury could have so construed it in view of

the fact that the entire trial was directed to the question of defendant's conduct in performing the operation and in his antecedent diagnosis.

[8] By this instruction the jury was further told that "the only way you may properly learn that standard is through evidence presented in this trial by physicians and surgeons called as expert witnesses." Appellant contends that the instruction was in error because "it eliminates proof * * * of the standard of care in the community through resort to medical recommendation and medical books." It is obvious that medical books cannot fix the standard of practice for a particular community—the standard of practice in the community may be higher or lower or differ otherwise from the textwriter's recommended practices. The use of medical texts is proper in cross-examination of the medical witnesses who have relied upon them but they are not admissible on direct examination. Gluckstein v. Lipsett, 93 Cal.App.2d 391, 400–404, 209 P.2d 98. If their use on cross-examination results in the medical witness modifying his testimony as to the standards in the community it is still the witness' testimony, not the medical text, which is to be looked to to determine the standard in the particular community.

[9] The court instructed that the testimony of lay witnesses "cannot be considered by you upon any question relating to the skill and care, or want of it, possessed and exercised by the defendant"; but "When it is a matter of common knowledge that danger is involved in certain conditions, or in a failure to maintain certain conditions, or to take certain precautionary measures, expert testimony is not required to establish such a fact, but it may judicially be noticed as a part of that fund of common knowledge shared by us with our fellow citizens generally."

The instruction as so qualified cannot have misled the jury. The first part of the instruction, in identical language, was approved in Friedman v. Dresel, 139 Cal. App.2d 333, 341, 293 P.2d 488, 493, as a correct statement of "the general rule that ordinarily the standard of care of a doctor * * * can be established only by the testimony of experts in the field." However the court then held that this should have been qualified by giving, as was here done, an instruction that where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required * * *." The instruction as a whole was proper.

Appellant complains of the giving of an instruction on expert testimony that while opinions of witnesses are not ordinarily permitted to be given, the law recognizes an exception in the case of expert witnesses. "A person who by education, study and experience has become an expert in any art, science or profession * * * may give his opinion as to any such matter in which he is versed and which is material to the case."

[10] In connection with the quoted sentence appellant also complains of the refusal to give an instruction offered by her: "In a malpractice case, a plaintiff can establish her case by the testimony of the defendant physician and surgeon himself, if his testimony established negligence on his part." This proposed instruction correctly states the law. Lashley v. Koerber, 26 Cal.2d 83, 89, 156 P.2d 441. However the jury was instructed generally that in determining whether negligence was proved they should consider all the evidence regardless of who produced it. "A party is entitled to the same benefit from evidence that favors her cause or defense when produced by her adversary as when produced by herself."

The jury must have understood this instruction to include defendant's own testimony. Appellant argues however that the failure to give her proposed instruction coupled with the instructions that opinion evidence could only be given by, and the standard of practice in the community established by, expert witnesses would lead

the jury to believe that they could not look to defendant's testimony elicited under cross-examination (Code Civ.Proc. § 2055) for those purposes, since he was not qualified as an expert. An examination of the transcript shows that he was qualified by counsel for appellant as an expert at the beginning of his cross-examination. After establishing that for a number of years defendant had specialized in practice on the eyes, ears, nose and throat and particularly in ophthalmology, including eye-surgery, counsel for appellant asked the following questions of defendant and received the following answers:

"Q. * * * In 1950, from 1950 on through 1953, during the time that you saw Rosemary Scarano and during the time that you had her as a patient, you were familiar with the standard of care of *opthalmologists* in your community and in similar communities? A. I was.

"Q. And were you familiar with the usual training and learning and education possessed by *opthalmologists* generally in your community and similar communities? A. Yes.

"Q. Now I am going to ask you some questions, and will you please keep in mind that when I ask you questions about what an eye man or doctor would do * * * or what learning or knowledge he should have, that I am referring to * * * those standards of care in the community in which you say you are familiar. Will you keep that in mind, sir? A. Surely.

"Q. So I won't have to say 'on the basis of the standard of care in the community,' do you understand that? A. Yes."

The jury must have known from this that defendant was being qualified and examined as an expert, and when they were instructed that ordinarily the standard of care in the community must be proved "by physicians and surgeons called as expert witnesses" we cannot suppose that they would ignore the testimony of defendant on that subject in view of the other instruction that a "party is entitled to the same benefit from evidence that favors her cause * * * when produced by her adversary as when produced by herself."

[11] Appellant further complains of the failure to give two requested instructions on the standard of care in malpractice cases but the jury was fully and correctly instructed on that subject and where the jury is so instructed a party cannot complain of the failure to instruct in particular language.

[12, 13] The court properly sustained objections to a question of defendant as to whether he would perform the same surgery on the other eye "on the basis of what you knew immediately after the operation" and questions of similar tenor. The circumstances to be considered in deciding defendant's negligence "are those which the evidence shows may reasonably be supposed to have been known to such person, and to have influenced his mind and actions at the time." Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 607, 93 P. 677, 678. Negligence is not to be determined by hindsight nor by what a party subsequently learns. These rulings were therefore correct.

[14] Appellant asked a medical witness for defendant: "Doctor, in a case of vision of 20/50 or 20/60, would you recommend surgery on a subluxated lens or a near-sighted condition just because of the vision alone and no other reason?" An objection was sustained on the ground that the question was compound. It clearly was. Counsel for appellant said that he would reframe the question, but instead went on to another subject.

The case was fairly tried and we find nothing in the record to justify a reversal.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

159 Cal.App.2d 31

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Douglas Kelly BRAZELL, Defendant and Appellant.

Cr. 6109.

District Court of Appeal, Second District, Division 1, California.

March 31, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Beach Vasey, J., for violating Penal Code section proscribing bookmaking, and he appealed. The District Court of Appeal, White, P. J., held that to constitute a violation of Penal Code section, a volume of gambling or betting is not required, and acceptance of even a single wager in contravention of statute will suffice.

Affirmed.

1. **Gaming** ⇐98(3)

Convictions, under Penal Code section proscribing bookmaking, were sustained by evidence. West's Ann.Pen.Code, § 337a, subds. 1, 6.

2. **Criminal Law** ⇐741(1), 742(1)

Credibility of witnesses and intrinsic value and effect of evidence are matters primarily for duly constituted arbiter of facts.

3. **Gaming** ⇐73

To constitute a violation of Penal Code section, a volume of gambling or betting is not required, and acceptance of even a single wager in contravention of statute will suffice. West's Ann.Pen.Code, § 337a.

Douglas Kelly Brazell, in pro. per.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of violating Section 337a of the Penal Code (Bookmaking) as follows:

Count I. Violation of Subdivision 1 of said section on or about January 12, 1957.

Count II. Violation of Subdivision 6 of the aforesaid section, on or about January 12, 1957.

Count III. Violation of Subdivision 1 of the aforesaid section on or about January 19, 1957.

Count IV. Violation of Subdivision 6 of said section on or about January 19, 1957.

Count V. Violation of Subdivision 1 of said section on or about January 26, 1957.

Count VI. Violation of Subdivision 6 of the aforesaid section on or about January 26, 1957.

Defendant pleaded not guilty to each count of the information; was tried before a jury and found guilty on all counts. Probation was denied and defendant was sentenced to a term of six months in the Los Angeles County Jail, on each count, the sentences to run concurrently with each other. From the judgment of conviction and "the sentencing of defendant" defendant prosecutes this appeal.

The following will serve as a fair epitome of the factual background surrounding this prosecution.

As to Counts I and II, Officer Sargis A. Trotsky testified that during the time here in question he was a Los Angeles city police officer attached to the "vice squad, bookmaking detail", and for some five and a half years had been conducting bookmaking investigations. That he had "become familiar with the signs and symbols and characters and language commonly used and employed by bookmakers in this community"; also "with the manner in which bets are accepted and given"; and with "any papers or periodicals which are sometimes used by bookmakers".

As to these counts, Officer Trotsky further testified that on January 12, 1957, at approximately 12:50 p. m., he entered the Alaska Cafe in San Pedro, Los Angeles County, and seated himself at the bar. A

few minutes later defendant entered and stood about ten feet away from the officer. The latter then observed a third person approach defendant and say, "War Vote, five to win", and thereupon such person handed defendant a piece of United States currency, the denomination of which Officer Trotsky could not determine. Defendant took the money and replied, "Okay", then removed a scratch sheet (a daily publication commonly used by bookmakers and horse players) from his back pocket, looked at it for a few seconds, then replaced it in his pocket.

Later, Officer Trotsky himself consulted a scratch sheet and found that a horse called War Vote was scheduled to run in the first race at the Santa Anita Race Track on that date. Without objection, the officer testified that in his opinion the aforesaid conversation between defendant and the unknown third party was "* * * a bet or wager on a race horse by the name of War Vote, and the five dollar win was the amount wagered on that horse, the win being the coming in number one position."

With reference to Counts III and IV, Officer Trotsky testified that, on January 19, 1957, he again visited the Alaska Cafe at about 12:50 p. m. and seated himself at the bar. That several minutes later defendant entered and approached a person who was sitting at the bar. That such person turned around, and facing defendant, said, "One and five, win and place", thereupon handing defendant a piece of currency which Officer Trotsky believed to be a ten dollar bill. That defendant said "Okay", took the money and walked to the rear portion of the bar. Without objection the officer again expressed his opinion that what he had just heard constituted the placing of a bet or wager; the word "one" signifying the first race and the word "five" referring to the horse holding the fifth handicap position (the horse listed as fifth choice on the scratch sheet).

With regard to Counts V and VI, Officer Trotsky testified that, once more, on January 26, 1957, he went to the Alaska Cafe at about 4 p. m. That some time within the next 30 minutes, defendant entered, remained a short time, departed, and then returned again at approximately 4:30 p. m. That defendant thereupon approached a young man seated at the bar to the right of Officer Trotsky and whom the officer had previously heard called by the name Johnny. The person named Johnny said to defendant "How did I do on the third, fourth and sixth?" Defendant then took his scratch sheet from his rear pocket, looked at it for a short time, then said, "Johnny, you have got $63.00 coming". With that defendant replaced the scratch sheet in his pocket, took out some currency and gave the man called Johnny some six or eight bills and some change.

Roughly five minutes later Officer Trotsky noted that the television set in the bar was broadcasting the preparations for the seventh race at Santa Anita Race Track. Immediately after the number 6 horse was shown on the screen in the process of going from the paddock onto the track, the officer observed a young male Mexican walk over to where defendant was standing, hand him two pieces of currency and say to him, "Make it number 6, Doug". Defendant took the money and said, "Okay". In the opinion of Officer Trotsky, the foregoing constituted a wager on the number 6 horse appearing on the television screen.

When arrested by a Los Angeles police officer on January 31, 1957, defendant had a scratch sheet in his right rear pocket.

On cross-examination, Officer Trotsky testified that scratch sheets were sold at news stands in the area in which he was investigating, and to his knowledge, they were not illegal. That the majority of the sales of so-called scratch sheets were made to bettors. The officer also testified that at no time did he attempt to identify or obtain the name or address of the aforementioned unknown persons who had dealings with defendant in the Alaska Cafe.

Sworn as a witness in his own behalf, defendant testified that he was acquainted with the Alaska Cafe and during the pe-

riod here in question, lunched there during the noon hour about five days per week. He denied each and all of the conversations testified to by Officer Trotsky or that he paid any one the sum of $63 in the cafe. He further testified that since he heard the descriptions of these unnamed persons, at the time of the preliminary examination on February 15, 1957, he searched for these people, and was unable to locate them in the area and as far as he could find out they never existed.

[1] On this appeal, it is the contention of appellant that, as to each of the six counts upon which he was found guilty, the judgment of conviction is not supported by the evidence.

The pertinent portions of Penal Code, section 337a provide in part as follows:

"Every person,

"1. Who engages in pool-selling or bookmaking, with or without writing, at any time or place; or

* * * * * *

"6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast or between men, beasts, or mechanical apparatus, is punishable by imprisonment * * *."

Appellant first urges that the entire case presented by the prosecution was based on circumstantial evidence and that the circumstances relied upon being reasonably consistent with innocence, the mere fact that such circumstances may also be reconciled with guilt, does not justify a conviction. This contention is dispelled by the language of the Supreme Court in the case of People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, as follows:

"'We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (Citing cases.) In the Perkins case [People v. Perkins, 8 Cal.2d 502, 66 P.2d 631] this court expressly rejected the application of the statement from the Staples case to a situation which involved only circumstantial evidence. As pointed out by the court the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. It said: 'The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury.' Also, in People v. Smith, 35 Cal.App.2d 73, 94 P.2d 633, 634, involving facts similar to those presented in the case at bar, where the trial was without a jury, it was stated that 'it is a matter for the trial judge to be persuaded beyond a reasonable doubt and not this court.'"

In the case just cited, the appellant therein relied upon some of the cases referred to by appellant herein, but the court said, "Anything stated in those cases which is inconsistent with the views herein expressed is disapproved." See also People v. Curtis, 106 Cal.App.2d 321, 235 P.2d 51; People v. Oliverio, 99 Cal.App.2d 743, 745, 222 P.2d 245.

Appellant's further contention that the conversations and conduct of appellant do not admit of the inference that he was engaged in bookmaking activities cannot be

sustained. When the factual situation present in the instant case is compared to that existing in the case of People v. Chaney, 147 Cal.App.2d 740, 305 P.2d 955, in which a conviction for bookmaking was affirmed, it is at once apparent that the verdict of the jury in the case at bar cannot be disturbed.

The facts presented to the jury in the case now engaging our attention are above narrated and need not be repeated. Peculiarly applicable to appellant's contention that, unexplained, they constitute no incriminatory evidence, is the language of this court in People v. Overman, 149 Cal.App. 2d 125, 131, 307 P.2d 1000, 1004, as follows: "Almost anyone of adult years, who is even casually acquainted with what goes on in the so-called 'sport of kings' at the various race tracks in Southern California and elsewhere would understand what was meant by what was said in the various telephone conversations. With all of the divers advertisements in the various mediums concerning the horse races at the several race tracs, the repeated radio announcements of the results and televising of the different races at least once each week, and with all of the propaganda about how many millions of dollars are given to charity by the race track owners, and all of the news stories of the frailties of the human beings who engage in embezzling money to 'play the horses', it would be difficult to avoid coming into contact with, and having an understanding of the incidence of the race tracks and what the words meant. As was said in People v. Larum, 111 Cal.App. 2d 732, at page 734, 245 P.2d 323, 324: 'The conversations and the passing of the money would be commonly understood as wagers on horse racing, and in the absence of any explanation by defendant that the transactions had a different meaning or purpose, the court could scarcely have failed to find they were wagers. The evidence was sufficient * * *.'"

[2] True, appellant denied the conversations and the conduct ascribed to him by the police officer, but, as heretofore pointed out, the credibility of witnesses and the intrinsic value and effect of evidence are matters primarily for the duly constituted arbiter of the facts.

[3] Appellant's final contention that before one can be held to "engage" in the business of bookmaking, the taking of more than one bet must be shown, as well as the fact that one is actively occupied or employed in making "a book of bets", is unavailing. An unbroken line of authorities hold that to constitute a violation of Penal Code, section 337a, a volume of gambling or betting is not required and that the acceptance of even a single wager in contravention of the statute will suffice.

The judgment is affirmed, and the attempted appeal from "the sentencing of the defendant" is dismissed.

FOURT and LILLIE, JJ., concur.



158 Cal.App.2d 652

Grace J. FRIZZELL, Plaintiff and Appellant,

v.

Riley L. FRIZZELL, Defendant and Respondent.

Civ. 17555.

District Court of Appeal, First District, Division 1, California.

March 26, 1958.

Proceedings on defendant's motion to modify separate maintenance decree so as to instruct parents as to what college their boy should attend. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., held that it would be to best interests of child to attend a state school rather than a parochial school, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that ordinarily parent who has custody has power to determine what school child shall attend,

but held that such power is subject to control by trial court where it believes that best interests of child will thus best be served; and held that when trial court thus modifies custody order, its determination cannot be upset in absence of showing an abuse of discretion.

Affirmed.

1. Husband and Wife ⇐299½

Trial court has power to modify separate maintenance decree by limiting discretion that parent awarded child custody otherwise possesses with regard to what college child should attend.

2. Infants ⇐19
Parent and Child ⇐3(3)

Questions of custody, support and education of children are addressed to sound discretion of trial court.

3. Infants ⇐19
Parent and Child ⇐3(3)

Unless a clear case of abuse of discretion is made to appear, appellate court will not substitute its opinion and thereby divest trial court of discretionary power reposed in it with regard to questions of custody, support and education of children.

4. Infants ⇐19
Parent and Child ⇐3(3)

An appellate court is never justified in substituting its discretion for that of trial court on issues of custody, support and education of children, unless there has been a miscarriage of justice.

5. Infants ⇐19
Parent and Child ⇐3(3)

An appellate court cannot interfere with trial court on matters of custody, support and education of children unless ruling of trial court exceeds bounds of reason.

6. Infants ⇐19
Parent and Child ⇐3(3)

An abuse of discretion in ruling on questions of custody, support and education of children cannot be presumed but must be affirmatively established by party complaining of order.

7. Husband and Wife ⇐299(3)

Rule that there must be showing of "changed circumstances" applies only where trial court has refused to modify separate maintenance decree and it is contended that an abuse of discretion occurred and has no application where trial court has modified decree.

8. Parent and Child ⇐2(4)

Finding as to unfitness of one or both parents is not essential to modification of custody decree.

9. Husband and Wife ⇐299½

It was within discretion of trial court to modify separate maintenance decree so as to instruct parents that their child should attend state college rather than parochial school. West's Ann.Civ.Code, § 138.

10. Parent and Child ⇐3(3)

Ordinarily parent who has custody has power to determine what school child shall attend, but such power is subject to control by trial court where it believes that best interests of child will thus best be served; and when trial court thus modifies custody order, its determination cannot be upset in absence of showing an abuse of discretion.

Gean W. Cannon, San Francisco, for appellant.

Barrett, Lucey & Harklerod, San Francisco, for respondent.

PETERS, Presiding Justice.

In October of 1947 Grace Frizzell, the plaintiff, obtained a decree of separate maintenance from Riley Frizzell, the defendant. The decree, among other things, incorporated by reference a property settlement agreement, gave "the care, custody, control and education" of the couple's two children, Glen and James, to the plaintiff, "with the right of the defendant to visit with said children at reasonable times," and ordered the defendant to pay to the plaintiff $50 a month for the support and maintenance of each of the children. In August

of 1951, by court order, the support allowance was increased to $75 per month per child, and the visitation rights of the father expanded. The father has made all payments called for by these orders.

In October of 1947, when the separate maintenance decree was secured, Glen was 8 years old and James was but 3 years old. Glen is now of college age. The parents cannot agree as to what college he should attend. The mother wants Glen to go to Santa Clara where he can continue his parochial education and can live at home, while the father is of the opinion that the boy should go to a state college, because he has not been doing well in his studies at a sectarian school. The boy's scholastic standing in the parochial school he is now attending is 122 out of a class of 153. The boy cannot secure admittance to the University of California because of his low grades, but he is eligible for admission to San Francisco State College or San Jose State College. If he attended the latter, he could continue to live at home with his mother.

The plaintiff and defendant were unable to resolve their differences. Thereupon, in July of 1956, the defendant filed a notice of motion "For Instructions of Court Relative to Education of Child." A hearing was held on the motion at which the plaintiff and defendant testified, and at the close of the hearing the trial court entered its "Order Giving Instructions as to the Further Education of Child." By this order the court "finds that it is to the best interest and welfare of said child that the further education of said child, being his college education, should be obtained at San Francisco State College, San Jose State College, or the University of California, if his admission to the University of California can be arranged." The court entered its order accordingly.

The order also provided that it was made "upon the express condition that the defendant, Riley L. Frizzell, shall continue to pay during the entire period of said college education the monies [sic] ordered by this Court for the care, support and education of said child." Thus, under this order, the father is required to pay for the support and maintenance of the child "during the entire period of said college education," which could well continue after the boy is 21.

From this decree the plaintiff appeals.

The main contention of appellant is that the trial court's order is contrary to the law of this state and not called for by the circumstances of the case. She points out that she has been awarded the "care, custody, control and education" of Glen, and contends that such provision can be changed only by a modification order predicated upon changed circumstances showing unfitness. Admittedly, there is no evidence that the appellant is unfit to have the care and custody of the boy, and, except as to his college education, the decree in no way affects appellant's rights to Glen's care and custody.

[1] The appellant mistakes the nature of these proceedings. Although labeled a petition for "instructions," the petition, in legal effect, is one for the modification of the modified separate maintenance decree in reference to the custody and control of Glen. The motion was to modify that decree so as to instruct the parents as to what college the boy should attend. To this extent it necessarily modified the decree by limiting the discretion that the one having custody would otherwise possess. This the trial court had the power to do.

[2–5] Questions of custody, support and education of children are addressed to the sound discretion of the trial court. Beal v. Beal, 218 Cal. 755, 24 P.2d 768; Berry v. Chaplin, 74 Cal.App.2d 669, 169 P.2d 453; Hale v. Hale, 55 Cal.App.2d 879, 132 P.2d 67. In Sharpe v. Sharpe, 55 Cal.App. 2d 262, 265, 130 P.2d 462, 464, the rule is stated as follows: "Unless a clear case of abuse is made to appear, an appellate court will not substitute its opinion and thereby divest the trial court of the discretionary power reposed in it. [Citation.] The burden is on appellant to establish an abuse of discretion [citing a case], and an appellate

court is never justified in substituting its discretion for that of the trial court unless there has been a miscarriage of justice. [Citing a case.]"

[6, 7] An appellate court can interfere with the trial court on such matters only where the ruling of the trial court exceeds the bounds of reason. An abuse of discretion cannot be presumed but must be affirmatively established by the party complaining of the order. Berry v. Chaplin, 74 Cal.App.2d 669, 169 P.2d 453.

[8, 9] The rule that there must be a showing of "changed circumstances" has no application where the trial court has modified a decree. That rule only applies where the trial court has refused to modify a decree and it is contended an abuse of discretion occurred. To show such abuse there must be a showing of changed circumstances. Kelly v. Kelly, 75 Cal.App.2d 408, 171 P.2d 95; Dotsch v. Grimes, 75 Cal.App.2d 418, 171 P.2d 506. Nor is a finding as to the unfitness of one or both parents essential before a trial court may modify a custody decree. This was well illustrated in Beal v. Beal, 218 Cal. 755, 24 P.2d 768. In that case the wife was awarded custody of two sons, aged 13 and 10 respectively. This was later modified, by consent, by placing the elder of the two boys in the joint custody of the parents, and by ordering that the older boy be enrolled in the Menlo School for Boys. Three years later the court again modified the decree by awarding custody of both boys jointly to the parents, and by providing that the older boy should live with the father in Los Angeles for three months to secure needed medical care, by providing the younger son should live with the mother for these three months and attend San Mateo High School, and thereafter both children should attend a boarding school selected by the parents, and if they cannot agree, then the boys shall attend Menlo School for Boys. The mother appealed, contending that such modification could not be sustained in absence of a finding of her unfitness. The court disposed of this issue as follows (218 Cal. at page 758, 24 P.2d at page 769):

"A finding as to the unfitness of one or both parents to have custody of the children was not essential; the application for modification was addressed to the discretion of the court section 138, Civ.Code; In re Guardianship of Shannon, 218 Cal. 490, 23 P.2d 1020. Admittedly the elder son, who, pursuant to the order of September, 1929, had previously attended the Menlo School for Boys, was suffering severely from injuries received in an airplane accident, and, having been removed from the Stanford Hospital to the southern part of the state, was under medical care at the father's home there, and at his expense. This boy was standing on the very threshold of maturity; the younger son was also rapidly approaching that critical age when the counsel and companionship of his father would be invaluable. Admittedly also, there had been a great deal of friction between these parents in the matter of arranging for the father to see the children and the latter had contributed directly to payment of some of their bills in addition to making the monthly allowance to plaintiff, for which he received no accounting. Properly exercising its discretion in this situation, it is apparent that the court was wisely guided by the considerations specified in section 138 of the Civil Code, to wit: '(1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; * * * (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.'"

[10] Thus, in the instant case, the order made was well within the discretion of the court. See also Holsinger v. Holsinger, 44 Cal.2d 132, 279 P.2d 961. In fact, the court, under section 138 of the Civil Code, referred to in the Beal case and under the cases above cited, could have changed the entire custody of the child to the father. It did less than this, merely

providing that the father's choice of schools should prevail over that of the mother.

The appellant urges that the real basis of the court's decision is the belief of the trial judge that a father cannot be compelled to send his child to college and therefore can impose his will on his wife in this respect although not entitled to custody. This contention is based on the case of Boens v. Bennett, 20 Cal.App.2d 477, 67 P. 2d 715, referred to by the parties at the trial. That case did hold that a father who had custody, regardless of financial position, could not be compelled to send his child to college. The Boens case has been severely criticized and practically overruled (see Hale v. Hale, 55 Cal.App.2d 879, 132 P.2d 67; Rawley v. Rawley, 94 Cal.App.2d 562, 210 P.2d 891; note 23 So.Cal.L.Rev. 407), and is contrary to the rule in some other jurisdictions. Esteb v. Esteb, 138 Wash. 174, 244 P. 264, 246 P. 27, 47 A.L.R. 110. Thus, it is questionable whether the case is now the law of this state, even where the father has custody and determines that his child should not have a college education. Whatever the proper rule in this respect may be, the case, even if it is still the law, is not here controlling. In the instant case, both parents want the boy to go to college. The father is willing to support the child during his college period, even if it lasts after the child is 21. The only controversy is over what college the boy shall attend. The record does not show that, in determining this question, the trial court felt compelled to agree with the father because of the Boens case. All that the record discloses is that the trial court believed that a father supporting a child should have a voice in the matter of that child's higher education. The record, far from showing that the trial court believed that the father had the sole right to determine the question, stated that the question of higher education was "purely a discretionary matter" with the court.

There can be no doubt that the order made by the trial court was well within its discretion. While a parent who has custody has the power to determine what school the child shall attend, this right is subject to control by the trial court where it believes the best interests of the child will thus best be served. When the trial court thus modifies the custody order, its determination cannot be upset in the absence of showing an abuse of discretion. There was no such showing here made.

The decree appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



158 Cal.App.2d 700

Rowland F. SWEET, Plaintiff and Appellant,

v.

Earl H. MARKWART, doing business under the fictitious firm name and style of Markwart Industries; Earl H. Markwart, doing business under the fictitious firm name and style of Markwart Company; Earl H. Markwart, doing business under the fictitious firm name and style of Yuba Tank and Steel Company; Earl H. Markwart, doing business under the fictitious firm name and style of Markwart Industrial Equipment Company; Helen H. Howard, Executrix of the Last Will and Testament of C. W. Howard (Deceased); American Trust Company, a corporation, Defendants and Respondents.

Civ. 8353.

District Court of Appeal, Third District, California.

March 26, 1958.

Hearing Denied May 21, 1958.

Action by engineer against contractor's assignees for benefit of creditors on common count for money had and received in connection with services performed under alleged agreement between engineer and contractor providing that engineer was to receive percentage of net profits from contracts. The Superior Court, Sacramento County, Malcolm Glenn, J., granted assignees' motions for directed verdict and

engineer appealed. The District Court of Appeal, Schottky, J., held that questions whether assignees knew of agreement, whether they told engineer to complete contracts, whether engineer remained on job and supervised completion of contracts, and whether money was paid to assignees on contracts, were for jury.

Reversed.

1. Trial ⇐340(1)

Power of trial court to correct verdict is precisely same as power of court to grant a nonsuit.

2. Assignments for Benefit of Creditors ⇐279

In action by engineer against contractor's assignees for benefit of creditors on common count for money had and received in connection with services performed by engineer under alleged contract between engineer and contractor providing that engineer was to receive percentage of net profits from contract, questions whether assignees knew of agreement, whether they told engineer to go ahead under agreement, whether engineer remained on job and supervised completion of contracts and whether money was paid to assignees on contracts, were for jury.

3. Assignments for Benefit of Creditors ⇐253

If engineer and contractor entered into agreement whereby engineer was to receive percentage of net profits of contracts, and contractor's assignees for benefit of creditors knew of agreement, told engineer to go ahead and supervise completion of contracts, and engineer did so, and money was paid to assignees on contract, it would be inequitable for assignees to get benefit of engineer's services without assuming burden of agreement.

4. Abatement and Revival ⇐58

If engineer and contractor entered into agreement whereby engineer was to receive percentage of net profits of contracts, fact that contractor's assignee for benefit of creditors died prior to trial of engineer's action against him on common count for money had and received in connection with services performed under contract would not prevent engineer from proving his cause of action against assignee's estate.

5. Depositions ⇐100

In action by engineer against contractor's assignees for benefit of creditors on common count for money had and received in connection with services performed under alleged agreement between engineer and contractor providing that engineer was to receive percentage of net profits from contracts, engineer should have been permitted to use deposition of assignee, who died prior to trial of action, against such assignee's estate. West's Ann.Code Civ. Proc. § 1880, subd. 3.

6. Depositions ⇐100

Deposition of party taken before his death may be used against his estate. West's Ann.Code Civ.Proc. § 1880, subd. 3.

7. Assignments for Benefit of Creditors ⇐279

In action by engineer against contractor's assignees for benefit of creditors under alleged oral contract, question whether it was understood that if engineer supervised completion of contracts he was to receive percentage of profits from contracts was for jury.

8. Assignments for Benefit of Creditors ⇐253

If contractor's assignees for benefit of creditors agreed to pay engineer a percentage of profits if engineer agreed to supervise completion of contracts, which had been started under agreement between contractor and engineer whereby engineer was to receive same percentage of profits, contract would be between assignees, and engineer, assignees would not be guarantors of agreement between engineer and contractor, and terms of contract would be sufficiently definite to be enforced.

9. Contracts ⇐346(15)

Even if proof showed contract between engineer and bank, which was contractor's assignee for benefit of creditors, and engineer's complaint alleged joint contract entered into between engineer, bank and trus-

tee, it would be an immaterial variance in view of fact that bank offered testimony that no conversation creating such contract ever took place.

10. Appeal and Error ⇐1039(13)

Wherein defendant could not have been misled to its prejudice by variance between plaintiff's pleading and proof, variance becomes immaterial.

11. Assignments for Benefit of Creditors ⇐279

In action by engineer against contractor's assignees for benefit of creditors under alleged oral contract, whereby engineer was to receive percentage of net profits for supervision of completion of contracts, question whether joint contract between engineer and both assignees was entered into was for jury.

12. Limitation of Actions ⇐127(4)

Where engineer's complaint alleged that he entered into oral contract on certain date with bank, but engineer did not prove that contract was entered into on that date because he was unable to establish that bank officials with whom he had conversations were authorized to act for bank, engineer was then allowed to introduce testimony of conversation with vice-president of bank on later date, and complaint was then amended to show contract was entered into at that later date, proof of contract entered into at later date did not substitute new cause of action and statute of limitations did not run.

13. Limitation of Actions ⇐127(2)

Where no attempt to prove a wholly different legal liability or obligation from that orginally stated in complaint is made, an amendment is proper and statute of limitations does not run.

14. Master and Servant ⇐3(2)

Alleged agreement, whereby engineer was to aid in obtaining contract for contractor and was to perform executive, field and engineering services necessary in performance thereof and, on completion of contracts, was to receive 40% of net profits of contracts, was at most a hiring, the term of which was measured by method adopted for payment of salary, and did not necessarily obligate engineer to continue until contracts were completed.

15. Assignments for Benefit of Creditors ⇐253

If engineer, who had entered into agreement with contractor to perform services for which he was to receive percentage of net profits of contracts, agreed with contractor's assignee to supervise completion of contracts, he would be bound thereby and there would be consideration for the agreement with assignee.

16. Assignments for Benefit of Creditors ⇐279

In action by engineer against contractor's assignees for benefit of creditors under alleged oral contract with assignee, question whether engineer agreed to stay and complete job at time of agreement with one assignee's officer was for jury.

17. Witnesses ⇐175(2)

In action by engineer against contractor's assignee for benefit of creditors and estate of deceased assignee for benefit of creditors under alleged oral contract made between engineer and assignees, wherein deposition of deceased assignee denying that any conversation creating agreement took place, was introduced in evidence, exclusion of proof of conversation in connection with claim against estate was improper.

18. Assignments for Benefit of Creditors ⇐278

In action by engineer against contractor's assignees for benefit of creditors on common count for money had and received in connection with work performed under contract between engineer and contractor providing that engineer was to receive percentage of profits upon completion of contracts, evidence established that engineer would have had a cause of action against contractor for breach of contract to share in profits of contracts which had been obtained.

19. Appeal and Error ⇐843(2)

Where verdict had not been received, reviewing court could not pass on question whether verdict should have been received

despite fact that one juror died after jury had arrived at its verdict.

20. Appeal and Error ⇐1176(5)

Where a verdict is not received or entered as a verdict of a jury, a reviewing court may not order the entry of judgment based on it.

Earl D. Desmond and E. Vayne Miller, Sacramento, for appellant.

J. A. Montgomery, Jr., and Lloyd A. Phillips, Jr., Sacramento, for respondent Helen H. Howard.

Devlin, Diepenbrock & Wulff, Sacramento, and Brobeck, Phleger & Harrison, San Francisco, for respondent American Trust Co.

SCHOTTKY, Justice.

This is an appeal by Rowland F. Sweet from judgments in favor of respondents in an action to recover the sum of $24,980.05 allegedly due and unpaid.

By his second amended complaint appellant Sweet sued Earl Markwart, C. W. Howard (Helen Howard, Executrix of the Last Will and Testament of C. W. Howard was substituted as the defendant before the trial of the action), and the American Trust Company. The complaint was in five counts, four common counts and a fifth count which alleged that during the years 1946 and 1947 Earl H. Markwart entered into six separate contracts to construct and install certain industrial cleaning equipment and aircraft cleaning equipment at prices aggregating $385,860.71; that before Markwart entered into these contracts he made an agreement with plaintiff whereby plaintiff was to aid in obtaining these contracts and to perform executive, field, and engineering services necessary in the performance thereof; that on completion of the contracts plaintiff was to receive 40 per cent of the net profits of the contracts; that while these contracts were still uncompleted, Markwart by written agreement assigned all his assets, including his interest in the six contracts, to defendants Howard and the American Trust Company; that shortly thereafter Howard and the American Trust Company orally agreed with plaintiff that he was to continue the contract with Markwart and that he would be paid the 40 per cent of the net profits of the contracts as agreed; that plaintiff has fully performed his part of the agreement and that Howard and the American Trust Company have refused to pay plaintiff his share of the profits which were alleged to be $24,980.05. The various defendants entered denials to the complaint and the cause proceeded to trial. At the conclusion of the trial defendants' motions for nonsuits were granted, (1) to Howard and the American Trust Company on the first count of the complaint which was a common count for work and labor performed at the request of the defendants; (2) to Markwart, Howard and the American Trust Company on the second count which was for money due upon a book account; (3) to Markwart on the third count which was a common count for money had and received; and (4) to the American Trust Company and Howard on the fourth count which was a common count for services performed at the defendants' request. Markwart was not named as a defendant in this count or in the fifth count of the complaint. Thereafter, directed verdicts were ordered in favor of Markwart on the first count, the American Trust Company on the third count and Howard on the third and fifth counts. The sole remaining cause of action, the fifth which was on the oral contract, was submitted to the jury against the American Trust Company only. After some deliberation the jury arrived at a verdict against the American Trust Company for $24,980.-05. The verdict was signed by the foreman, but the jury, instead of returning to the courtroom with the verdict, went to dinner where one juror suffered a heart attack and died. The trial court refused to accept the verdict of the jury upon its return, and the jury was discharged. Thereafter, purportedly acting under the provisions of section 630 of the Code of Civil Procedure, the court entered judgments in favor of the

various defendants on the counts not nonsuited.

Appellant thereafter appealed from the judgments of nonsuit which were ordered and from the judgment in favor of Markwart on the first cause of action; from the judgment in favor of Howard on the third and fifth causes of action; from the judgments in favor of the American Trust Company on the third and fifth causes of action; and from an order denying appellant's motion to have the court enter and record the written verdict of the jury.

The appeals from the orders granting nonsuits as to Howard and the American Trust Company were ordered dismissed by this court on February 2, 1953. Sweet v. Markwart, 115 Cal.App.2d 735, 252 P.2d 751. On September 27, 1956, this court dismissed the appeal from the order denying the motion to have the trial court enter and record the written verdict of the jury as it was not an appealable order since it was made before judgment. Appellant has abandoned his appeal from the order granting a nonsuit to Markwart. The following questions are presented on this appeal:

1. Whether the trial court erred in directing a verdict in favor of Howard on the third count of the complaint which was a common count for money had and received, and on the fifth count which was on an express contract.

2. Whether the trial court erred in granting a directed verdict in favor of the American Trust Company on the third count.

3. Whether the trial court erred in entering judgment in favor of the American Trust Company on the fifth count.

4. Whether the trial court erred in directing a verdict in favor of Markwart on the first count which was a common count for work and labor performed at the request of the defendant.

[1] It is the law in this state that the power of a trial court to direct a verdict is precisely the same as the power of the court to grant a nonsuit. Merlino v. Southern Pacific Co., 132 Cal.App.2d 58, 281 P.2d 583. "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.' * * * Unless it can be said as a matter of law, that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768.

"Upon appeal from a judgment based on a directed verdict it is the duty of the reviewing court to consider the evidence and the inferences which reasonably may be drawn therefrom, in the light most favorable to the plaintiff. That other evidence may be found in the record which would support equally reasonable inferences to the contrary is of no consequence." Merlino v. Southern Pacific Co., supra, 132 Cal.App. 2d at page 60, 281 P.2d at page 585.

The evidence produced at the trial, viewed in the light most favorable to the appellant, disclosed that in 1945 Markwart, who was in the steel construction business, and Sweet entered into an oral agreement whereby Sweet, who had developed certain aircraft engine cleaning equipment which eliminated 95 per cent of the hand labor in cleaning engine parts, agreed to work for Markwart in a new branch of Markwart's business which was to consist of a division which would engage in the sale and design of the cleaning equipment. Sweet was to receive 40 per cent of the net profits of the division after actual costs of material, labor, taxes and 25 per cent of the cost of labor and materials for overhead were deducted from the amount received on each contract. Sweet was to solicit business, design the

equipment, and supervise the manufacture and the installation of the equipment. This agreement continued. In December, 1946, Markwart, who was in financial difficulties and who was assigning all sums due or thereafter to become due him to the American Trust Company, hired C. W. Howard as his general manager. Howard had power to hire and fire the heads of the various departments, but according to Markwart did not discharge anyone until after April 30, 1947. Howard was informed of Sweet's agreement with Markwart. On April 11, 1947, Howard by a letter, terminated the agreement and thereafter Sweet, who had been on a drawing account, received a regular salary check with deductions made for federal and Social Security taxes. Sweet testified that after he received the letter he spoke to Howard and that Howard told him that the letter abrogated the agreement for future jobs but that the contracts already obtained by Sweet (including the six which are the basis of this lawsuit) were not affected by the termination of the agreement.

On April 30, 1947, Markwart executed an agreement with Howard, as trustee, and the American Trust Company whereby Markwart transferred all his assets to Howard as trustee, for the purpose of liquidating the business and paying certain named creditors and satisfying the bank's obligations. The agreement provided that the trustee would use his best efforts to complete all executory contracts and work in progress and endeavor to realize and salvage as much as possible out of the business. Shortly after this agreement was signed, Sweet and Howard went to San Francisco and saw a Mr. Hammond, a vice president of the bank, who was in charge of the liquidation of the loans made to Markwart. A Mr. Davenport, another bank employee, was also present. Sweet discussed the April 30, 1947, agreement with them. He was concerned because the agreement provided that the bank could remove the trustee at any time and Sweet wanted to know to whom he would look if Howard were removed. During this conversation Sweet discussed the profits which were to be made on one of the contracts which Sweet claims he is entitled to share. Sweet showed Hammond how he computed the profits. His agreement with Markwart was discussed generally. Hammond told Sweet that he would be paid his 40 per cent of the net profits of the six contracts but that the agreement would not apply to any future jobs which were secured.

After the complaint was filed Sweet had Howard's deposition taken, and Sweet's deposition was also taken. The trial court ruled that Howard's deposition could not be used against the estate. All conversations between Howard and other parties were limited in use to parties other than the estate.

[2–5] We think that the trial court erred in ordering directed verdicts in favor of the American Trust Company and the Estate of Howard on the third cause of action which was a common count for money had and received. "Although such an action is one at law, it is governed by principles of equity * * *. It may be brought '* * * wherever one person has received money which belongs to another, and which in "equity and good conscience," or in other words, in justice and right, should be returned. * * *'" Mains v. City Title Insurance Co., 34 Cal.2d 580, 586, 212 P.2d 873, 876. An assignee for the benefit of creditors may in his discretion and according to what he considers to be in the best interest of the creditors perform or refuse to perform the assignor's part of an executory contract. The assignee must exercise ordinary prudence and good faith in dealing with the assignor's contract obligations, and where he induces the other party to perform or otherwise reaps the benefit of a contract he must assume its obligations. 6 C.J.S. Assignments for Benefit of Creditors § 190. The evidence produced at the trial was sufficient to indicate that both of the assignees knew of the Sweet-Markwart agreement; that they both told Sweet to go ahead; that Sweet remained on the job and supervised completion of the six contracts; that the money was paid to the assignees on the contracts. Under such circumstanc-

es it would be inequitable to deprive Sweet of the rewards due him. The fact that Howard died prior to the trial of the action would not prevent Sweet from proving his cause of action against the estate. Howard's deposition was taken and read into evidence by Sweet's attorney though the court would not permit it to be used against the estate. This was error. In Evans v. Gibson, 220 Cal. 476, 31 P.2d 389, plaintiff sued the decedent and took his deposition. Decedent died prior to the trial. At the trial plaintiff introduced the deposition and was allowed to testify against the estate. Judgment was obtained against the executrices of the decedent's estate, who, on appeal, contended that much of the testimony of the plaintiff was inadmissible under the provisions of section 1880, subdivision 3, of the Code of Civil Procedure. On this point the Supreme Court indicated that when the deposition of a party is taken prior to his death it may be used in evidence against the estate and the plaintiff may testify. The court said, 220 Cal. at page 489, 31 P.2d at page 395:

> "Excluding the evidence which may be incompetent, sufficient remains to sustain the judgment against the executrices. The deposition of Gibson taken in the case before trial under section 2055 of the Code of Civil Procedure, was introduced, and the transcript of his testimony taken in the Leavitt v. Gibson action [136 Cal.App. 62, 28 P. 2d 41] was introduced herein pursuant to stipulation. Said deposition and transcript in themselves provide damaging evidence against Gibson. Furthermore, there is some authority that the adverse party may render himself competent by introducing the deposition of the decedent taken before his death."

[6] We hold that when the deposition of a party is taken before his death the deposition may be used against his estate. From the deposition it is clear that Howard had knowledge of the Sweet-Markwart agreement. From Sweet's testimony it is equally clear that the bank, too, had knowledge of it. Under such circumstances it would be inequitable for the assignees to get the benefit of Sweet's services without assuming the burdens of the Sweet-Markwart agreement. Smith v. Barnard, 148 N.Y. 420, 42 N.E. 1054.

[7, 8] We also think it was error to enter judgment in favor of the American Trust Company on the fifth count which was an oral contract. The letter of April 11, 1947, from Howard to Sweet could be construed as terminating the Sweet-Markwart agreement. If so, Sweet, as of April 30, 1947, was not obligated to continue in the employ of the company. The only cause of action Sweet would have had at that time was a cause of action for breach of contract against Markwart. If we may assume that no contract then existed Sweet could enter into a new contract for his services. After the assignment Sweet was concerned with his future. He, in the company of Howard, went to Hammond's office where he discussed the largest of the six executory contracts for the manufacture and installation of the engine cleaning equipment. Hammond was interested in ascertaining the amount of profit that would accrue if the contract was completed. This was discussed, as was Sweet's agreement with Markwart generally. Sweet testified that Hammond told him to go ahead and he would get his 40 per cent. We think that these facts are sufficient to indicate that a contract was entered into between Sweet and the bank. The law will construe an agreement so as to carry into effect the reasonable intentions of the parties if their intent can be ascertained. Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706. From the testimony of Sweet one may infer that Hammond and Sweet discussed the method of cost allocation which Sweet's agreement with Markwart provided; that after Hammond went over the cost analysis of one contract he was satisfied with the arrangement; that it was understood that Sweet would get 40 per cent of the net profits if he remained and supervised the completion of the six contracts. This construction may be given

the conversation when we consider that Sweet was apparently the one man in the Markwart organization who could supervise the completion of the six contracts and when we consider that the bank was interested in salvaging as much as possible from the business to apply to the unsatisfied loans. Under such a construction the contract is between the bank and Sweet, and the bank is not a guarantor of the Sweet-Markwart agreement. The terms of the contract are sufficiently definite to be enforced.

[9–11] The bank contends that the complaint must fail because it alleges that a joint contract was entered into between Sweet, Howard, and the bank, and the testimony at most proves a contract between Sweet and the bank. We do not think that the proof only shows a contract between Sweet and the bank, but if it did it would be an immaterial variance between the pleading and the proof. The bank offered testimony that no conversation between Sweet and Hammond ever took place. By offering such testimony the bank could not have been misled to its prejudice. In such a case a variance between the pleading and the proof becomes immaterial. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580; Rubin v. Platt Music Co., 92 Cal.App. 203, 268 P. 396. We are of the opinion, however, that the evidence produced was sufficient to prove a joint contract. Howard, Hammond and Sweet were all present at this conversation. Sweet had prepared a cost analysis of one job to show the profit that would be obtained if one job were completed. Hammond did most of the talking although the discussion was with the others. There was also evidence that the bank kept a close check on Howard and that he could not disburse funds without the bank's approval. Under such circumstances we think that one may infer that the purpose of the conference was to clear up Sweet's status and when Hammond told Sweet that he would get his 40 per cent he was speaking for Howard also.

[12, 13] The bank contends that the contract as proved was barred by the statute of limitations. The complaint alleged that an oral contract was entered into on or about May 7, 1947. Sweet attempted to prove conversations with other bank officials but he could not do so because he was unable to establish that these other officials were authorized to act for the bank at the time of the purported conversations. Sweet was then allowed to introduce testimony of the conversation with Hammond on or about May 15, 1947. The complaint was then amended to show that the contract was entered into on or about May 15, 1947. It is the bank's contention that proof of the contract of May 15, 1947, was proof of a contract different from that pleaded and therefore it was barred by the statute of limitations. We do not agree. The amendment did not substitute an entirely new cause of action. There was no attempt to prove a wholly different legal liability or obligation from that originally stated. In such a case an amendment is proper and the statute would not run. Klopstock v. Superior Court, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318.

[14, 15] The bank also contends that if there was a contract there was no consideration for it. The bank contends that since Sweet was under a salary arrangement with Howard and since Sweet's duties were to supervise the completion of the contracts there was no consideration for the new agreement. We do not think that the Howard-Sweet arrangment necessarily must be construed as obligating Sweet to continue until the contracts were completed. It was at most a hiring the term of which was measured by the method adopted for payment of the salary. If Sweet agreed with the bank to stay he would be bound and there would be consideration for the agreement. The bank also contends that Sweet did not agree to stay and complete the job at the time of the agreement with Hammond. We think that it may be inferred that even if that matter was not expressly discussed this was the whole tenor of the conversation between the parties. The bank also contends that if any contract was entered into

it was merely a contract of guarantee because Sweet was obligated under the Sweet-Markwart agreement. This argument overlooks the fact that there was evidence that the agreement had been terminated by Howard.

[16, 17] We are also of the opinion that it was error to exclude proof of the conversation between Hammond, Howard and Sweet in the action against the estate. In his deposition Howard denied that any such conversation took place. This deposition was introduced in evidence. In Coble v. McClintock, 10 Ind.App. 562, 38 N.E. 74, at page 75, the court said: "We think, when it is made to appear that the decedent has testified in a manner known to the law, and that his testimony is available to his estate, the reason for closing the mouth of the living party has ceased to exist, and when the reason ceases the rule should cease also." See also Annotation, 158 A.L.R. 306. Under such circumstances there is no advantage to the adverse party by permitting him to testify against the estate as to matters denied by the decedent because the denial of the decedent is available to the estate. We think that the evidence produced against the bank should have been permitted against the estate and if introduced would have proved the oral contract against the Estate of Howard.

[18] Markwart has not filed a brief in this matter. It is clear that Sweet would have a cause of action against Markwart for breach of contract to share in the profits of certain contracts which had been obtained.

[19, 20] Appellant has asked this court to order the verdict of the jury entered if this court reverses the case. We cannot pass on the question whether the verdict should have been received despite the fact that one juror died after the jury had arrived at its verdict. If the verdict had been received, this court could pass on the question presented, and, if this court were to decide that the verdict had been properly rendered, it could, on reversing the judgments, order that judgment based on the verdict of the jury be entered. However, where a verdict is not received or entered as the verdict of the jury, an appellate court may not order the entry of judgment based on it. Crowe v. Sacks, 44 Cal.2d 590, 599, 283 P.2d 689.

The judgments are reversed.

PEEK, J., and WARNE, J. pro tem., concur.



159 Cal.App.2d 1

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank BROES, Sr., Defendant and Appellant.

Cr. 6014, 6015.

District Court of Appeal, Second District, Division 3, California.

March 28, 1958.

Hearing Denied May 21, 1958.

Proceedings on orders revoking probation which had been extended to defendant following his conviction of two separate felonies. The Superior Court of Los Angeles County, Clement D. Nye, J., revoked probation and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where probation report to effect that defendant had maintained an uncooperative, hostile and aggressive attitude toward probation officer was on file three weeks before court acted on recommendation of parole officer to revoke defendant's probation and defendant was present at hearing and represented by counsel, trial court did not abuse discretion in revoking probation on theory that defendant had not seen and had not been advised as to contents of report until some time after orders of revocation.

Judgments affirmed.

1. Criminal Law ⇐982

Where, on June 10, 1954 proceedings charging defendant with violation of Dangerous Weapons' Control Law were suspended and defendant was put on probation for three years, minute order which was made on June 4, 1957 and which revoked defendant's probation was effective and was made within probationary period and mere fact that a subsequent order on June 11, 1957 also revoked probation did not have effect of revoking order of June 4, the later order merely being an unnecessary duplication of the earlier one. West's Ann. Pen. Code, § 12000 et seq.

2. Criminal Law ⇐982

Where probation report to effect that defendant had maintained an uncooperative, hostile and aggressive attitude toward probation officer was on file three weeks before court acted on recommendation of parole officer to revoke defendant's probation and defendant was present at hearing and represented by counsel, trial court did not abuse discretion in revoking probation on theory that defendant had not seen and had not been advised as to contents of the report until some time after orders of revocation.

William M. Sarnoff, Los Angles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Frank Broes, Sr. has noticed appeals from two judgments rendered following an order revoking probation in each case, which had been extended to him following his conviction of separate offenses of felonies. May 14, 1954 in case No. 163799, Broes pleaded guilty to a charge of violation of the Dangerous Weapons' Control Law, Deering's General Laws Act 1970, section 1, West's Ann.Penal Law, § 12000 et seq. On June 10, 1954 proceedings were suspended and Broes was put on probation for three years and fined the sum of $200. March 21, 1955, in case No. 166468, appellant was found guilty of two offenses of grand theft. People v. Broes, 138 Cal.App. 2d 843, 292 P.2d 556. Proceedings were suspended and he was granted probation for five years on condition that he make restitution and pay a fine of $1,000. Among the terms of probation he was directed to report to the probation officer as directed; his business activities were to be under the supervision of the probation officer and he was to report to the officer his activities, income and expenses. The conviction under each count was to run concurrently as to the probation period.

May 14, 1957, the probation officer filed a report in each case recommending that probation be revoked and sentence pronounced. A hearing was set for May 16, 1957. On June 4, 1957, in case No. 163799, the court made a minute order "Violation of probation filed. Probation revoked. Bench warrant issued." An order was made June 11th "Bench warrant is recalled. Defendant is released on his own recognizance." June 13th another order was made "Probation is revoked and defendant is sentenced as indicated." On the same day in case No. 166468 an order was made "Probation is revoked and defendant is sentenced as indicated.". The sentence under case No. 163799 was ordered to run concurrently with the sentence in case No. 166468.

[1] It is contended by the appellant that his probationary period expired June 10, 1957 in case No. 163799, that the order made on June 4th was in some manner nullified by the orders of June 11th and 13th and that the later order was void as having been made after expiration of the probationary period. And it is contended that probation not having been revoked prior to June 10th, the court was without authority to impose sentence. Upon this point appellant cites People v. O'Donnell, 37 Cal. App. 192, 194, 174 P. 102. We have no reason to question the effectiveness of the order of June 4th. The order of June 11th recalling the bench warrant and releasing

defendant on his own recognizance and the further minute order ordering probation revoked as of June 13th did not have the effect of revoking the former order. The later order was an unnecessary duplication of the earlier one.

[2] The order revoking probation in case No. 166468 was made within the five years probationary period. It is contended with respect to this order and the order in No. 163799 that they constituted an abuse of discretion. It appears from the minutes in each case that defendant was present on June 13th and that he was represented by counsel. The grounds upon which the claim of abuse of discretion are asserted are obscure. It is contended that the report of the probation officer contained many misstatements of fact which could have been refuted by appellant had he had an opportunity to do so. He says he had not seen nor been advised as to the contents of the report and had no knowledge of its contents until some time after the orders of revocation.

Upon appellant's application, we ordered the probation report transmitted to this court as a part of the record on appeal. It is conceded by appellant that if the statements in the report were true the facts constituted sufficient reason for revocation of probation. It was stated in the report that appellant last reported to the probation officer January 14, 1957 and that he maintained toward the probation department an uncooperative, hostile and aggressive attitude. There was nothing in the record to indicate that appellant and his counsel did not know that the reports were on file in ample time to have controverted any alleged misstatements therein. They were on file for three weeks before the court acted upon either of them. Although an order was made for filing as part of the record on appeal an affidavit of defendant in which a copy of the probation report in No. 166468 was identified and to which it was attached, the court has not accepted as evidence or considered the averments of the affidavit tending to contradict the statements in the report. No cause has been shown for disturbing the judgments appealed from.

The judgments are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



158 Cal.App.2d 770

Charles RADOFF, Plaintiff and Respondent,

v.

John HUNTER et al., Defendants, John Hunter and Richard F. Yee, Appellants.

Civ. 22336.

District Court of Appeal, Second District, Division 3, California.

March 27, 1958.

Rehearing Denied April 15, 1958.

Hearing Denied May 21, 1958.

Action for personal injuries sustained when bitten by a dog of the defendant. Judgment for the plaintiff in the Superior Court of Los Angeles County, Bayard Rhone, J., and the defendants appealed. The District Court of Appeal, Parker Wood, J., held that the evidence sustained finding that defendants should have anticipated an attack by the dog under the circumstances.

Judgment affirmed.

1. Animals ⇐74(3)

In action for injuries sustained when bitten by a dog, vicious propensities and dangerous character of a dog and knowledge thereof by his owner may be inferred from evidence that the dog was kept tied as a watchdog and from his size and breed.

2. Animals ⇐74(5)

In action for injuries sustained by plaintiff when bitten by a dog of defendant, where the dog, a German shepherd, was kept by defendants as a watchdog

and chained with a 15-foot chain evidence sustained finding that defendants should have anticipated an attack by the dog, or defendants should have anticipated that persons might trespass within the 15-foot radius, where at time of attack the dog was concealed from view, and no warning was given of his presence.

Goebel & Donovan and Herbert J. Beck, Los Angeles, for appellants.

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries resulting from being attacked and bitten by a dog. In a nonjury trial judgment was for plaintiff. Defendants appeal from the judgment.

Appellants contend that the evidence was insufficient to support the findings; and that the findings do not support the judgment.

On July 9, 1955, when plaintiff was injured, the defendant Mr. Yee was the owner of a pet store on Santa Monica Boulevard in Los Angeles. On and prior to that day, the defendant Mr. Hunter assisted Mr. Yee in operating the store. The defendants owned the dog herein referred to. Mr. Hunter stayed at the store every day, including nighttime, because there had been attempted robberies at the nearby store of Sears, Roebuck and Company and someone had broken a window at the back of the pet store. Prior to July 9 a German shepherd dog, which had been trained as a watchdog, had been given to the pet store in order that the dog might be disposed of. The defendants kept the dog as a watchdog and they kept him outside at the rear (north end) of the store. The dog was chained, with a 15-foot chain, to a window bar on a store next to the rear of the pet store. At the rear of the pet store, and near its rear door, there were packing cases, trash cans, and an old counter which was about three feet high. A large packing crate, which was also there, was used as a shelter for the dog. The rear door of the store was used by customers. There was a parking area back of the store, which area was paved with asphalt. The dog weighed between 80 and 100 pounds, and was about 5½ feet tall when standing on his hind legs.

An automobile service department of Sears, Roebuck and Company is about 10 feet west of the side of the pet store. The 10-foot space is paved with asphalt and is used by Sears as a storage yard. There is a parking area at the rear (north end) of the service department, which area is paved with asphalt. The paved parking areas, and the paved 10-foot space between the pet store and the service department, are level. At the boundary line between the parking area of the pet store and the 10-foot space, there is a curb which is about 6 inches high and 6 inches wide.

On said July 9, about 10 a. m., plaintiff Mr. Radoff drove his automobile to the automobile service department of Sears for the purpose of having the automobile battery charged. Someone at that department told him to park his automobile at the rear (north end) of the department for that particular service. Plaintiff parked his automobile at the place indicated which was a parking space about 10 feet from the parking area back of the pet store. The service man, after suggesting that plaintiff needed a new cable for the battery, removed the used cable and dropped it. Plaintiff took the cable to a trash can which was at the rear of the pet store and about 40 to 50 feet from the automobile. In going to the trash can he stepped over the curb onto the parking area back of the pet store. He dropped the cable in the can and started back to the automobile. He testified that after he had gone about three steps something snapped his leg, and he fell on his face and wrist; as he rolled farther away, he looked back and saw that it was a dog that had grabbed his leg; at that time the dog was growling, bar-

ing his teeth, and trying to get to the plaintiff. Plaintiff did not hear any noise or see anything before the dog bit him. He was bitten in the back of the upper part of his leg. There was no sign on the pet store premises indicating that a dog was at the rear of the store. Neither of the defendants knew that plaintiff was on the pet store premises until after the plaintiff had been injured.

Mr. Hunter testified, at the trial, that after the incident here involved, he learned that an old man (not plaintiff) had been teasing the dog. Mr. Hunter testified, at the time his deposition was taken, that prior to the incident here involved, an old man in the neighborhood teased the dog.

[1, 2] The court found that plaintiff entered defendants' premises without the knowledge, consent or invitation of defendants, express or implied, and insofar as the defendants were concerned, plaintiff was a trespasser; that the defendants should have anticipated an attack by the dog; that with such knowledge defendants failed to exercise reasonable care to warn those who entered defendants' parking lot of the condition and risk involved.

Appellants argue that the finding that they should have anticipated an attack by the dog is not supported by the evidence. There was evidence that defendants knew that the German shepherd or police dog had been trained as a watchdog; they kept him as a watchdog and kept him chained, with a 15-foot chain, outside the store and near the rear door; the dog weighed between 80 and 100 pounds, and was about 5½ feet tall when standing on his hind legs; customers used the rear door of the pet store. Also, there was evidence that defendant Hunter knew, before plaintiff was injured, that the dog had been teased by an old man and that when "an older person came around" the dog, the dog acted as if the person were the old man who had teased him. In Frederickson v. Kepner, 82 Cal.App.2d 905, at pages 908, 909, 187 P.2d 800, at page 802, it was said: "The (a) vicious propensities and dangerous character of a dog and (b) knowledge thereof by his owner may be inferred from evidence that the dog was kept (1) tied (2) as a watchdog and also (3) from his size and breed. [Citations.] Applying the foregoing rules to the facts in the instant case it is apparent that the jury could have inferred from the foregoing evidence that, since defendant kept a German police dog of 75 pounds weight tied on his premises as a watchdog, and permitted the dog to be unfettered only in the evenings and when accompanied by someone, (a) the dog had a dangerous nature, and (b) defendant had knowledge of the dangerous character of the animal. Hence, since there was direct evidence that the dog caused injury to plaintiff, defendant would be liable to plaintiff for the damage resulting and it was error for the trial court to grant the motion for a nonsuit." The evidence was sufficient to support the finding that defendants should have anticipated an attack by the dog.

Appellants argue further that since plaintiff was a trespasser, the only duty they owed to him was to refrain from wilful or wanton injury. In Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App.2d 91, at pages 96, 97, 219 P.2d 73, at page 77, it was said: "[W]hile there are many cases holding that a land owner is only required to refrain from inflicting wanton or wilful injuries on a trespasser or licensee [citation], there are many cases also holding that after 'a trespasser is seen in a position of danger, due care must be exercised to avoid injuring him, and it is negligence not to do so.' [Citation.] This duty of reasonable care not only extends to situations where the land owner knows of a trespasser's presence, but also to situations where he should know of his presence. Thus, the Restatement of Torts, vol. 2, § 336, declares that if the possessor of land does not know of a trespasser's presence, but 'from facts known to him should know or believe that another is or may be' trespassing, he is

'subject to liability for bodily harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.' Many California cases are cited as being in accord in the California annotation to this section. Many courts, in imposing this duty of reasonable care towards trespassers and licensees, have drawn a distinction between active and passive negligence, and have limited the reasonable care test to overt acts of negligence. [Citation.] California has quite clearly adopted this distinction and imposed a duty to exercise reasonable care towards known licensees or trespassers so far as active operations are concerned. In the well-reasoned case of Oettinger v. Stewart, 24 Cal. 2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, cases to the contrary were expressly overruled." In the present case the defendants did not know of the presence of plaintiff on the pet store premises until after plaintiff was injured. The court could reasonably infer, however, from the fact that the pet store was located near a large shopping and parking area that the defendants should have believed or anticipated that persons might walk or trespass within the 15-foot radius where the watchdog was allowed to range, and where at times he was concealed from view in his shelter or behind crates, trash cans or the counter. In Northon v. Schultz, 130 Cal.App.2d 488, 279 P.2d 103, a visitor in a home was injured when a dog therein ran against the back of the visitor's legs and caused her to fall. In that case the court indicated that the owner's conduct in allowing the dog to run against the visitor was "active conduct." It was said therein (130 Cal.App.2d at page 490, 279 P.2d at page 104) that since the decision in Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, it is settled that a landowner owes to a licensee the duty of not injuring him by "active conduct." It was also said in that case (130 Cal.App.2d at page 489, 279 P.2d 103): "The keeper of a dog who has knowledge that it possesses traits which may make it a source of danger to other persons is subject to an absolute liability to another who is injured by the dog as a result of such traits." In the present case the keeping of the trained watchdog, under conditions where at times he was concealed from view and where no warning was given of his presence, was similar to maintaining a trap whereby invitees, licensees, or trespassers might be injured.

The evidence was sufficient to support the findings, and the findings support the judgment.

The judgment is affirmed.

VALLÉE, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment. There was no active negligence of the defendants. They merely created a dangerous condition for intruders in the portion of the premises set aside for the dog, and if he had been in sight all the time, trespassers upon his domain would have only themselves to blame if he chased them away, even by the use of extreme measures. Any grown-up should have gumption enough to stay out of the reach of a chained watchdog, especially one as faithful and efficient as a well-trained German shepherd. But the defendants' dog had a large packing crate in which to nap during the daytime, when his presence might go unnoticed. He would then constitute a pitfall for the unwary. Defendants should have maintained a warning sign. Their failure to do so rendered them liable for injuries, even to trespassers who were unaware of the presence of the dog. For this reason alone, I agree there was a liability to plaintiff.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

158 Cal.App.2d 675

Gerald F. MURPHY, William H. Gilmore, Lawrence G. Dillon, Anthony J. Duffy, Petitioners and Appellants,

v.

Francis P. WALSH, Charles T. McDonough, William P. Lahanier, as and constituting the Civil Service Commission of the City and County of San Francisco; William L. Henderson, Secretary of the Civil Service Commission of the City and County of San Francisco; The City and County of San Francisco, a municipal corporation, Respondents,

Clarence Rosenstock and Bruno Bassi, Intervenors and Respondents.

Civ. 17775.

District Court of Appeal, First District, Division 2, California.

March 26, 1958.

Mandamus proceeding to annul portion of civil service promotional examination for position of assistant fire chief and to enjoin certification of eligible list for position compiled as result of examination. The Superior Court, City and County of San Francisco, Thomas Coakley, J., rendered judgment denying application for writ of mandamus and refusing the injunction, and the petitioners appealed. The District Court of Appeal, Brazil, J. pro tem., held that under the circumstances the Civil Service Commission did not act arbitrarily, capriciously, in abuse of discretion or in violation of the charter.

Affirmed.

1. Mandamus ⇐187(9)

On appeal from judgment denying mandamus to annul civil service promotional examination and refusing to enjoin certification of eligible list based thereon, the questions involved were not moot, notwithstanding that an eligible list is in effect for only four years and that instant eligible list was four years old, where rights of intervenors, who were the two highest on the list and who had occupied advanced positions as result of examination, were in question and problems raised by appeal were of a recurring nature and were of prospective interest to municipal civil service authorities and future applicants.

2. Municipal Corporations ⇐216(2)

Rules promulgated by civil service commission pursuant to authority granted to commission by city charter have the force and effect of law so long as they are reasonable and within the fundamental principles of the charter.

3. Municipal Corporations ⇐216(1)

A city civil service commission has wide discretionary powers in many of its fields of operation, but such commissions have only such powers as are conferred on them, and when they exceed or abuse their powers it is not only within the power, but it is the duty, of the judicial branch of government to prevent such excess or abuse on petition of those adversely affected.

4. Administrative Law and Procedure ⇐324, 761

Officers ⇐103

Administrative boards and officers are vested with a high discretion in working out their problems, and an abuse of that discretion must appear very clearly before the courts will interfere.

5. Municipal Corporations ⇐217(3)

Judicial interference with broad discretionary powers of city civil service commission in matter of subjects of examination and qualifications which are to be measured is not justified except on showing of arbitrary, fraudulent, or capricious conduct, or clear abuse of discretion.

6. Mandamus ⇐168(3)

In mandamus proceeding to annul portion of civil service promotional examination for position of assistant fire chief and to enjoin certification of eligible list for position compiled as result of examination, evidence was not admissible to show that key answer to question did not conform to the question itself.

7. Evidence ⇐518

In mandamus proceeding to annul portion of civil service promotional examina-

tion for position of assistant fire chief and to enjoin certification of eligible list for position compiled as result of examination, it was not error to refuse to permit experts and grammarians to testify as to meaning of words used in the instructions and the questions or problems.

8. Mandamus ⇐168(3)

In mandamus proceeding to annul portion of civil service promotional examination for position of assistant fire chief, where an examination question required preparation of five-minute radio script requesting public support of voters for bonds to construct new fire houses, it was not error to refuse permission to call witnesses to show that radio script writing was not a duty of assistant chief.

9. Mandamus ⇐168(3)

In mandamus proceeding to annul portion of civil service promotional examination for position of assistant fire chief, it was not error to refuse to permit employee in charge of fire department equipment to show the equipment in the fire department at the time of the examination.

10. Mandamus ⇐168(3)

In mandamus proceeding to annul portion of civil service promotional examination for position of assistant fire chief, it was not error to refuse to permit petitioners to present as witness the expert consultants who aided the civil service commission in the examination, in view of commission's authority under the charter to hire outsiders to help in giving the examination. West's Ann.Code Civ.Proc. § 2055.

11. Municipal Corporations ⇐196

In conducting civil service promotional examination for position of assistant fire chief, the examiners could set up key answers to essay questions after the examination was held and the papers graded rather than prior to the examination.

12. Mandamus ⇐168(4)

In mandamus proceeding to annul portion of civil service promotional examination for position of assistant fire chief and to enjoin certification of eligible list for position compiled as result of examination, record failed to show that participants in the examination were denied the opportunity to protest timely and prior to the adoption of the tentative list.

Molly H. Minudri, San Francisco, for appellants.

Dion R. Holm, City Atty. of City and County of San Francisco, William F. Bourne, Deputy City Atty., San Francisco, for respondents.

M. Mitchell Bourquin, San Francisco, for respondents and intervenors.

BRAZIL, Justice pro tem.

[1] Petitioners appeal from a judgment denying their application for a writ of mandate to annul a portion of a civil service promotional examination taken by them for the position of Assistant Fire Chief and refusing to enjoin the respondents from certifying an eligible list for that position compiled as a result of that examination. An eligible list is in effect for only four years. Although the certification of the list is now four years old, the questions involved in this appeal are not moot because of the rights of the intervenors, the two highest on the list, who have occupied the advanced positions during all this time as a result of the examination which is being questioned. The problems with which this appeal is concerned are also of a continuing or recurring nature and of prospective interest to the Commission and future applicants.

[2] The Charter of the City and County of San Francisco, in section 140 thereof, establishes a Civil Service Commission, charged with the duty of providing qualified persons for employment in the many departments of the city. Job appointments must be made solely upon merit and fitness as established by appropriate tests. The next section provides that the Commission shall adopt rules to carry out the civil service provisions of the charter which rules, together with applicable charter sec-

tions, govern all examinations and promotions. Rules made under such a power have the force and effect of law, so long as they are reasonable and within the fundamental principles of the charter provisions. (10 Cal.Jur.2d 438.)

Pertinent parts of section 145 are: "* * * The commission shall control all examinations and may employ suitable persons in or out of the public service to act as examiners. The tests may be written, oral, mechanical or physical, or any combination of them, practical in character and related to matters fairly to test the relative capacity of the applicants for the positions to be filled. The commission shall be the sole judge of the adequacy of the tests to rate the capacity of the applicants to perform service for the city and county * * *."

An amendment to the charter adopted by an election in 1940 makes an exception to the provisions of section 145 with relation to promotive examinations in the police and fire departments. We are here concerned with a promotive examination in the fire department. The amendment is now section 146, which provides: "Whenever it deems it to be practicable, the civil service commission shall provide for promotion * * * on the basis of such examinations and tests as the commission may deem appropriate * * *. All such promotive examinations in the police and fire departments shall be entirely of a written character, and all questions asked or problems given in said examinations shall pertain to matters concerning the duties of members of the department for which the examination is held."

The petitioners allege that the respondents acted arbitrarily, capriciously and in abuse of discretion and without regard to the provisions of section 146. At the trial and on appeal, petitioners have enlarged the scope of their complaint to include failure of the commission to follow its own rules in the conduct of the examination and in the matter of allowing protest of key rating factors or results.

On August 21, 1953, the commission prepared and issued an official announcement of a promotional examination in the class H–50 Assistant Chief of Department; which included a statement of duties of the position and the scope of the examination. The examination was held November 4, 1953. It was divided into two parts, the first being only true or false questions upon which the participants could receive a maximum 550 points out of a total of 750. No complaint is made about the content or the manner in which the first part of the examination was conducted.

The second portion, in which the controversy centers, is as follows:

"Question 1—Weight *150* Points

"Discuss and give your views on:

"Improvements you would recommend in the present fire-fighting equipment to increase efficiency.

"*Note:* Discussion should be confined to a maximum of 500 words."

"Question 2—Weight *50* Points

"A bonded indebtedness in the sum of $1,500,000 for the construction of new fire houses is to be submitted to the voters of San Francisco at a special municipal election to be held on December 1, 1953.

"Prepare a *five-minute* radio script requesting public support of the bonds."

Part II was prepared in this manner. "Instructions: the purpose of this part of the examination is to test your ability to analyze a situation, organize your thoughts and to develop a written statement in a clear and logical manner. The soundness and clarity of your reasoning is as important as is any factual knowledge presented. Your approach and the organization of your statement, as well as its substantive content, will be considered in grading this part of the examination."

The commission's rules for the conduct of an examination provide for rating key answers to be available for inspection of participants for three days before the examination papers are graded. With the

multiple choice questions of the first part, this was done; but with the essay type questions of the second part key answers were not made available. Instead key rating factors were made available after the papers were graded and a tentative eligible list was posted. The rating factors used for the second part problems, were made up after a consideration of the essays written by all the participants. What all the participants had to say on the subject formed the basis of the rating factors. A period of protest and counter protest was allowed for about four weeks after the rating factors were made available and before the final list of eligibles was determined.

In one long sentence of their brief, appellants list their grievances under a general heading that the court erred in refusing to admit evidence that the commission acted arbitrarily, capriciously, in abuse of discretion and in violation of the charter. Each complaint of that sentence will hereinafter be given separate consideration. The trial court at the start of the case suggested an offer of proof from petitioners, and after it was made sustained respondents' objection thereto. Nowhere in the offer was there any suggestion that petitioners sought to prove favoritism, fraud or dishonesty on the part of anybody. The court received in evidence the charter provisions, rules of the commission, the written examination and related matters, and the rating factors or criteria used in grading Part II of the examination.

Before examining the complaints of the petitioners it is well to have in mind the basic rules that guide the courts in a review of the conduct of a civil service commission in the conduct of an examination.

[3] "The Commission has wide discretionary powers in many of its fields of operation. However, such commissions have only such powers as are conferred upon them. When they exceed or abuse their powers it is not only within the power, but it is the duty of the judicial branch of the government to prevent such excess or abuse upon the petition of those adversely affected." Allen v. McKinley, 18 Cal.2d 697, 705, 117 P.2d 342, 347.

[4] "Moreover, with particular reference to the administration of civil service, it is the policy of the courts of this state that 'Courts should let adminstrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.' (Citations.)" Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 21, 168 A.L.R. 467.

[5] "* * * the civil service commission has been given broad discretionary powers in determining the subjects of examination and the qualifications which are to be measured. (Citations.) Judicial interference under such circumstances is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct or a clear abuse of discretion (citations.)" Wilson v. Los Angeles, County Civil Service Comm., 103 Cal.App.2d 426, 432, 229 P.2d 406, 410.

"There are many decisions involving mandamus and its application, but none has been presented in the briefs, nor have we been able to find one, where a court employed mandamus to pass upon answers to questions in an examination held by any board or commission authorized to hold such examination", and "* * * analysis shows a marked uniformity of decision on the part of courts to leave examinations in the hands of members of boards to whom they have been intrusted." Mitchell v. McKevitt, 128 Cal.App. 458, 462, 465, 17 P.2d 789, 791.

The particulars of petitioners' general complaint, that the court refused to receive evidence to prove capricious, arbitrary or unlawful conduct are set forth as quotations from the brief at the beginning of each paragraph.

[6] "It refused the petitioners the right to put on evidence showing that the key answers to Part I of Question II of the

examination did not conform to the question itself."

It is not for a court to second guess the conductors or examiners on the accuracy of the answers. "Much must be left here to the judgment of the examiners. The test cannot be wholly objective and to the extent that it is subjective the result may depend as much upon the fitness of the examiners as upon the fitness of the candidate. That is a risk inherent in all systems of examination." Sloat v. Board of Examiners, 274 N.Y. 367, 9 N.E.2d 12, 15, cited with approval in Almassy v. Los Angeles County Civil Service Comm., 34 Cal.2d 387, 401, 210 P.2d 503.

"Refused the appellants permission to call as witnesses experts and grammarians * * * to assist the court in the meaning of the words used * * * to show that the key answers did not conform to the questions propounded."

[7] The obvious answer is that the examination was not given for experts and grammarians but for firemen who wanted to be promoted to Assistant Fire Chief. Words mean what people generally understand their meaning to be. A dictionary is only a compilation of what words sounds mean to the greatest number of people ordinarily using the words. The trial judge was in as good a position as the experts or grammarians to determine what meaning the hopeful applicants would ascribe to the words, alone or in their context, which were used in the instructions and the questions or problems.

[8] "Refused permission to call witnesses to show that radio script writing was not a duty of H 50 Assistant Chief."

There was no need for such evidence for all agree that script writing is not part of an assistant chief's duty. Section 146 of the charter does place a limit on the kind of question or problem that can be propounded—it must pertain to matters concerning the duties of the department for which the examination is held. It is for the commission within its broad discretionary powers to first decide what question or problem pertains to the duties of the position, considering the rule that the commission's exercise of its discretion will not be upset in the absence of clear abuse. It is not unreasonable to find that the problem involved in Question II is not one of radio script writing but one which involves its topic. The subject matter of the suggested script does pertain to the duties of the position to be filled. The suggested method of answering the problem is but a short illustration of the form the answer to the problem should take. The attributes of a radio script can well be adapted to the making of reports either within the department or to the public in the interest of an efficient administration of a fire department. It must be remembered that petitioners were seeking to qualify for one of the highest positions in a very large fire department. Among other duties of an assistant chief was that of taking over as chief of the entire department should occasion ever require. It is reasonable to expect a person in such high position to be able to communicate well and forcibly with the men in the department or with the general public.

[9] "Refused to permit the appellants to call as a witness the employee of the Fire Department in charge of equipment to show the equipment in the Fire Department at the time of the examination."

Appellants' contention here is based upon their interpretation of the word "Improvements" contained in Question I. They say the word can only relate to existing equipment, and cannot include within its meaning additions to or purchases of equipment. The key rating factor includes purchases and additions to present equipment as an improvement in present fire-fighting equipment. The court cannot substitute, if it would, a different rating factor, for it is apparent that the commission's interpretation is not unreasonable. Additionally, it should be noted that the interpretation is that which the majority of applicants thought it meant, for the rating factor is based upon the answers they all gave to the problem.

[10] "It refused to permit the petitioners to present to the Court as witnesses under section 2055 of the Code of Civil Procedure the expert consultants who aided the Civil Service Commission in this examination so as to show their true function."

What useful purpose this line of questioning would serve has not been shown by appellants and it is not apparent. Section 145 of the Charter gives the commission the authority to hire, even outsiders, to help in giving the examination.

[11] "[A]nd the fact that the key answers were set up after the examination was held and the papers graded, rather than prior to the examination as provided in Rule 12 of the Civil Service Commission".

Rule 12 is far too long to quote verbatim, but in part it reads: "Prior to the rating of the examination papers, the questions asked in the written examination and the rating key answers will be available for three days. * * * The purpose of this inspection of rating key answers is to correct any errors in the rating key answers or any of the questions asked in the examination that may be ambiguously or incorrectly phrased; therefore, protests by participants must be filed in writing during this rating key inspection period." First it should be noted that Rule 12 is limited to "questions" leaving a reasonable inference that it does not apply to "problems". Although labeled questions, the two parts of Part II are in fact not questions at all but are in the nature of problems requiring an essay as a proper answer. Section 146 of the charter refers to both questions and problems which must be in writing.

There was evidence introduced on this last subject from the Secretary of the Commission who testified that the rating factor for an essay type question was not posted until the papers were graded for there was no fair or practical way of getting the proper rating factor until all the examination papers were read. To such a question there is no definite wrong or right answer, such as there is in a multiple choice question, from which a key answer can be made up before the grading. What all the participants have to say about the problem forms the basis upon which the rating criteria are based. A rating factor made up in advance of answers by participants, might find all answers way below par, or find answers which were better than that which had been set up as 100 per cent. The witness stated that this procedure had always been the administrative interpretation of the rules regarding rating keys or rating factors.

[12] "And in order to show that participants were denied the opportunity to protest timely and prior to the adoption of the tentative list."

There was no limitation in the trial court in presenting evidence on this point even though there was and is doubt as to whether or not it was a proper issue before the court under the pleadings. The court found that there was substantial compliance with all the applicable rules of the commission relating to protest. Appellant has not shown wherein this finding is not justified from the evidence. It was found that the Commission did not rate factors for Part II until after the papers were graded and a tentative list of eligibles had been prepared; that the rating factors were posted February 19, 1954, that although all petitioners entered protests, none did so on the ground of failure to post rating factors before grading. The protests were heard by the Commission at a regularly noticed hearing and as a result thereof two of the petitioners were upgraded five points each, which, however, did not change the result in their cases. With the exceptions noted all protests were denied.

The civil service examination was a competitive examination, held to create an eligible list for vacant positions. The applicants are in fact in competition with each other, for the vacancies are filled only from among those who take the examination, with the one getting the highest mark being entitled to the first vacancy and so on down the line until all are filled. It is not the same as an entrance examination where

to be successful, a participant must receive a passing grade which is dependent upon a standard of excellence predetermined by a board of examiners. The important thing in an entrance examination is to get a passing grade; in a civil service promotional examination it is important to get a better grade than any body else.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.



158 Cal.App.2d 556

J. W. VAN HOOK, Plaintiff and Respondent,

v.

SOUTHERN CALIFORNIA WAITERS ALLIANCE, LOCAL 17, an unincorporated association, Defendants and Appellants.

Civ. 22271.

District Court of Appeal, Second District, Division 2, California.

March 20, 1958.

Rehearing Denied April 17, 1958.

Hearing Denied May 14, 1958.

Former officer of local union brought action against local union to recover retirement benefits, which resolution of local union assured him he would receive if he would remain with union and refuse offer of outside employment. The Superior Court of Los Angeles County, Donald E. Dunbar, J., entered judgment in favor of the former officer, and the local union appealed. The District Court of Appeal, Kincaid, J. pro tem., held that evidence sustained finding that there was a promissory estoppel so as to entitle former officer to recover retirement benefits.

Affirmed.

1. Limitation of Actions ⇐43

Cause of action accrues, so that the statute of limitations begins to run at moment when party having cause of action is entitled to begin and prosecute action thereon.

2. Limitation of Actions ⇐43

Cause of action will "accrue", so that the statute of limitations begins to run, when it comes into existence or becomes a presently enforceable demand.

See publication Words and Phrases, for other judicial constructions and definitions of "Accrue".

3. Limitation of Actions ⇐104½

The running of statute of limitations is suspended during any period in which plaintiff is legally prevented from taking action to protect his rights.

4. Limitation of Actions ⇐65(3)

If former officer of union was first required by constitution of international union to exhaust his internal remedies within union by way of successive appeals before filing his action, which was based on promissory estoppel, against union to recover retirement benefits, running of statute of limitations was suspended until date when general executive board of international union notified him that his appeal was denied and that decision of general president was affirmed.

5. Limitation of Actions ⇐13

Where delay in commencing action is induced by conduct of defendant, he cannot avail himself of defense of statute of limitations.

6. Limitation of Actions ⇐13

Where former union official and local union both considered that a former officer was required to invoke and exhaust internal remedies within union and international union by way of successive appeals before instituting any action against local union to recover retirement benefits, and local union actively participated in successive appeals by former officer, and no objection to such procedures was ever voiced by local union until after action was filed by former officer to recover retirement benefits, local union was estopped by its own conduct from asserting that statute of limitations had run.

7. Estoppel ⇐85

Elements of doctrine of promissory estoppel are a promise, clear and unambiguous in its terms, reasonable and foreseeable reliance by party to whom promise is made, and injury of such party because of his reliance.

8. Estoppel ⇐118

In action by former officer of local union against local union to recover retirement benefits, which resolution of union assured him he would receive if he would remain with union and refuse offer of outside employment, evidence sustained finding that there was a promissory estoppel which would entitle former officer to recover.

Alexander H. Schullman, Los Angeles, J. W. Brown, Cincinnati, Ohio, and S. L. Kurland, Los Angeles, for appellants.

Cantillon & Cantillon, Beverly Hills, for respondent.

KINCAID, Justice pro tem.

This action was instituted May 11, 1954. A trial by jury resulted in a verdict for plaintiff and defendant appeals from the resulting judgment in the sum of $109,900 plus interest.

A second amended complaint sets forth causes of action based upon promissory estoppel and upon a contract. No evidence was offered or received under the second cause of action. This complaint alleges in its first cause of action that for many years prior to 1957 plaintiff was a salaried officer of the defendant union; that as such an officer he was required every two years to submit his candidacy to a vote of the membership; that at no time during his employment by defendant was there in effect any provision for the pensioning or retirement of members who had served defendant as salaried officers regardless of the length of time of such service; that prior to November 10, 1947, a restaurateur in Los Angeles County offered plaintiff employment for a term of 10 years at a fixed salary plus a percentage of the net profits; that plaintiff determined to accept this employment as it afforded him more financial security than his position with the union; that the fact of this offer of employment and the fact of plaintiff's intention to accept the same were communicated to defendant through its officers and members. That thereafter, and on or about the 10th day of November, 1947, and for the purpose of inducing plaintiff not to accept employment other than with the defendant, the defendant promised plaintiff that upon his retirement he would be entitled to certain benefits; that in reliance upon this promise of the defendant, plaintiff refused the offer of outside employment and remained in the service of defendant for a period in excess of two years. In conclusion, the complaint alleges that plaintiff retired and demanded performance of defendant's promise; that plaintiff was not paid or given the retirement benefits promised him; that on the contrary, the defendant repudiated its obligation to him; and that plaintiff has exhausted all the available and required trade union appellate procedures.

The answer of defendant admits that it is an unincorporated association existing under and by virtue of the laws of the State of California; that plaintiff was an officer of defendant for a long and continuous period of time prior to the 10th day of November, 1947, during which time plaintiff received a weekly salary for his services; that plaintiff's official capacity with defendant and his salary incident thereto, were contingent upon his being re-elected at general elections held every two years; that there were no provisions in the by-laws or the constitution of the defendant, for the pensioning or retirement of union officials irrespective of their length of service. The defendant admits by its answer that plaintiff appealed to the International Union, of which defendant is an affiliate, and admits that said appeal was denied; that every one of its members is required by the constitution to exhaust all remedies of appeal or protest before resorting to any other court or tribunal, and that any member who brings a legal action against defendant

without first availing himself of all remedies of appeal provided for in such constitution, shall thereafter be ineligible to hold any office in any local or international union. The defendant denies that the exhaustion of said appellate procedures was necessary in plaintiff's case; that plaintiff either received or intended to accept an offer of employment by Robert Murphy as alleged in the complaint.

At the inception of the trial the defendant moved pursuant to Code of Civil Procedure, section 597, that the court try the special issues raised by the plea of the statute of limitations. The court granted defendant's motion and a hearing on this special defense was had by the court sitting without a jury.

In connection with this hearing, and for all purposes of the trial, the plaintiff and the defendant entered into the following stipulations: (1) that at some time prior to October 27, 1947, respondent informed appellant that he intended to resign his elective office as executive secretary in order to accept an offer of employment by the House of Murphy; (2) that on October 27, 1947, and at a general membership meeting of appellant, the retirement resolution was read and the same was ordered referred to the executive board for its consideration since the resolution proposed the expenditure of money; (3) that on November 6, 1947, the executive board of appellant met, considered the retirement resolution and recommended that the same be adopted by appellant's membership; (4) that on November 10, 1947, a general membership meeting of appellant was held, whereat the retirement resolution together with the recommendations of the executive board were considered and the same were then and there adopted; (5) that on February 9, 1948, a general membership meeting approved the minutes of the general membership meeting of November 10, 1947; (6) that on March 6, 1950, Mr. Van Hook was defeated for re-election as secretary of appellant; (7) that on March 11, 1950, and prior to the expiration of his term of office, Mr. Van Hook wrote a letter to appellant wherein he stated that he was retiring and now availed himself of the retirement benefits promised him according to the terms of the resolution of November 10, 1947; (8) that on March 13, 1950, a general membership meeting carried a motion to refer the matter of respondent's retirement to the executive board; (9) that on March 23, 1950, the executive board of appellant directed that it employ an attorney to analyze the legal aspects of the resolution; (10) that on April 10, 1950, the executive board of appellant received an attorney's memorandum on the subject of the retirement resolution and ordered that the same be sent to the general president of the International Union; (11) that on December 13, 1951, one Richard H. Cantillon, an attorney at law, communicated with the International president to ascertain what disposition, if any, had been made by him of respondent's claim to retirement benefits; (12) that on December 17, 1951, the International president responded to Mr. Cantillon's inquiry by letter, and stated, among other things: "It would appear to us that this is a simple trade union matter that does not require the services of an attorney * * *"; (13) that on February 18, 1952, respondent wrote a letter to appellant in which he recited the fact of his prior written notice and in which letter he enclosed the minutes of the meetings of October 27, 1947, November 6, 1947, November 10, 1947, and February 10, 1948, hereinabove referred to. Respondent also stated in said letter that the only information that was available to him relative to the appellant's disposition toward his claimed retirement benefits was contained in the minutes of the meetings of March 23 and 27, and April 6 and 10, 1950. Respondent also stated that unless prompt remittance was made of the money then due, he would take what action he deemed necessary; (14) that on February 25, 1952, appellant wrote a letter to respondent acknowledging receipt of the letter of February 18, 1952, and stating that legal counsel for appellant had advised them that they were "under no contractual obligation to

pay you any money"; (15) that on March 6, 1952, respondent wrote a letter to the International president "[a]ppealing from the decision contained [in the letter of February 25, 1952]." This appeal was supported by copies of the pertinent 1947 resolution and minutes, together with a copy of the minutes of the meeting of February 10, 1948; (16) that on March 24, 1952, a general membership meeting of appellant adopted a resolution repudiating any obligation to respondent; (17) that on March 28, 1952, the International president denied respondent's "appeal" by rendering "Decision 3110." (The evidence discloses that on April 2, 1952, the executive board of appellant received and read Decision 3110 of the International president and referred the same to the general membership meeting of April 28, 1952, whereat "the fact was noted [in the minutes] that the General President denied the appeal." At this meeting a motion was made, seconded and carried that Decision 3110 be "noted and filed"; (18) that on May 24, 1952, respondent appealed the decision of the general president (Decision 3110) of March 28, 1952, to the General Executive Board of the International Union; and (19) that on July 3, 1952, the General Executive Board of the International Union notified respondent that his appeal to them was denied and they affirmed the decision of the general president.

In support of the judgment the evidence discloses that while Mr. Van Hook was secretary of Local 17 he became acquainted with one Robert Murphy, an employer who was engaged in the successful operation of a restaurant in Los Angeles, California.

In the latter part of 1946 Mr. Van Hook had a conversation with Mr. Murphy wherein the latter proposed that Mr. Van Hook go to work for Mr. Murphy in his cafe. Following this initial conversation respondent and Mr. Murphy met on several occasions and discussed the subject of his employment by Murphy. The last of these meetings took place some time in the middle of the summer of 1947, at which time Mr. Murphy presented Mr. Van Hook with a written contract offering Mr. Van Hook the position of manager of the House of Murphy.

Shortly after Mr. Van Hook received the written contract of employment he communicated this fact to the officers of Local 17 who were assembled at an executive board meeting. Later he informed the general membership of Local 17 of his intention to accept Mr. Murphy's offer of employment and resign as secretary and business manager of Local 17. He informed them that he had an offer of a position with Bob Murphy at his House of Murphy at a better salary and on a long-term contract. He advised them that under Murphy's contract he would have security for the rest of his life.

On October 27, 1947, a resolution [1] signed by approximately three hundred members

1. "Resolution

"Whereas, for 20 years Brother J. W. Van Hook has loyally and faithfully served our Union as President, Business Agent, and Secretary-Treasurer, and

"Whereas, during this time, we have seen our Union grow from a very small membership to more than three thousand members, with almost 100 per cent organization of the waiters of Los Angeles, and

"Whereas, during the early period of our organization, Brother Van Hook and all of our officers made many sacrifices, personally and financially, in their efforts to organize the workers in our industry, and

"Whereas, the progressive steps made in elevating wage standards, bettering the working conditions of our membership, the care and welfare of our sick members, the burial of our deceased members, the ownership of our palatial home, and our substantial financial condition can mainly be attributed to the diligence, honesty, faithfulness, and ability of Brother Van Hook, and

"Whereas, James W. Van Hook has won the gratitude, respect and friendship of every member of Local 17, and

"Whereas, Our Local realizes that the expert knowledge of Brother Van Hook and his insight into the numerous and complicated ramifications and problems

was presented in a general membership meeting of Local 17. The resolution provided Mr. Van Hook would receive certain benefits upon his retirement as an officer of Local 17. The resolution urged that Mr. Van Hook not leave and find other employment. Because this resolution required the expenditure of monies the president and chairman presiding at the membership meeting prohibited the members from acting thereon and referred the resolution to the executive board.

On November 6, 1947, the executive board of Local 17 met and after excluding Mr. Van Hook, who was a member of that board, from participating in the proceedings, the retirement resolution was considered. While the resolution was under consideration the president left the meeting and inquired of Mr. Van Hook whether or not he would decline the offer of employment he had received from Mr. Murphy if the executive board recommended passage of the retirement resolution. Mr. Van Hook told the president that if the executive board recommended passage of the retirement resolution and if the general membership adopted this recommendation, he would feel it his duty to remain with Local 17 and refuse Mr. Murphy's offer.

On November 10, 1947, a general membership meeting of appellant was convened. There were more than two hundred members at this meeting and the resolution bearing that date and providing for the retirement of Mr. Van Hook was unanimously passed.

A copy of the retirement resolution passed by Local 17 was handed to Mr. Van Hook by the recording secretary. Mr. Van Hook then informed Mr. Murphy that he would not be able to accept his offer of employment as he considered himself under the circumstances to be duty bound and obligated to remain in the service of Local 17.

Sometime shortly after the meeting of February 9, 1948, and when Mr. Van Hook made inquiry relative to a contract pursuant to the resolution of November 10, 1947, the president of Local 17 told him that there wasn't any need for a contract as the reso-

of the culinary profession are invaluable not only to Local 17 but to the entire Union, and

"Whereas, it is the desire of Local 17 to continue to receive the advice of Brother Van Hook and the benefit of his wide and varied experience in employee and employer relationships in this City, now therefore

"Be It Resolved that the Executive Board and the President and Recording Secretary of this Local 17 be and they are hereby instructed to enter into a contract as of this date, to-wit, the 10 day of November, 1947, for and on behalf of Local 17 with James W. Van Hook whereby the Local agrees that upon his retirement as Secretary-Treasurer, Business Representative, he is to be employed in an advisory capacity as long as he shall live at a salary of 75% of the salary he is receiving at the time of his said retirement; as such advisor he is to confer with, advise and assist the Executive Board and officers of Local 17 whenever requested by them, or on his own initiative; he is to attend the meetings of the Executive Board of Local 17 and the Joint Executive Board with the privilege of voice, but no vote; he is also to attend the meetings of the State American Federation of Labor and of the American Federation of Labor, but only to represent the interests of Local 17 and not as a delegate. His traveling expenses to and from said A. F. of L. conventions and his hotel expenses while such conventions are in session are to be defrayed by Local 17. The contract shall provide that the foregoing duties, but not his compensation, will be subject to his physical condition permitting.

"Be It Further Resolved that it is not the intent of this resolution to urge the early retirement or dispense with the valuable services of Brother Van Hook, but to assure him financial security so that he will not feel it necessary to find other employment than that in which he is now engaged as the loss of his services would be of great damage to Local 17.

"Be It Further Resolved that this resolution be spread upon the minutes of Local 17, and that this signed resolution be attested, signed and stamped with the seal of the Local by the President and Recording Secretary and presented to Brother Van Hook.

"Adopted: Nov. 10, 1947

"/s/ Samuel Gessin Recording Secretary"

lution was couched in the same language as the resolution by which the general president of the American Federation of Musicians was retired.

At an election of officers held on March 6, 1950, Mr. Van Hook was defeated in his effort to be re-elected to the office of secretary of Local 17.

On March 10, 1950, and prior to the actual expiration of his term of office as secretary of Local 17, he retired and gave notice that he was availing himself of the benefits promised by the 1947 resolution.

Mr. Van Hook then related in chronological order the subsequent procedures, both preliminary and appellate, followed by him within the trade union structure. He testified as to his various demands and appeals and he concluded by identifying as exhibits the decisions of the general president and executive board which denied his appeal for relief within the union organization.

Defendant-appellant argues that the court erred in instructing the jury that the defense of the statute of limitations was not available to defendant, contending that plaintiff's cause of action accrued no later than March 6, 1950, the day he was defeated for re-election as secretary. Defendant claims that a two-year limitation applies on the ground that the cause of action is not based upon an instrument in writing and that, even assuming that the resolution constituted an instrument in writing, the four-year period would have expired on March 6, 1954, and prior to the filing of the complaint herein.

[1, 2] A cause of action accrues at the moment when the party owning it is entitled to begin and prosecute an action thereon. The term "accrue" as applied to a cause of action, means to arrive; to commence; to come into existence; to become a presently enforceable demand. Smith v. Minnesota Mut. Life Ins. Co., 86 Cal.App. 2d 581, 590, 195 P.2d 457.

[3, 4] "It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 431, 116 P.2d 37, 39, 136 A.L.R. 800; see Skaggs v. City of Los Angeles, 43 Cal.2d 497, 500, 275 P.2d 9. It follows then if plaintiff was first required to exhaust his internal remedies within the organization by way of successive appeals before filing his action in the courts the statute of limitations was suspended until July 3, 1952, the date when the General Executive Board of the International Union notified plaintiff that his appeal to them was denied and they affirmed the decision of the general president. In this event, the action having been filed on May 11, 1954, the two-year statute of limitations would not have run.

The constitution of the International Union in effect at the time here in question is ambiguous in its terms as to the right of a member to appeal to the convention. Section 13 provides: "*Limitation on Rights of Members to Appeal.* Except as stated herein, an appeal of a member may not be taken beyond the General Executive Board." Section 12 provides: "*Appeal Bodies.* Appeals may be taken from a decision of a Local Union to the Joint Executive Board, if one exists * * * decisions of the General Executive Board may be appealed to the Convention; however where the penalty imposed does not exceed a fine of $100.00 or suspension of more than thirty (30) days, an appeal as of right may not be taken beyond the General President." It is difficult to ascertain from these terms whether an appeal to the convention would be limited to fines exceeding $100 or suspension of members for more than 30 days. This is further complicated by section 14 providing that "Appeals to the Convention must obtain the approval of the Law Committee before being submitted to the Convention. When appeals by General Officers or International Organizers are involved, the Law Committee shall grant such right to appeal and establish the rules for conducting the hearing before the Convention." It would appear then that if such an appeal were taken by one not a General Officer or International Organizer no such right need

be granted nor rules for conducting the hearing before the convention be established.

Defendant asserts that a convention of the International Union would have been held in Atlantic City, N. J., in April 1953. This would have necessitated another nine or more months delay in obtaining a decision. In the light of the ambiguities and uncertainties of the foregoing constitutional provisions, the added delay and the continuing opposition to plaintiff's claim it is reasonable to find that plaintiff was excused from any further attempted appeal beyond the ruling of the General Executive Board as being futile. Mooney v. Bartenders Union Local No. 284, 48 Cal.2d 841, 844, 313 P.2d 857; Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 143, 231 P.2d 6, 21 A.L.R.2d 1387; De Monbrun v. Sheet Metal Workers, 140 Cal.App.2d 546, 562, 295 P. 2d 881.

Defendant now contends that plaintiff's cause of action arises out of a claim for money rather than involving a matter of internal union discipline and therefore it was not necessary for plaintiff to first exhaust the internal remedies of the trade union under its constitution and that he could have filed his action in the courts in March 1950. Defendant cites De Monbrun v. Sheet Metal Workers, supra, and Mooney v. Bartenders Union Local No. 284, supra, in support of this contention. These cases acknowledge the general and established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance. Holderby v. Internat. Union, etc., Engrs., 45 Cal.2d 843, 846, 291 P.2d 463. The Mooney case involved the right of union members to the revelation of any misuse of funds by an immediate examination of the organization's books. The De Monbrun case involved a claim for accounting and wrongful misappropriation of union funds. In each of these cases the defendant union insisted that the plaintiffs must first exhaust the internal remedies within the organization before going to the courts but each case was held under the facts there existing to be an exception.

In the Holderby case it was again contended that the plaintiff had failed to exhaust the remedies available within the union and that he therefore was not entitled to judicial relief. After reciting the above quoted general jurisdictional rule first requiring the exhaustion of internal remedies the court said (45 Cal.2d at pages 846–847, 849, 291 P.2d at page 466): "The plaintiff claims that an exception to the general rule made it unnecessary that he pursue the internal remedies for review before commencing this action. In Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, at page 338, 208 P.2d 1009, at page 1016, it is stated that 'where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal.' See Harris v. National Union, etc., Cooks & Stewards, 98 Cal.App.2d 733, at page 736, 221 P.2d 136. If such an exception is construed as broadly as the quoted language would permit, it would make it unnecessary for any party with a justified grievance involving personal and property rights against an organization of which he is a member, including the plaintiff in the present case, to have the matter corrected internally by the machinery provided before resorting to the courts. The exception in such a case would swallow the rule, a result clearly not intended by the cases relied on as authority for the broad interpretation sought by the plaintiff to justify this action. * * * A violation of other laws and wrongs done within the organization are intended to be conciliated and corrected by the appellate machinery provided therein, if properly invoked by an aggrieved party and applied by the organization. If recourse to such appellate machinery is not sought an aggrieved party foregoes his right to a judicial review regardless of the breach of its own rules

by the organization in causing the grievance in the first instance."

The steps taken by the parties herein as well as the record of this case clearly demonstrate that both plaintiff and defendant considered themselves obligated to first invoke and exhaust the internal remedies within the organization by way of successive appeals before instituting any action in the courts on plaintiff's claim. Here defendant union seeks to prejudice one of its members because of adherence by both parties to this union tradition. No objection to these procedures so invoked by plaintiff was ever voiced by defendant until the statute of limitations was pleaded as an affirmative defense in its answer to the case on file. Defendant actively participated in the successive appeals within the organization and the delays incidental to the obtaining of the final decision of rejection of the appeal by the General Executive Board of the International Union on July 3, 1952, may largely be charged to it. Indeed the evidence indicates that for a period of about 1½ years plaintiff's claim lay dormant with no decision having been rendered thereon by either the general president or the defendant Local 17.

[5, 6] By its conduct herein the defendant lulled plaintiff into a sense of false security in implying that by proceeding through the successive steps of appeal provided by the constitution of the International Union his claim might be recognized or a settlement reached. "It is well settled that where delay in commencing an action is induced by the conduct of the defendant, he cannot avail himself of the defense of the statute [of limitations]." Gaglione v. Coolidge, 134 Cal.App.2d 518, 527, 286 P.2d 568, 574. That the defendant is estopped by its own conduct from now asserting the defense of the running of the statute of limitations against the plaintiff herein is further shown by the rules so clearly set forth in Industrial Indemnity Co. v. Industrial Acc. Comm., 115 Cal.App. 2d 684, 689, 690, 252 P.2d 649, 652. "The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. (Citations.) A person by his conduct may be estopped to rely on the statute. Where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. (Citations.) When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise. (Citations.) One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought. (Citation.)

"Actual fraud in the technical sense, bad faith, or an intent to mislead, are not essential to create such an estoppel. It is sufficient that the debtor made misrepresentations or so conducted himself that he misled the creditor, who acted thereon in good faith to the extent that he failed to commence action within the statutory period. (Citations.) Acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made, may create an estoppel against pleading the statute. (Citation.) An insurer cannot hold out a hope of amicable adjustment of a claim and thus delay action against it, and then plead the delay caused by its own conduct as a defense to an action when brought. (Citation.) It is only when a substantial period for instituting proceedings supervened after expiration of the delay engendered by a party that his conduct or representations will not estop him from asserting the bar of the statute, or where such conduct or representations did not in fact induce the party to forbear from institution [sic] proceedings. (Citation.) A party has a reasonable time in which to bring his action after the estoppel has expired. (Citation.)" (See, also, Benner v. Industrial Acc. Comm., 26 Cal.2d 346, 350,

159 P.2d 24; Carruth v. Fritch, 36 Cal.2d 426, 434, 224 P.2d 702, 24 A.L.R.2d 1403; Mills v. Mills, 147 Cal.App.2d 107, 120, 305 P.2d 61.)

The evidence fully supports the implied finding of fact that the acts, representations and conduct of defendant and the officers of the International Union lulled plaintiff into a sense of security preventing him from instituting proceedings before the running of the statute, that plaintiff relied thereon to his prejudice and that an estoppel exists as against defendant. Industrial Indemnity Co. v. Industrial Acc. Comm., supra, 115 Cal.App.2d 684, 690, 252 P.2d 649; Cruise v. City & County of San Francisco, 101 Cal.App.2d 558, 562, 225 P.2d 988.

Since plaintiff brought his action within the two-year period following receipt by him of notice of denial of his appeal by the General Executive Board of the International Union this is within a reasonable time after the estoppel has expired.

Plaintiff's second amended complaint pleads facts setting forth a cause of action for promissory estoppel. Defendant maintains that the court erred in its instructions to the jury as to this subject; that the evidence is insufficient to establish promissory estoppel against defendant and there was not and could not be promissory estoppel as a matter of law.

[7] The elements necessary for the doctrine of promissory estoppel are well set forth in Graddon v. Knight, 138 Cal.App. 2d 577, 583, 292 P.2d 632, as (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; (4) the party asserting the estoppel must be injured by his reliance. And at page 582 of 138 Cal.App. 2d, at page 636 of 292 P.2d the rule is stated as set forth in section 90, Restatement of Contracts: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Also, section 1962, subdivision 3, Code of Civil Procedure is there quoted: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it * * *."

[8] Applying the foregoing rules to the evidence in this case for the purpose of testing both the court's instructions on the subject and the finding of promissory estoppel as against defendant we find such evidence amply sufficient in each instance. The duly adopted resolution of November 10, 1947, is a clearly worded undertaking by defendant to assure or promise plaintiff the payment to him in the future of the retirement benefits therein definitely specified. It states it is "to assure him financial security so that he will not feel it necessary to find other employment than that in which he is now engaged as the loss of his services would be of great damage to Local 17." The word "assure" is a synonym for the word "promise." It is evident that by this resolution defendant not only intended to and did assure plaintiff of future financial security if he would continue his employment but deliberately intended to induce plaintiff to forego any other offer of employment.

There is material evidence which the trier of facts was entitled to believe that in reliance upon the promise of defendant, plaintiff rejected other remunerative employment offered him by a third party. That this employment was of substantial character is established by the showing that it was by a well-known restaurant under a 10-year contract at a specified salary of $250 per week, plus a percentage of the profits of the business. Upon advising defendant of this proffered and remunerative employment, upon the urging of Mr. Finnigan, the then president of defendant local and upon adoption of the resolution by defendant the new employment was rejected; that said employment was rejected in reliance upon the resolution and upon the

assurance therein contained of future financial security. Under the terms of the promise he was asked and was expected to continue his active services in behalf of defendant, the retirement provisions and payments to commence only at such time as his retirement became effective. He was thereafter re-elected as secretary-treasurer and served for another two-year term. He stood for re-election again and was defeated for another term and then, on a date prior to the expiration of his term of office, notified defendant in writing of his retirement and of his demand for the retirement benefits promised him according to the provisions of the resolution. This evidence sufficiently establishes a promissory estoppel as to defendant in favor of plaintiff and the jury was correctly instructed as to this subject.

Other cases illustrative of the doctrine of promissory estoppel are Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, wherein a police officer was induced to resign his position upon the representation of defendants that they would employ him for a period of 10 years at a stipulated salary and would give him a written contract to that effect. After working for defendants for two years the written contract was not given him and his employment was terminated by defendants without cause. The court rejected appellants' contentions, holding they were estopped by their conduct and promises from denying plaintiff's right to the benefit promised him, saying (156 Cal. at page 794, 106 P. at page 93): "It was the change of position caused by his resignation from the police department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service, but was something that must be done by plaintiff before he could begin to perform, as was known to the defendants. *Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform.*" (Emphasis added.)

In West v. Hunt Foods, Inc., 101 Cal. App.2d 597, 604, 605, 225 P.2d 978, defendant assured its employee-plaintiff that if he would remain with the company he would be given a pension upon his retirement. In reliance on such promise he remained with the company. The court held that a promissory estoppel was thus created and defendant was obligated to pay plaintiff the promised pension. To the same effect see Hunter v. Sparling, 87 Cal.App.2d 711, 725, 726, 197 P.2d 807; Wade v. Markwell & Co., 118 Cal.App.2d 410, 419, 258 P.2d 497, 37 A.L.R.2d 1363; Frebank Co. v. White, 152 Cal.App.2d 522, 525, 313 P.2d 633.

We have considered the other incidental points raised by appellant but deem them of no merit and that further discussion as to them is unnecessary.

The judgment is affirmed.

ASHBURN, Acting P. J., and HERNDON, J., concur.



158 Cal.App.2d 691

In the Matter of the ESTATE of Alvin C. ALGEE, also known as A. C. Algee, Deceased.

Madeline J. ALGEE, Executrix, Appellant,

v.

W. W. ESCHWIG, Respondent.

Civ. 22822.

District Court of Appeal, Second District, Division 2, California.

March 26, 1958.

Proceeding on application by attorney for an allowance of fees. From an order of the Superior Court, San Luis Obispo County, Allen B. Campbell, J., awarding attorney a sum as his share of statutory compensation, the executrix appealed. The District Court of Appeal, Ashburn, J., held that wife's share of community property is a part of her deceased husband's estate and

was properly included in base for computation of statutory attorney's fees.

Order affirmed.

1. Executors and Administrators ⇐236

Where another attorney was substituted as counsel for executrix in respondent's place, making of allowance to respondent of his share of statutory attorney's fees ultimately payable from estate was a proper exercise of discretion on part of trial judge although executrix had not made a final accounting. West's Ann.Prob. Code, §§ 904, 911.

2. Husband and Wife ⇐276(1)

Wife's share of community property is a part of her deceased husband's estate and was properly included in base for computation of statutory attorney's fees. West's Ann.Civ.Code, § 161a; West's Ann. Prob.Code, § 202.

3. Husband and Wife ⇐276(4, 7)

Personal representative of husband is entitled to possession of entire community property and is chargeable with same upon his accounting.

4. Courts ⇐472(4)

Upon death of husband, determination of what constitutes community property and apportionment of wife's share to her is a matter resting exclusively within probate court.

Butler & Hegner, Compton, for appellant.

W. W. Eschwig, in pro. per., for respondent.

ASHBURN, Justice.

[1] Madeline Algee, widow and executrix of the will of decedent, appeals from an order allowing respondent Eschwig $3,000 as his share of the statutory attorney's fee, another attorney having been substituted as counsel for the executrix in his place. Respondent served in that capacity from December 10, 1956 to May 24, 1957, when the substitution was made. He thereupon applied for an allowance upon attorney's fees, same was contested, and the court awarded him $3,000 as his share of the statutory compensation, together with the sum of $263.16 in repayment of moneys advanced by him. The estate had not then progressed to the stage of an accounting. The full fee for ordinary services computed upon the basis of the appraised value of $163,489.49 would have been $3,832.34. Appellant does not argue that this allowance was excessive per se, but relies upon two basic propositions, (1) that no allowance upon statutory fees may be made before final accounting, and (2) as all the property was community, one-half of which belonged to the surviving widow, that half did not constitute part of the husband's estate and could not be included in the base for fee computation.

In support of the first proposition appellant cites In re Estate of Hite, 155 Cal. 448, 458, 101 P. 448, which does hold that no allowance upon statutory fees can be made in advance of final accounting. The opinion says, 155 Cal. at page 458, 101 P. at page 452: "We do not think that it was intended by section 1616, of the Code of Civ. Proc. to require a court to make any allowance on account of such commissions in advance of a final account by the executor or administrator. * * * It is settled that an executor or administrator is not entitled to the commissions allowed him by law until the settlement of his final account. See In re Estate of Rose, 80 Cal. 166, 180, 22 P. 86; In re Estate of Carter, 132 Cal. 113, 114, 64 P. 123, 484. We think the same rule must be held applicable to attorneys under the commission method of compensation provided for by section 1619, so far as the ordinary probate proceedings are concerned, and that nothing is due from the estate on account thereof until such services are completed." This ruling was made on March 31, 1909. At that time § 1616, Code of Civil Procedure, provided: "* * * Any attorney who has rendered services to an executor or admin-

istrator may at any time during the administration * * * apply to the court for an allowance to himself of compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay to such attorney out of the estate such compensation as to the court shall seem proper. Any payment made by an executor or administrator in conformity with such order shall be allowed by the court in his account." Stats.1905, Ch. 577, p. 776. The 1911 legislature amended the section (Stats.1911, Ch. 390, p. 708) with presumptive intent to change the law. People v. Weitzel, 201 Cal. 116, 118, 255 P. 792, 52 A.L.R. 811; Clements v. T. R. Bechtel Co., 43 Cal.2d 227, 231, 273 P.2d 5. The provision for an application at any time during administration was retained, but the phrase "such compensation as to the court shall seem proper" was changed to read "such compensation on account of services rendered by such attorney up to the date of such order;" and this significant phrase was added, "and such payment shall be forthwith made."[1] In 1929 the section was again amended (Stats.1929, Ch. 492, p. 853) to provide that the application could be made at any time after six months from admission of the will to probate or the granting of letters of administration; the provision that "such payment shall be forthwith made" remained in the section.[2] In the process of codification as § 911, Probate Code, the language was slightly changed but no substantial alteration made in the wording or meaning of the section. It then and now reads: "Any attorney who has rendered services to an executor or administrator, at any time after six months from the issuance of letters testamentary or of administration, and upon such notice to the executor or administrator and to the persons interested in the estate as the court or judge thereof shall require, may apply to the court for an allowance upon his fees; and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith."

As the Hite case, supra, analogized the attorney's fee to the executor's fee in this respect it is significant that the 1911 amendment to § 616, Code of Civil Procedure (Stats.1911, Ch. 390, p. 708) also conferred upon the personal representative the right to apply for an allowance "upon his commissions" at any time after one year from probate of will or issuance of letters of administration, and authorized the court to allow him "such portion of his commissions as to the court shall seem proper;" it then added this counterpart to the provision for immediate payment to the attorney of the amount awarded him, "and the portion so allowed may be thereupon charged against the

1. Stats.1911, Ch. 390, p. 708: "* * * Any attorney who has rendered services to an executor or administrator may at any time during the administration, and upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself of compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay to such attorney out of the estate such compensation on account of services rendered by such attorney up to the date of such order as to the court shall seem proper, and such payment shall be forthwith made. * * *"

2. Stats.1929, Ch. 492, p. 853: "* * * Any attorney who has rendered services to an executor or administrator may at any time after six months from the admission of a will to probate, or the granting of letters of administration, and upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself of compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay such attorney out of the estate such compensation on account of services rendered by such attorney up to the date of such order as to the court shall seem proper, and such payment shall be forthwith made."

estate," [3] which means that the representative may immediately pay himself the amount so allowed. Section 904, Probate Code, is in substantially this same form today.

The conclusion seems inescapable that the legislature, over the years following the Hite decision, has deliberately reversed the policy there declared concerning allowances upon statutory fees of personal representatives and their attorneys.

In Re Estate of Jones, 166 Cal. 147, 152, 135 P. 293, 295 (decided in 1913), the court was dealing with an allowance on account of an executor's commissions and said, without reference to the Hite decision: "The allowance of commissions to the executor is objected to on the ground that the court is not authorized to apportion commissions between successive personal representatives until the estate has been completely administered and is ready for distribution. Such was unquestionably the law prior to the amendment in 1911 of section 1616 of the Code of Civil Procedure [Stats.1911, p. 707]. In re Estate of Barton, 55 Cal. 87; In re Levinson's Estate, 108 Cal. [450] 456, 41 P. 483, 42 P. 479. But under the amendment referred to, the executor or administrator may at any time after one year from the admission of the will to probate, or the granting of letters of administration, 'apply to the court for an allowance to himself upon his commissions,' and the court is empowered to make an order 'allowing such executor or administrator such portion of his commissions as to the court shall seem proper, and the portion so allowed may be thereupon charged against the estate.' This provision plainly contemplates an allowance on account of commissions before the administration is completed, and to this extent changes the law as declared in the cases above cited. There is nothing to indicate that the rule is not applicable to an executor who dies or is removed, as well as to one continuing in office."

In re Estate of Piercy, 1914, 168 Cal. 750, 145 P. 88, was an appeal from an order settling an administrator's third account current. The court had refused to allow any counsel fees or commissions in a situation essentially the same as the one before us,—need for an apportionment between administrators, one of whom had retired from the proceeding. At pages 754–755 of 168 Cal. at page 90 of 145 P. the court said: "The appellant complains of the refusal of the court to allow him administrator's commissions and counsel fees. The appellant had been succeeded as administrator by Andrew J. Piercy and the administration of the estate remained uncompleted. The former administrator was not, therefore, entitled to the statutory commissions, but, at most, to such part thereof as the court might apportion to him upon a consideration of the respective rights of the successive administrators. Prior to the amendment in 1911, of section 1616 of the Code of Civil Procedure, no such apportionment could be made until the estate had been completely administered and was ready for distribution. In re Estate of Barton, 55 Cal. 87; In re Levinson's Estate, 108 Cal. [450] 456, 41 P. 483, 42 P. 479. The amended section provides, however, for an application, after the expiration of one year from the grant of letters, for an allowance upon commissions. This provision is applicable to successive administrators. In re Estate of Jones, 166 Cal. 147, 135 P. 293. * * * This conclusion is no bar to the right of the appellant to proceed hereafter for a partial allowance under section 1616. * * * The demand for an allowance for attorney's fees stands upon similar grounds." To the same effect is In re

3. Stats.1911, Ch. 390, p. 708: "At any time after one year from the admission of a will to probate, or the granting of letters of administration, any executor, or administrator, may, upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself upon his commissions, and the court shall on the hearing of such application make an order allowing such executor or administrator such portion of his commissions as to the court shall seem proper, and the portion so allowed may be thereupon charged against the estate."

Estate of Mallory, 99 Cal.App. 96, 106, 279 P. 488.

Concerning an allowance to the attorney made under § 911, Probate Code, Zagoren v. Hall, 122 Cal.App. 460, 465, 10 P.2d 202, 204, says: "The final provisions of section 911 of the Probate Code that 'such payment (for attorney's fees) shall be made forthwith,' should be construed to mean that prompt payment shall be made when there are available funds in the estate from which the obligation may be satisfied. When an estate possesses available funds with which to pay attorney's fees which have been allowed, and the administrator or executor fails or refuses to comply with the order, adequate remedy exists either by citation or by resorting to the provisions of section 954 of the Probate Code." To the same effect, see In re Estate of McDonald, 37 Cal.App.2d 521, 525, 99 P.2d 1115.

We entertain no doubt that the making of the allowance to respondent as his share of the attorney's fees ultimately payable from this estate was a proper exercise of discretion on the part of the trial judge.

[2] The contention that the wife's share of community property cannot be considered in computing fees proves to be equally untenable. The argument is that half of the community property is vested in the wife during the lifetime of both spouses, becomes her separate property immediately upon the husband's death, is not taken into the possession of the personal representative nor chargeable to him in his accounts, does not pass to the widow by decree of distribution, and hence does not and cannot constitute a part of a deceased husband's estate; being no part of that estate it cannot be included within the base for computation of fees. Appellant concedes that the contrary is ruled in Re Estate of Phillips, 123 Cal.App. 2d 570, 266 P.2d 954 (4th Dist.; hearing denied), and would have the reasoning of that case reexamined. The conclusion there expressed is this: "We conclude that the wife's share of the community property is a part of the 'estate' which came into the hands of this executor within the meaning of that term as used in sections 901 and 910, is property which the executor is responsible for and is chargeable with, and was properly included in the amount used as a basis for fixing the ordinary commissions and fees." 123 Cal.App.2d at page 574, 266 P.2d at page 956. We find that opinion persuasive and in our opinion sound in result.

Appellant's argument in this regard reflects a series of misapprehensions. There are few absolutes in the law and the postulate that the wife is the present owner of one-half of the community property is not one of them. Section 161a, Civil Code, which declares the existence of that present interest, is qualified by § 202, Probate Code: "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division 3 of this code * * *." Mr. Justice Vallée thus aptly phrases the matter in Re Estate of Atwell, 85 Cal.App.2d 454, 464, 193 P.2d 519, 525: "One-half of the entire community property belongs and goes to the widow upon condition, the condition being that the property lawfully diverted during the course of administration, i. e., necessary for the payment of debts, expenses of administration, the federal estate tax, etc., shall be used for such purposes and shall not go to the widow. The property so lawfully diverted therefor never passes to the widow." The Supreme Court defined the wife's right as follows in Re Estate of Coffee, 19 Cal. 2d 248, 252, 120 P.2d 661, 664: "It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community together with his separate property, is ample to pay those debts and expenses."

[3] The personal representative of the husband is entitled to possession of the entire community property and is chargeable with same upon his accounting. Chase v. Leiter, 96 Cal.App.2d 439, 457, 215 P.2d 756; In re Estate of Phillips, supra, 123 Cal.App.2d 570, 574, 266 P.2d 954; 20 Cal. Jur.2d § 259, p. 417. In the Chase case, supra, the court said: "The action of the trial court in awarding the widow possession of any of the community property as against the executors was erroneous. All of the community property is subject to administration in the estate of the husband." 123 Cal.App.2d at page 457, 215 P.2d at page 766. In Phillips, supra: "When a husband dies, the probate court has jurisdiction to pass upon the wife's claim to a community interest, In re Estate of Kurt, 83 Cal.App.2d 681, 189 P.2d 528, and must determine what part of the property is community property, what part is needed to pay debts, what election has been made by the widow, and other questions, before it can be known what 'belongs' to the widow. When these matters are determined, and the wife's share can be identified, it must then be separated from the rest of the estate in some orderly manner by an order or decree made by the court. In the meantime the executor must remain in possession, and it cannot reasonably be said that he is not chargeable with, and responsible for, all the property thus placed in his keeping. The wife's community interest is necessarily involved in a large part, if not all, of such administration, and should logically be considered a part of that estate for the purpose of fixing and paying the proper cost of administration. The executor remains responsible for and chargeable with all of the property, until released by the court through some order making a proper 'disposal' of the remaining portion which 'belongs' to the widow." 123 Cal.App.2d at page 574, 266 P.2d at page 956.

[4] Upon death of the husband, the determination of what constitutes community property and the apportionment of the wife's share to her is a matter resting exclusively with the probate court (In re Estate of Kurt, 83 Cal.App.2d 681, 684, 189 P.2d 528; Central Bank v. Superior Court, 45 Cal.2d 10, 17, 285 P.2d 906; In re Estate of Nash, 132 Cal.App.2d 233, 237, 282 P.2d 184; In re Estate of Hartnett, 155 Cal.App. 2d 280, 318 P.2d 81), and a decree of distribution is necessary to that end. In re Estate of Nash, supra, 132 Cal.App.2d at page 237, 282 P.2d 184; Colden v. Costello, 50 Cal.App.2d 363, 370, 122 P.2d 959. In Colden, supra, it is said: "The title of a surviving wife to her interest in the community estate rests upon a decree of distribution. Her right as survivor of the community is one thing; the decree of distribution which determines and identifies the estate which comes to her by virtue of her right is quite another, and is indispensable as a muniment of her title." 50 Cal.App.2d at page 370, 122 P.2d at page 963.

The analogy of a mortgaged property, upon which appellant relies (In re Estate of Lampman, 15 Cal.2d 212, 100 P.2d 488), is not a true one, nor is it helpful. This is pointed out in Phillips, supra, 123 Cal.App. 2d at page 573, 266 P.2d at page 956: "The wife's one-half of the community property is by the statutes made subject to administration and, impliedly at least, to the costs of administration. Being subject to administration, and necessarily to be handled and accounted for by the executor of the husband's estate it should naturally be considered a part of the estate being administered insofar as fixing and paying all costs of administration is concerned. In Re Estate of Lampman, supra [15 Cal. 2d 212, 100 P.2d 491] it was held that while possession of the property was one element to be considered the true test, in determining whether the value of certain property should be considered in fixing fees, is whether or not the executor 'was chargeable with, or responsible for,' the portion of the property in question."

Cases which hold that estate and inheritance taxes do not attach to the wife's share of the community property are likewise not controlling. See Phillips, supra, 123 Cal. App.2d at page 572, 266 P.2d 954. Though

her half may not be literally a part of the deceased husband's estate, it is made so by § 202, Probate Code, and the burdens thereby placed upon it.

As above indicated, we consider that the Phillips case is soundly reasoned, buttressed by ample precedents, and sound in its conclusion that the wife's half of the community property is chargeable with a proportionate part of the costs of administration of the deceased husband's estate and that attorney's fees are a part of such costs. In addition to the authorities above cited we refer to In re Estate of Marinos, 39 Cal.App.2d 1, 7, 102 P.2d 443, which makes the same holding as Phillips.

Order affirmed.

FOX, P. J., and HERNDON, J., concur.



157 Cal.App.2d Supp. 863

William E. FENTRESS, Appellant,

v.

VAN ETTA MOTORS et al., Defendants; Ford Motor Company, Respondent.

C. A. 2521.

Appellate Department, Superior Court, San Francisco County, California.

Jan. 31, 1958.

Automobile purchaser's action against manufacturer and dealer for damages to automobile due to alleged negligence in manufacturer of brakes and wheel bearings of automobile and for negligence and alleged breach of warranty. The Municipal Court for the City and County of San Francisco, James J. Welsh, J., entered judgment for manufacturer and purchaser appealed. The Appellate Department, Superior Court, Devine, P. J., held that an action would lie against manufacturer of article which when negligently made was likely to produce injury to person or property, for damages resulting from accident caused by negligence, even though the damages were confined to the destruction or harm of the article itself.

Reversed and trial court directed to set aside order sustaining demurrer without leave to amend.

1. Negligence ⇐27

An action will lie against manufacturer of an article, which if negligently made, is likely to produce injury to person or property, for damages resulting from accident caused by negligence, where damages are confined to the destruction or harm to the article itself.

2. Automobiles ⇐16

Purchaser, whose automobile was damaged in an accident when the brakes failed to hold, was entitled to bring an action against manufacturer of automobile for damages to vehicle.

3. Negligence ⇐27

In order that an action might lie against manufacturer of article which if negligently made is likely to produce injury to person or property, for damages resulting from accident caused by the negligence, where damages are confined to the destruction or harm to article itself, negligence must be proved in accordance with general rule of manufacturer's negligence, article must be of a nature that, if negligently made, it is reasonably certain to produce harm to persons or property, an accident must have resulted, and accident must be a casualty involving some violence or collision with external objects rather than a mere marked deterioration or even a complete ruin brought about by internal defect.

Pillsbury, Madison & Sutro, San Francisco, for appellant.

Charles O. Morgan, Jr., San Francisco, for respondent.

DEVINE, Presiding Judge.

Plaintiff has appealed from a judgment in favor of Ford Motor Company, based on an order sustaining a demurrer without leave to amend. The action is against Van Etta Motors, vendor of a Mercury automobile, on an alleged warranty; answer of that defendant has been filed; but it is also against Ford Motor Company for damages alleged to have been caused by negligence in the manufacture of the brakes and wheel bearings of the automobile. The damages were to the automobile itself, in an accident in which it was wrecked when the brakes failed to hold. No damage to person or to other property is alleged.

[1, 2] The order and judgment were made by the trial judge because of our decision in Judson Pacific Murphy, Inc. v. Thew Shovel Co., 127 Cal.App.2d 828, 275 P.2d 841, and appellant frankly bases his appeal on the proposition that we should overrule that earlier decision of our own court. The question may be stated simply, but it is one which has very rarely been considered. It is this: Will an action lie against the manufacturer of an article which, if negligently made, is likely to produce injury to person or property, for damages resulting from an accident caused by the negligence, where the damages are confined to destruction or harm to the article itself? In the Judson case we answered this question in the negative, on the ground that to extend the manufacturer's responsibility to include the article itself would make the manufacturer virtually a warrantor.

We have reached a conclusion different from our former holding, and we are causing this opinion to be published because the earlier one was reported.

Although the main reason for our change has been none other than an altered judgment based on further reflection, it may be mentioned that one or two cases have been brought to our attention which were not before us—and some had not then been decided—when we decided the Judson case. Also, the trend of judicial decisions seems to carry on what Justice Cardozo, in Ultramares Corporation v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445, 74 A.L.R. 1139, called "the assault upon the citadel of privity." See for example Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16, in which the court, disapproving earlier decisions, held that a notary who prepared an invalid will was liable to a prospective legatee despite the absence of privity.

Shortly after the landmark case on manufacturer's liability of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440, the Supreme Court of New York held, in Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y.S. 131, that the manufacturer's liability for negligence in an automobile brake failure case extends to damage solely to the article itself, the automobile. Unlike the MacPherson case, the Quackenbush case was not carried to the court of appeals. As authority for the proposition that the manufacturer's liability for negligence extends to damage to the article itself, the Quackenbush case stands almost alone. The decision in International Harvester Co. v. Sharoff, 10 Cir., 202 F.2d 52 does hold the manufacturer liable, the article itself being the sole casualty, but the manufacturer was the immediate vendor, and the cause having been stated on warranty as well as on negligence, the decision does not necessarily ground itself upon the charge of negligence. On the other hand, the Judson decision seems to be the only one denying the manufacturer's liability in this type of case.

In the Quackenbush case, it was reasoned by the court that it would be illogical to hold that a person driving a car with negligently fabricated brakes could recover from the manufacturer if he suffered personal injury, but if he had jumped from the vehicle and escaped personal injury, and the automobile was destroyed, he could not recover for the damage to the car. The accident and the negligence causing

it, rather than the results of the accident were held to be the controlling factors. We accept that reasoning, and we shall add some thoughts of our own.

[3] To accept the rule of the Quackenbush case will not make the manufacturer a warrantor to the ultimate purchaser. In the first place, negligence must be proved, in accordance with the general rule of manufacturer's negligence. Burr v. Sherwin-Williams Co., 42 Cal.2d 682, 695, 268 P.2d 1041.

In the second place, the article, while no longer, as in the early days of the doctrine of manufacturer's liability, required to be inherently dangerous, must be of such nature that, if negligently made, it is reasonably certain to produce harm to persons or to property. Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481; Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345. Injury or damage must have been foreseeable, reasonably, by a prudent manufacturer. 65 C.J.S. Negligence § 100, p. 631; Restatement of Torts, p. 1039, § 388. This at once removes a host of articles which could become harmful to the public only by remote possibilities or under bizarre circumstances, from the rule of manufacturer's liability in general, and from liability for damage to the very articles, in particular.

In the third place, an accident must have resulted. In the case of Trans World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284, plaintiff sought damages against the manufacturer in the nature of the cost of repairs to airplane engines which it had bought through a seller whom, for an unknown reason, said the court, plaintiff did not choose to sue on warranty. The court held that, although certainly the engines, if negligently made, were likely to endanger persons and property, nevertheless, since the fault was found in time to avert accident, the manufacturer's negligence would not cause liability. Otherwise, the court pointed out, there would not be much scope for the law of warranty, and persons who had no contractual relations with the manufacturer could escape the limitations, if any there were, agreed upon in their contract of purchase made with their immediate vendors.

Finally, it seems that the accident must be a casualty involving some violence or collision with external objects, not a mere marked deterioration, or even a complete ruin brought about by internal defect. In Wyatt v. Cadillac Motor Car Division, 145 Cal.App.2d 423, 302 P.2d 665, judgment for defendant manufacturer on order sustaining demurrer without leave to amend was affirmed, where the complaint alleged that a paper was negligently sealed in an automobile's breather pipe, causing ruin of the engine, the defect not having been one which would be likely to produce injury to persons or to other property. The manufacturer, in guarding against damage to the public at large, would not have to guard against such a defect, its liability extending only to its own vendee.

Although we need not define the limitations set forth above, we mention them as showing that, by answering the question above stated in the affirmative, we are very far from embracing an unlimited manufacturer's responsibility.

Besides the fact that the rule contended for by appellant does not, when restricted by the limitations which no doubt are to be applied, convert the manufacturer's position to that of warrantor to third persons, there are positive reasons for its acceptance. The manufacturer's liability is based on reasons of public policy. The purchaser is a member of the public. If his property happens to be the article negligently made, he is entitled to damages no less than is a total stranger to the property. In fact, his purchase, though not directly from the manufacturer, may have promoted the latter's business, and his position should not be inferior to that of others. Nothing is added to the required quantum of care, because the manufacturer must observe that duty in order to avoid responding to strangers, in any event, where the articles

are of the nature described above. The amount of care itself required is not enlarged, but the owner of the article is regarded as not being excluded from the protection afforded to the entire public.

There may be many occasions when the liability of a retailer as a warrantor would not, for practical purposes, be as availing to a plaintiff as would that of a manufacturer. The retailer is closer to the plaintiff in the sense of contractual privity, but the manufacturer is the more responsible in the sense of fault if, as alleged, it is his negligence which brought about the loss.

The judgment is reversed, and the trial court is directed to set aside the order sustaining the demurrer without leave to amend.

MOLKENBUHR and SHOEMAKER, JJ., concurred.

50 Cal.2d 163

Walter W. PHILLIPS, Appellant,
v.
Glenn R. NOBLE, Respondent.

Walter W. PHILLIPS, Appellant,
v.
Charles MITCHELL, Respondent.

L. A. 24706.

Supreme Court of California,
In Bank.
March 28, 1958.

Action by passenger against both drivers for personal injuries sustained in automobile collision. From a judgment for defendants entered in the Superior Court, Los Angeles County, Fred Miller, J., the passenger appeals. The Supreme Court, Gibson, C. J., held that where no instruction on res ipsa loquitur was requested or given, and the case was not one in which the doctrine could be applied as a matter of law on basis of undisputed facts, and the Supreme Court could not say that it was more probable than not that both drivers were negligent, or that one was at fault to exclusion of the other, failure to instruct on res ipsa loquitur was not reversible error.

Affirmed.

Schauer and McComb, JJ., dissented in part.

Opinion 313 P.2d 22, vacated.

1. Appeal and Error ⇐216(1)

In the absence of a request for instructions on the doctrine of res ipsa loquitur, it is not reversible error to give the instruction on the mere happening of an accident, if the application of the doctrine depends upon the determination of disputed facts.

2. Automobiles ⇐181(1)

Where there was evidence that plaintiff was a guest in automobile colliding with another, he could not recover against the driver unless he established that the injury resulted from wilful misconduct of the driver. West's Ann.Vehicle Code, § 403.

3. Automobiles ⇐242(2)

"Res ipsa loquitur" which permits the drawing of an inference that ordinary care was not used, cannot serve as a means of establishing intoxication or wilful misconduct permitting recovery by a guest against driver of automobile. West's Ann. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

4. Automobiles ⇐245(24)

In action for injuries sustained by guest in automobile, where no instruction on res ipsa loquitur was requested or given, case was not one in which doctrine could be applied as a matter of law on the basis of undisputed facts, where court could not say, that it was more probable than not, that both drivers were negligent or that one was at fault to the exclusion of the other. West's Ann.Vehicle Code, § 403.

5. Appeal and Error ⇐216(2)

In action by guest for injuries sustained in automobile collision brought against both drivers, where plaintiff did not request an instruction apprising court that he was relying on doctrine of res ipsa loquitur, judgment would not be reversed because of failure of the trial court to use words in the challenged instruction which would have avoided conveying idea, that there was no probability of negligence on the part of at least one of the drivers.

6. Appeal and Error ⇐901

An appellant has the burden to present a record which is sufficiently complete to establish that the claimed errors were not invited by him, and in the absence of such a showing, he may not properly complain.

Everett E. Demler and Eric A. Rose, Long Beach, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, Ball, Hunt & Hart, Clarence

S. Hunt, Long Beach, and Jean Wunderlich, Los Angeles, for respondents.

GIBSON, Chief Justice.

This is an appeal by plaintiff from an adverse judgment entered on a jury verdict in consolidated actions to recover damages for personal injuries suffered by him when a car driven by defendant Mitchell, in which plaintiff was riding, collided with one driven by defendant Noble.

The collision occurred at the intersection of Sepulveda Boulevard and 22nd Street in Manhattan Beach. Sepulveda, a six-lane thoroughfare, runs in a north-south direction, and 22nd connects with Sepulveda from the east, forming a T-shaped intersection. There were no stop signals on Sepulveda at the intersection, but there was a reflector stop sign on 22nd. Immediately before the collision occurred, Mitchell was driving in a northerly direction on Sepulveda in the lane next to the center line, and Noble was making a left turn from 22nd onto Sepulveda.

Mitchell testified that as he was approaching the intersection there were cars in each of the two lanes to his right and that these cars started to slow down when they were about ten feet from the intersection, at which time he was about 25 feet farther back. Not knowing why the other cars were stopping, Mitchell applied his brakes and stopped a foot or two inside the intersection. He said he did not see Noble's car until a second before the collision.

Noble testified that he stopped at the reflector sign on 22nd Street for about 15 seconds and then proceeded into the intersection at a speed of from three to five miles per hour. As he entered the intersection, the cars in the two northbound lanes closest to him slowed down and stopped. These vehicles obstructed his view of the third lane so that he did not see the Mitchell car until he passed the two outside lanes. When he first saw Mitchell's car it was about 25 feet away and traveling between 30 and 35 miles per hour, and it did not slow down before the collision. Mitchell's right front fender struck Noble's left front fender, and Mitchell's car continued in motion after the collision for about 14 feet.

Plaintiff testified that he paid Mitchell fifty cents a day for transportation. Mitchell denied that he received any compensation.

The trial court, at defendant's request, gave the following instruction: "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action, was negligent." It is plaintiff's contention that an inference of negligence arose from the happening of the accident under the doctrine of res ipsa loquitur, and he asserts that the instruction precluded the jury from drawing the inference.

An issue as to the propriety of the quoted instruction has frequently arisen in cases where there was evidence warranting the application of the doctrine of res ipsa loquitur. See Shaw v. Pacific Greyhound Lines, Cal.Sup., 323 P.2d 391; Jensen v. Minard, 44 Cal.2d 325, 329, 282 P.2d 7; Barrera v. De La Torre, 48 Cal.2d 166, 170 et seq., 308 P.2d 724. This is because the instruction contains an idea which, unless explained, might be understood by laymen as being inconsistent with the doctrine. See Shaw v. Pacific Greyhound Lines, Cal.Sup., 323 P.2d 391; Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 261–262, 143 P.2d 929; England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692; Ellis v. Jewett, 18 Cal.App.2d 629, 634, 64 P.2d 432.

[1] We have recently held that, in the absence of a request for instructions on the doctrine of res ipsa loquitur, it is not reversible error to give the instruction on the mere happening of an accident if the application of the doctrine depends upon the determination of disputed facts. Barrera v. De La Torre, 48 Cal.2d 166, 170 et seq., 308 P.2d 724. In such a case a *request* for appropriate instructions on the doctrine is essential so that the court may be apprised of the plaintiff's reliance on it and have an

opportunity to explain the relationship between the doctrine and the instruction on the mere happening of an accident. In the absence of such a request, the only situation in which the giving of the challenged instruction was held to constitute error was where the res ipsa loquitur inference arose as a matter of law from facts conceded by the defendant. Jensen v. Minard, 44 Cal.2d 325, 329, 282 P.2d 7.

[2–4] Here no instruction on res ipsa loquitur was requested or given, and the case is not one in which the doctrine may be applied as a matter of law on the basis of undisputed facts. The evidence relating to the conduct of the defendants prior to the collision is conflicting, and we cannot say that it is more probable than not that both drivers were negligent or that one was at fault to the exclusion of the other. With respect to the cause of action against Mitchell, there was evidence that plaintiff was a guest within the meaning of section 403 of the Vehicle Code, in which event he could not recover unless he established that the injury resulted from the intoxication or wilful misconduct of Mitchell.[1] Obviously res ipsa loquitur, which permits the drawing of an inference that ordinary care was not used, cannot serve as a means of establishing intoxication or wilful misconduct. Fiske v. Wilkie, 67 Cal.App.2d 440, 449–452, 154 P.2d 725; cf. Cadotte v. Industrial Accident Comm., 86 Cal.App.2d 754, 757, 194 P.2d 563. Insofar as Noble is concerned, there can be no justification for applying the doctrine as a matter of law against him alone. Assuming that the doctrine might be used in some collision cases to require an explanation from both defendants, Noble would be placed at a serious disadvantage if he were required as a matter of law to exculpate himself in order to avoid liability when Mitchell, who may have been equally or solely negligent, would not be required to do so if plaintiff were considered his guest.

The case of Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092, relied upon by plaintiff, is clearly distinguishable. The court pointed out that the injury there involved took place before the effective date of the guest statute (now section 403 of the Vehicle Code, referred to above) and that for this reason the driver of the car in which the plaintiff was riding was liable for ordinary negligence. 220 Cal. at page 60, 29 P.2d at page 166. Accordingly, the case can be of no assistance to plaintiff with respect to his action against Mitchell. The case is likewise not authority regarding Noble's liability. The court was there concerned with the propriety of an instruction which permitted the jury to apply res ipsa loquitur to the driver of the car in which the plaintiff was riding, and there was no discussion of the liability of the driver of the other vehicle, who, although a defendant in the trial court, was not a party to the appeal.

Shaw v. Pacific Greyhound Lines, Cal. Sup., 323 P.2d 391, is also distinguishable. That case involved the propriety of an order granting a motion for a new trial where an instruction on res ipsa loquitur containing only minor defects was refused although an appropriate instruction would have been clearly justified by the evidence.[2] In view of the broad discretionary powers of a judge in passing upon a motion for a new trial we upheld the order, but we recognized that the reversal of a judgment on appeal would not be warranted in circumstances such as those now before us.

1. Section 403 of the Vehicle Code provides: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury * * * unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the intoxication or wilful misconduct of said driver."

2. Although the defendant in Shaw v. Pacific Greyhound Lines, Cal.Sup., 323 P.2d 391, was a common carrier, application of res ipsa loquitur was not required because the evidence was conflicting with respect to whether the plaintiff was injured as a result of the operation of the defendant's vehicle.

[5] It should be pointed out, however, that the form of the challenged instruction does not fit a factual situation like the one involved in the present case. The instruction told the jury that the mere fact that an accident happened does not support an inference that "some person, or any party to this action," was negligent. It should have been worded so as not to deny the existence of a probability that someone was negligent but instead to state that no inference arises that both drivers were negligent or that a particular one was negligent to the exclusion of the other. However, since plaintiff did not request an instruction which would have apprised the court that he was relying on the doctrine of res ipsa loquitur, we cannot say that the judgment here should be reversed because of the failure of the trial court to use words in the challenged instruction which would have avoided conveying the idea that there was no probability of negligence on the part of at least one of the drivers.

[6] Plaintiff claims that the trial court modified two instructions requested by him and that the modifications rendered the instructions uncertain and erroneous. The record, however, does not show the instructions in the form requested by plaintiff, and the asserted errors may be attributable to him. It is, of course, plaintiff's burden, as appellant, to present a record which is sufficiently complete to establish that the claimed errors were not invited by him, and in the absence of such a showing he may not properly complain. (Cf. Lynch v. Birdwell, 44 Cal.2d 839, 846–847, 285 P.2d 919.)

The judgment is affirmed.

SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance but upon the sole ground that the instruction here in question, while erroneous, was not prejudicial to plaintiff under the facts as disclosed by the record in this case. The instruction referred to reads as follows: "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action, was negligent." In my opinion it is error to give the foregoing instruction in any negligence case. The declaration contained in this instruction is in direct conflict with the experience of everyone who has been involved in an accident. Barring accidents which may be solely the result of acts of God or of circumstances or conditions entirely beyond the control of the parties involved, it is inconceivable to me that an accident could happen in the absence of negligence on the part of someone. The instruction above quoted served no purpose except to confuse and mislead the jury, and in my opinion, plays a more important part in this direction than the erstwhile stock instruction on unavoidable accident (see, Parker v. Womack, 37 Cal. 2d 116, 230 P.2d 823; Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500).

There is obviously no necessity for giving the above quoted instruction in any negligence case and the giving of such an instruction cannot possibly aid the jury in determining whether or not the defendant was guilty of negligence which proximately contributed to plaintiff's injury or that plaintiff was not guilty of contributory negligence. In the conventional negligence case, instructions are given defining negligence, proximate cause and burden of proof. The jury is then told that before the plaintiff can recover he must prove by a preponderance of the evidence that defendant was guilty of negligence which was the proximate cause of the accident, and if contributory negligence is pleaded as a defense, that the burden is on the defendant to prove that plaintiff was guilty of contributory negligence which contributed to his own injury in some degree. With these instructions in mind, the jury are in a position to return a verdict based upon the evidence. Since the jury has been told that plaintiff cannot recover damages from the defendant unless the latter was guilty of negligence which was the proxi-

mate cause of the accident and that plaintiff must have been free from negligence himself which proximately contributed to the accident, any additional instructions such as the one above quoted or the one on the subject of unavoidable accident condemned in the Butigan case, are mere surplusage and tend to mislead and confuse the jury. For this reason I would hold that the giving of either of such instructions is error.

The question of whether or not plaintiff has suffered prejudice as the result of the giving of either of the above mentioned instructions is sometimes a close one. In the ordinary case where there is a sharp conflict in the evidence but where there is sufficient competent evidence to establish negligence on the part of the defendant and evidence of contributory negligence on the part of the plaintiff is either weak or non-existent, I would hold the giving of either of the above mentioned instructions prejudicial error justifying a reversal of the judgment in favor of the defendant if the instructions were given at his request. On the other hand, where the evidence of defendant's negligence is weak and there is substantial evidence in support of the defense of contributory negligence, I would be disposed to hold the giving of the questioned instructions not necessarily prejudicial.

The foregoing reasoning leads me to the conclusion that in cases where plaintiff has made out a case under the doctrine of res ipsa loquitur and offers appropriate instructions applying this doctrine, it would be prejudicial error for the court to give either of the above mentioned questionable instructions at the request of defendant. I am likewise of the opinion that where the evidence makes out a case under the doctrine of res ipsa loquitur as a matter of law, such as Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7; Danner v. Atkins, 47 Cal. 2d 327, 303 P.2d 724; and Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724, it would be prejudicial error to give either of the above questioned instructions even in the absence of the offer by plaintiff of res ipsa loquitur instructions on his behalf.

In the case at bar no instructions applying the doctrine of res ipsa loquitur were offered by plaintiff and in my opinion the record does not disclose a case giving rise to this doctrine as a matter of law. In the absence of proposed instructions by plaintiff applying the doctrine of res ipsa loquitur as to one or both of the defendants, it is obvious that no error can be predicated upon the failure of the court to submit the case to the jury under this doctrine, and we are not faced with the question as to whether or not it would have been error for the trial judge to refuse to instruct the jury under this doctrine if appropriate instructions applying this doctrine had been presented by plaintiff. I have heretofore given expression to the view that the doctrine of res ipsa loquitur may be applicable to many cases involving collisions between two or more automobiles or an accident in which only one automobile is involved (see, dissenting opinions in Danner v. Atkins, 47 Cal.2d 327, 334, 303 P.2d 724; Barrera v. De La Torre, 48 Cal.2d 166, 173, 308 P.2d 724), and I am in full accord with the views expressed by this court in Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092, and with the statement of Dean Prosser in the second edition of his work on torts, on pages 207 to 209, and the discussion in The Law of Torts by Harper and James (1956), pages 1090 to 1092, and I am unwilling to join with the majority in restricting the application of the doctrine of res ipsa loquitur to the very limited field in which it has been applied by the majority of this court in recent decisions (Danner v. Atkins, supra, 47 Cal.2d 327, 303 P.2d 724; Barrera v. De La Torre, supra, 48 Cal.2d 166, 308 P.2d 724).

It is perfectly obvious to me that in a case where the doctrine of res ipsa loquitur is applicable, and instructions applying this doctrine are given, the giving of either of the above questionable instructions creates a patent conflict, as the court in one breath tells the jury that the mere happening of

the accident gives rise to an inference of negligence, and in the next, that it does not. I can see no merit whatsoever in the specious reasoning of Mr. Justice SCHAUER on this subject, as everyone familiar with the trial of a law suit knows that when instructions are given to a jury, sufficient evidence has been introduced to establish the fact that the accident was the result of the negligence of someone connected with the case, or the issue of negligence would not be submitted to the jury. If the case were tried in a vacuum and there was no evidence as to how the accident happened or from which inferences or presumptions could be drawn, the abstract reasoning of Mr. Justice SCHAUER might come into play, but it can have no place in the trial forum where there is direct or indirect evidence as to how the accident happened.

For the reason above stated, that it does not appear as a matter of law that the doctrine of res ipsa loquitur is applicable to the facts of this case and where no instruction applying this doctrine was offered by plaintiff, I am constrained to agree with the majority that the giving of the above quoted instruction, while error, was not prejudicial to the plaintiff.

SCHAUER, Justice (concurring and dissenting).

In this case the majority reach a correct judgment but, regrettably, their opinion contains unsound discussion which, coupled with what appears to be intended as directions to be followed by counsel and trial courts in the preparation of instructions, may well lead to confusion and error.

The trial court in this case had given the time-tried and rationally correct instruction that "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action, was negligent." In criticism the majority declare: "The instruction told the jury that the mere fact that an accident happened does not support an inference that 'some person, or any party to this action,' was negligent." In view of the heretofore recognized elements of proof (*in addition to the mere happening of an accident*) essential to drawing of the res ipsa loquitur inference, is not the statement indisputably correct? But the majority continue: "It should have been worded so as not to deny the existence of a probability that someone was negligent but instead to state that no inference arises that both drivers were negligent or that a particular one was negligent to the exclusion of the other." It may be asked, wherein does the quoted instruction "deny the existence of a probability that someone was negligent"? And is it not a startling thesis that the instruction should "instead * * * state that no inference arises that both drivers were negligent or that a particular one was negligent to the exclusion of the other"? Such a factual statement by a trial judge would clearly constitute an invasion of the jury's province. And the majority continue: "However, since plaintiff did not request an instruction which would have apprised the court that he was relying on the doctrine of res ipsa loquitur, we cannot say that the judgment here should be reversed because of the failure of the trial court to use words in the challenged instruction which would have avoided conveying the idea that there was no probability of negligence on the part of at least one of the drivers." I read and re-read the "challenged instruction" in vain for "words * * * conveying the idea that there was no probability of negligence on the part of at least one of the drivers." This instruction does not deal with "probability of negligence"; it is, rather, explanative and cautionary, in a purely abstract way, as to the elements of proof essential to the drawing of an inference.

If *in addition* to "the mere happening of an accident" there is evidence tending to show that a defendant had some substantial connection with *the cause* of the accident, and if there is also evidence showing the circumstances of the accident and those circumstances reasonably warrant an inference that the accident would not ordinarily or probably have happened in the

absence of negligence by the defendant, then manifestly an inference may be drawn against him, and the jury may be so told. But obviously there is absolutely nothing in the challenged instruction which suggests the contrary. That instruction merely guards against drawing the inference upon proof of the "mere happening of an accident, without more." Application of the rule must depend upon what facts are found. Where the evidence admits of different findings, all potentially appropriate rules should be stated to the jury.

I concur in the majority's holding that "res ipsa loquitur * * * cannot serve as a means of establishing intoxication or wilful misconduct," and also in the judgment of affirmance.

McCOMB, J., concurs.



50 Cal.2d 153

Ernest SHAW, Respondent,

v.

PACIFIC GREYHOUND LINES (a Corporation), Appellant.

L. A. 24748.

Supreme Court of California, In Bank.

March 28, 1958.

Rehearing Denied April 23, 1958.

Action for injuries sustained by passenger when bus of defendant allegedly made a suddent slowdown or stop. Judgment for defendant in the Superior Court, Los Angeles County, Caryl M. Sheldon, J., and a new trial was granted and the defendant appeals. The Supreme Court, Gibson, C. J., held new trial was properly granted for an instruction, that the mere fact that an accident happened, considered alone, did not support an inference that some party was negligent.

Affirmed.

Schauer and McComb, JJ., dissented.

Opinion 314 P.2d 167, vacated.

1. Carriers ⇐321(21)

In action by passenger against carrier for injuries allegedly sustained when bus made a sudden slowdown or stop, instructing that mere fact that an accident happened, considered alone, does not support an inference that some party was negligent, is subject to objection that it contains an idea which may be understood by a layman to be inconsistent with the doctrine of "res ipsa loquitur," meaning that an inference arises from happening of an accident that the proximate cause of the occurrence was some negligent conduct by defendant.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

2. Carriers ⇐321(23)

In action by passenger for injuries sustained when bus made a sudden slowdown, evidence that plaintiff was injured from such sudden slowdown and that no improper conduct by the plaintiff proximately contributed to his injuries, would entitle plaintiff, upon request, to instructions on doctrine of res ipsa loquitur.

3. Carriers ⇐316(3)

In action by passenger for injuries allegedly sustained when bus made a sudden slowdown, if plaintiff was intoxicated and because thereof, he fell and injured himself through no fault of the driver, injury would not result from negligent management of the bus, and plaintiff would not be entitled to inference afforded by application of res ipsa loquitur.

4. Trial ⇐261

A trial judge is not required to correct a requested instruction which is incomplete or erroneous.

5. Trial ⇐261

Where instruction tended by plaintiff on doctrine of res ipsa loquitur was incomplete in that plaintiff did not fill in the blank space after the word "namely", and also was defective because of plaintiff's failure to choose between alternatives offered by certain words and to make appropriate deletions, court was not required to give the instruction.

6. Appeal and Error ⇐854(6), 977(1)

Determination of a motion for new trial rests so completely within court's discretion, that its action will not be disturbed, unless a manifest and unmistakable abuse thereof clearly appears, and order will be affirmed, if it may be sustained on any ground, although reviewing court might have ruled differently in the first instance.

7. Appeal and Error ⇐978(1)

Where the trial court grants a new trial for an erroneous instruction, if the instruction was erroneous in any degree, or even if it is only fairly debatable that such instruction may have been misleading, broad discretion of the trial court may not be disturbed.

8. New Trial ⇐39

In action by passenger for injuries sustained when bus made a sudden slowdown, trial court did not abuse its discretion in granting plaintiff a new trial, because it instructed that the mere fact that an accident happened, considered alone, did not support an inference that some person or any party to the action was negligent.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker, Los Angeles, for appellant.

Milan Medigovich, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff, a passenger on one of defendant's buses, brought this action for injuries to his knee allegedly resulting from the negligence of the driver in suddenly reducing the speed of the bus. Pursuant to a verdict, judgment was rendered in favor of defendant. A new trial was granted upon the ground that there had been an error of law occurring at the trial. Defendant has appealed.

The testimony of plaintiff may be summarized as follows: He boarded the bus at Corona del Mar about 12:30 in the morning and sat in the second seat behind the driver. About 30 minutes later, while the bus was traveling at a speed of approximately 65 miles an hour, it suddenly slowed down as though there had been a severe application of the brakes. Plaintiff was thrown against the seat in front of him, and, as a result, his knee was injured. Before the bus reached the next stop, Doheny Palisades, plaintiff informed the driver that he had been injured by the movement of the bus and that he was in "terrific pain." At the Doheny Palisades stop plaintiff attempted to get up but was unable to do so. When the bus arrived in San Diego he was met by two claims adjusters for defendant who helped him off the bus and drove him to a hospital. X-rays were taken of his knee, and his leg was placed in a cast. Plaintiff said that several hours before he boarded the bus at Corona del Mar he had had four highballs, a full-course dinner, and an after-dinner drink, but that he did not become intoxicated.

The bus driver testified that plaintiff stumbled when he entered the bus at Corona del Mar and that there was an odor of alcohol on his breath. The driver said that he did not apply the brakes of the bus abruptly during the portion of the trip in question, that plaintiff first complained of his injury at the Doheny Palisades stop, and that plaintiff was then standing on the ground outside the bus, holding onto the door.

Other witnesses testified that plaintiff was intoxicated shortly before he got on the bus and that the brakes of the bus were not applied suddenly. According to a person employed by defendant who was present when plaintiff was questioned by a claims adjuster, plaintiff said that the bus was going from 35 to 40 miles an hour when he was hurt and that he first told the driver of his injury when the bus stopped at Doheny Palisades.

The jury was instructed: "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action, was negligent."

[1] Although it is proper in many cases to give an instruction that the mere happen-

ing of an accident does not support an inference of negligence, a problem arises where, as here, there is evidence warranting the application of the doctrine of res ipsa loquitur. It is apparent that an instruction like the one quoted above contains an idea which might be understood by a layman to be inconsistent with the doctrine of res ipsa loquitur. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 261–262, 143 P.2d 929; England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692; Ellis v. Jewett, 18 Cal.App.2d 629, 634, 64 P.2d 432. The direction that the mere happening of an accident, considered alone, does not support an inference of negligence would appear to contradict the usual statement of the doctrine of res ipsa loquitur as found in the typical instructions given on the subject, namely, that an inference arises from the happening of the accident that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. In the absence of a proper explanation of the relationship between the two instructions, the words "mere" and "considered alone" might not prevent laymen from erroneously concluding that under no view of the evidence could an inference of negligence be drawn from the happening of the accident. And it has been held that where both instructions were given without explanation, an order granting a new trial should be affirmed. (Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 261–262, 143 P.2d 929; England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692; Ellis v. Jewett, 18 Cal.App.2d 629, 634, 64 P.2d 432.

In Jensen v. Minard, 44 Cal.2d 325, 329, 282 P.2d 7, it was held that the giving of the mere happening of an accident instruction was prejudicial error where it had been conceded by the parties that defendant had fired a bullet which killed a child. It was pointed out that, in view of the concession, the instruction in effect told the jury that the fact that the child was killed by the defendant's act afforded no evidence of negligence. The opinion then stated that, even though instructions on the doctrine of res ipsa loquitur were not requested, the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself.

[2, 3] Plaintiff's testimony in the present case would support findings that he was injured when he was riding as a passenger on defendant's bus, that the injury resulted from a sudden slowing of the vehicle due to a severe application of the brakes, and that no improper conduct by plaintiff proximately contributed to his injuries. This evidence entitled plaintiff, upon request, to instructions on the doctrine of res ipsa loquitur. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 435 et seq., 260 P.2d 63; St. Clair v. McAlister, 216 Cal. 95, 97 et seq., 13 P.2d 924. On the other hand, the jury could reasonably have found from the evidence that the bus did not slow down suddenly, that plaintiff was intoxicated and that, because of his condition, he fell and injured himself through no fault of the driver. Under this view of the evidence, the injury did not, as plaintiff claimed, result from the negligent operation or management of the vehicle, and he was not entitled to the inference afforded by the application of res ipsa loquitur. See Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 435–437, 260 P.2d 63; Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 731, 81 P.2d 950, 118 A.L.R. 533; Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 757, 239 P.2d 671, 33 A.L.R.2d 778. The doctrine was not, therefore, applicable as a matter of law, and this case does not come within the rule announced in Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7.

In Barrera v. De La Torre, 48 Cal.2d 166, 170 et seq., 308 P.2d 724, where, because of the factual situation, it did not appear that res ipsa loquitur was applicable as a matter of law and no instruction upon the doctrine was requested or given, the court in affirming a judgment for defendant held that it was not error to instruct the jury that the mere fact that an accident happened does not support an inference of negligence. As we have seen, however, where both the

mere happening of the accident and the res ipsa loquitur instructions were given without explanation of the conflicting ideas contained in the two instructions, it has been held that the trial court was justified in granting a new trial. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 261–262, 143 P.2d 929; England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692; Ellis v. Jewett, 18 Cal.App.2d 629, 634, 64 P.2d 432.

The following instruction on res ipsa loquitur offered by plaintiff was refused: "If, and only in the event, you should find that there was an accidental occurrence as claimed by the plaintiff, namely: ———; and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he (it) did, in fact, exercise ordinary (the utmost) care and diligence or that the accident occurred without being proximately caused by any failure of duty on his (its) part." (2 Cal.Jury Instns., Civ. (4th rev. ed. 1956) No. 206, pp. 636–637.)

[4, 5] The requested instruction was incomplete in that plaintiff did not fill in the blank space after the word "namely," and it was also defective because of plaintiff's failure to choose between the alternatives offered by the words appearing in parentheses and to make the appropriate deletions. A trial judge is not required to correct a requested instruction which is incomplete or erroneous. Tossman v. Newman, 37 Cal. 2d 522, 525, 233 P.2d 1; Davis v. Johnson, 128 Cal.App.2d 466, 473, 275 P.2d 563; Bertolozzi v. Progressive Concrete Co., 95 Cal.App.2d 332, 337–338, 212 P.2d 910.

Since it cannot be said as a matter of law that the doctrine of res ipsa loquitur is applicable here, and since the court was not required to give the inaccurate instruction offered by plaintiff and no instruction on the subject was given, we would probably have affirmed the judgment under the rule of Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724, had the court not granted the motion for a new trial. The question presented here, however, is whether the court under the circumstances abused its discretion in granting a new trial.

[6, 7] The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance. Brandelius v. City & County of San Francisco, 47 Cal. 2d 729, 733–734, 306 P.2d 432. In the Brandelius case it was stated that the granting of a new trial could be reversed "only if * * * the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury." 47 Cal. 2d at page 745, 306 P.2d at page 442. It has also been said that the power of the judge to do justice by ordering a new trial is not impaired even though the moving party is technically estopped to claim error or has waived his right to complain. See Hoel v. City of Los Angeles, 136 Cal. App.2d 295, 307, 288 P.2d 989; Conroy v. Perez, 64 Cal.App.2d 217, 226–227, 148 P.2d 680; Nieves v. Vigolino, 135 Cal.App. 763, 765, 27 P.2d 916. Of particular significance here is the statement made in a recent decision which sustained an order granting a new trial: "If the challenged instruction was erroneous in any degree, or even if it is only 'fairly debatable' that such instruction may have been misleading, the broad discretion of the trial court may not be disturbed * * *." Bolton v. Martin, 126 Cal.App.2d 178, 180, 271 P.2d 991, 992; see also Sloboden v. Time Oil Co., 131 Cal.

App.2d 557, 559, 281 P.2d 85; Balthrop v. Atchison, T. & S. F. Ry. Co., 142 Cal.App. 2d 823, 826, 299 P.2d 341.

[8] The minor defects in the res ipsa loquitur instruction could have been easily cured by striking out the word "namely," eliminating the blank space, and choosing the alternatives which were obviously appropriate. The drawing of the inference afforded by the doctrine of res ipsa loquitur was of great importance to plaintiff's case, and, in view of all the circumstances, we cannot say that the trial court abused its broad discretionary powers in granting a new trial.

The order is affirmed.

SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance. The instruction that "The mere fact that an accident happened, considered alone, does not support an inference that some person or any party to this action was negligent." was clearly erroneous (see, my concurring opinion, Phillips v. Noble, Cal.Sup., 323 P.2d 388). Since the trial court granted a new trial we are not here concerned with the question of prejudice. Bolton v. Martin, 126 Cal.App.2d 178, 271 P.2d 991; Sloboden v. Time Oil Co., 131 Cal.App.2d 557, 281 P.2d 85; Balthrop v. Atchison, T. & S. F. Ry. Co., 142 Cal.App.2d 823, 299 P.2d 341.

In my opinion it was the obvious duty of the trial judge to make any corrections necessary in the proposed instruction on res ipsa loquitur and to give it to the jury. Because of the error committed in giving the instruction above quoted and in refusing to give an instruction on res ipsa loquitur, the order granting a new trial must be affirmed.

SCHAUER, Justice (dissenting).

I cannot agree with the majority's holding that it was error, and that the trial judge properly found it to be prejudicial error, to instruct the jury that "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action, was negligent."

The fact that an accident happened *considered with other circumstances* may *in the light of those circumstances* support an inference of negligence. But the "mere fact that an accident happened, considered alone," cannot ever prove negligence of any person if for no other reason than that the narrow hypothesis of such statement excludes from its purely abstract concept evidence of any circumstance whatsoever indicative of the cause of the accident or showing the connection of any person with the accident either as causing it or being injured by it. Likewise, the "mere fact that an accident happened, considered alone," severs the hypothesis from the circumstance that an instrumentality may have been involved in the accident, and if an instrumentality was involved, it excludes the effect of proof that any person was in control, or responsible for management, control or condition, of such instrumentality. Manifestly, the "mere fact that an accident happened, considered alone," does not include consideration of a showing that the accident did not happen to a trespasser on private property, or that it did occur on a public highway, or to a passenger in a vehicle whether as a guest or a fare-paying patron of a common carrier, or of any other circumstance whatsoever.

The majority assert that "The direction that the mere happening of an accident, considered alone, does not support an inference of negligence would appear to contradict the usual statement of the doctrine of res ipsa loquitur as found in the typical instructions given on the subject, namely, that an inference arises from the happening of the accident that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. In the absence of a proper explanation of the relationship between the two instructions, the words 'mere' and 'considered alone' might not prevent lay-

men from erroneously concluding that under no view of the evidence could an inference of negligence be drawn from the happening of the accident."

The above quoted declaration appears to me to be unjustifiable. It appears to be more concerned with the interests of the claimant than with fairness of the trial. Heretofore the law has been that much more than the "mere happening of an accident, considered alone" must be shown to support an inference of negligence. Even the learned author of the majority opinion in this case has in the past recognized that there must be some rational basis of probability in fact for the inference of negligence and some factual showing of some connection through *control, management* or *responsibility* between the defendant and the instrumentality, if any, causing the injury to the plaintiff. (See e. g., Escola v. Coca Cola Bottling Co. (1944), 24 Cal.2d 453, 457 [1] et seq., 150 P.2d 436; Ybarra v. Spangard (1944), 25 Cal.2d 486, 489 [1], 154 P.2d 687, 162 A.L.R. 1258; Zentz v. Coca Cola Bottling Co. (1952), 39 Cal.2d 436, 440 et seq., 247 P.2d 344; Burr v. Sherwin Williams Co. (1954), 42 Cal.2d 682, 687 [2], 268 P.2d 1041.)

The language of the quoted instruction is clear and unless the law is to be materially changed to an extent not delimited by the majority it merely declares an uncontrovertible truth. The giving of it is simply an aid to the layman juror, designed to assist him in gaining a true and clear understanding of the law upon which liability of the defendant *justifiably* may be found; it tends to preclude him from being misled into believing that proof of an accident without more is proof of fault on the part of any person involved. It serves to make clear to the jurors that it is not the mere *happening* of the accident, but is in the circumstances *causing* it, that fault and liability may be found.

Our concern should be addressed to both parties, to the end that each may have justice under the law. It is especially important that the subject instruction be given whenever the res ipsa loquitur instruction is given, lest the jurors be misled as to the essentials for application of the latter doctrine. If the res ipsa doctrine is lawfully to be applicable in any case, then certainly much more must be proven, and necessarily must be considered in determining whether the defendant was negligent, than the "mere fact that an accident happened, considered alone." The issue to be resolved in such cases is not merely did an accident happen, but, rather, do the circumstances relative to the *cause of the accident* reasonably indicate that the defendant was negligent and that his fault was a proximate cause of the accident?

An enumeration of the elements essential to warrant invocation of the res ipsa doctrine in resolving the issue demonstrates that the instruction complained of here is in no way inconsistent with proper application of res ipsa when its elements are proven. To hold that it would be error in a res ipsa loquitur case to instruct that the "mere fact that an accident happened, considered alone, does not support an inference that * * * any party to this action, was negligent," is either to belie all other [1] supposed essential elements of res ipsa, or to conceal or de-emphasize and confound them to the bemuddlement of jurors. The innocent declaration of the subject instruction does nothing worse than tend to make the jurors understand that liability, if it exists, must be found in the *cause,* not the mere happening, of the accident.

I take further issue with the majority on the ground that their holding essentially implies that jurors are stupid, too stupid to understand the meaning of the simple words appearing in the criticized instruction, or to co-relate its concept to other instructions and the evidence. My observation of jurors in action supports a conclusion quite to the contrary. Certainly we must recognize that jurors are laymen, many of them unlearned in the law, and

1. Other than the "mere fact that an accident happened, considered alone."

they are entitled to every help the court can give them. But it should not be presumed that they can understand all other instructions except the simple one quoted above. In my view the subject instruction would tend to clarify, not to confuse, the applicable law and, hence, to protect the jurors against inappropriate inferences based on the mere happening of the accident and without proof of all the elements prerequisite to the res ipsa loquitur inference.

The opinion of the majority here appears to be another considered step toward the goal forseen in the dissent in Butigan v. Yellow Cab Co., 1958, 49 Cal.2d 652, 320 P.2d 500.

For the reasons above stated I would reverse the order granting a new trial.

McCOMB, Justice, concurs.

Rehearing denied: SCHAUER, and McCOMB, JJ., dissenting.



50 Cal.2d 75

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Max OSSLO, Joseph McFaden, Arthur Meyer, Chester D. Hazel, Louis J. Cacio, Paul E. Dempster, Jerry L. Dimitratos and Charles A. Tucker, Defendants and Appellants.

Cr. 6127.

Supreme Court of California,
In Bank.

March 26, 1958.

Rehearing Denied April 23, 1958.

Writ of Certiorari Denied June 9, 1958.

See 78 S.Ct. 1152.

Prosecution for conspiracy to commit assault, and for assault by means of force likely to produce great bodily harm. The Superior Court, San Diego County, John J. Hewicker, J., entered judgment of conviction and defendants appealed. The Supreme Court, Schauer, J., held that an individual judge, as distinguished from a court, is not empowered to retain jurisdiction of a cause, and therefore, provisions of probation orders by which individual judge purported to retain jurisdiction of the cause would be stricken.

Orders granting probation modified and affirmed, judgments and order denying new trial affirmed.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

Opinion, 310 P.2d 1020, vacated.

1. Criminal Law ⇐1159(2)

On appeal, a court will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant inference of guilt.

2. Criminal Law ⇐1160

It is the function of the jury in a criminal case in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence, it must be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the lower court.

3. Criminal Law ⇐1144(13), 1159(6)

The Supreme Court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict, and if the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with determination of guilt by the jury.

4. Assault and Battery ⇐92
Conspiracy ⇐47

Evidence sustained convictions for conspiracy to commit crime of assault, and for assault by means of force likely to produce great bodily injury. West's Ann.Pen.Code, §§ 182, 245.

5. Criminal Law ⇐406(7)

Falsifications by a defendant in a criminal prosecution evidence consciousness of guilt and in view of fact they suggest no honest explanation for incriminating circumstances, constitute admissions of guilt.

6. Conspiracy ⇐45

In prosecution for conspiracy to commit crime of assault, trial court did not err in admitting evidence that members of a union to which certain defendants belonged participated in labor disputes to which such union was not a party, in view of fact such evidence tended to show that employment of such defendants by another union probably would result in acts of violence by such defendants.

7. Criminal Law ⇐1169(1)

In prosecution for conspiracy to commit crime of assault, and for assault, arising out of a union jurisdictional dispute, although evidence concerning fights, unconnected with union activities, involving two of the defendants was not admissible as tending to show characteristics of such defendants, its admission was harmless error in view of evidence that defendants participated in assault charged.

8. Criminal Law ⇐386

In prosecution for conspiracy to commit assault, arising out of a union jurisdictional dispute, evidence of telephone calls between defendants and members of their union organizations was admissible to show defendants' association.

9. Criminal Law ⇐1170(1)

In prosecution for conspiracy to commit assault, and for assault, arising out of a jurisdictional union dispute, although testimony of a defendant that he had been frightened by a group of people belonging to a rival union was relevant to show noncriminal purpose of employment of certain defendants, and should have been admitted, in light of other evidence of guilt, its exclusion was not prejudicial.

10. Conspiracy ⇐28

Conspiracy to commit assault charges a crime under the Penal Code. West's Ann. Pen.Code, § 182.

11. Jury ⇐131(17)

In prosecution for conspiracy to commit assault, and for assault, arising out of a jurisdictional union dispute, questions directed to prospective jurors during voir dire examination by prosecuting attorney, as to whether they did not believe that might makes right, or that a person because he is a member of a labor union deserves to get beat up once in a while, were not improper, in view of fact they were designed to elicit relevant information concerning prospective jurors' state of mind, and question as to whether such jurors knew a clerk was beaten was not improper in view of fact that such beating was indubitably established and concerned subject of the assault charge which jurors were being selected to try.

12. Criminal Law ⇐703

In prosecution for conspiracy to commit assault, and for assault, arising out of a jurisdictional union dispute, reference of prosecuting attorney to "goons" during his opening statement, was not improper, in the light of evidence developed by the prosecution.

13. Criminal Law ⇐722(2), 730(12)

In prosecution for conspiracy to commit assault, and for assault, arising out of a jurisdictional union dispute, where witness identified one of the defendants as "the second gentleman" action of prosecuting attorney in stating that he objected to the use of the word "gentleman" in reference to such defendant, while highly improper, would not be deemed prejudicial, in view of the fact trial judge immediately rebuked the prosecuting attorney and admonished the jury to disregard his remark.

14. Criminal Law ⇐720(7)

In prosecution for conspiracy to commit assault, and for assault, arising out of a jurisdictional union dispute, reference of prosecuting attorney to certain people as unindicted coconspirators, while unfair to such persons, was not prejudicial to defendants, and in view of fact it suggested view of evidence taken by prosecuting attorney, and view taken by jury, it would not be deemed to constitute misconduct.

15. Criminal Law ⇐730(7)

In prosecution for conspiracy to commit assault, and for assault, arising out of a jurisdictional union dispute, statement of prosecuting attorney in argument that a certain person was the finger man, would not be deemed prejudicial, even though there was no support for such statement in the evidence, in view of fact that trial judge promptly admonished the jury to remember the evidence, and to not take any inferences not supported by the evidence.

16. Criminal Law ⇐982

Where it was found that certain defendants were guilty of crimes growing out of union activities, condition of probation that such defendants could not hold any union position or receive remuneration from any union during probationary period was not improper.

17. Criminal Law ⇐982

The granting of probation is entirely within the sound discretion of the trial court, and a defendant has no right to probation, although he does have the right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo sentence.

18. Criminal Law ⇐982

An individual judge, as distinguished from a court, is not empowered to retain jurisdiction of a cause, and therefore provisions of probation orders by which an individual judge purported to retain jurisdiction of a cause would be stricken.

19. Criminal Law ⇐982

Rules of court which provide that post-trial proceedings in a cause shall be heard by the judge who tried the matter are entirely proper, but an individual judge cannot order that such proceedings must be heard by him.

20. Criminal Law ⇐632

The precedence to which criminal cases are entitled is not of such an absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned.

21. Criminal Law ⇐632

In prosecution for conspiracy to commit assault, and for assault, record failed to establish there was an improper channeling to a particular judge of the case, as an individual, rather than as judge of the presiding criminal department, in view of fact trial was held in department where it had been from inception of case. West's Ann. Pen.Code, §§ 681a, 1050.

Aaron Sapiro, Charles M. Arak, Los Angeles, and Charles P. Scully, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendants were charged with (count I) "Conspiracy to Commit the Crime of Assault (PC 182)" and (count II) "Assault by Means of Force Likely to Produce Great Bodily Injury (PC 245)." A jury found them guilty as charged. Imposition of sentence upon defendants Osslo, McFaden, and Meyer was suspended and they were granted probation. Judgments of conviction were entered against defendants Hazel, Cacio, Dempster, Dimitratos, and Tucker. Defendants' motion for new trial was denied. Defendants appeal, respectively, from the probation orders and judgments, and from the order denying their motion for new trial. They present a multifold attack upon the orders and judgments. Defendants urge that the evidence is insufficient; that there was prejudicial error in the admission and exclusion of evidence; that the charge of conspiracy to commit the crime of assault is not a charge of a crime known to the laws of this state; that there was prejudicial misconduct of the prosecuting attorney; that the punishment imposed upon defendants Osslo, McFaden and Meyer is improper and excessive; and that the case was erroneously channeled into a particular department of the superior court. For the reasons developed in the ensuing discussion

we have concluded that these contentions are without substantial merit except that one of the terms, hereinafter described, of the orders granting probation to Osslo, McFaden, and Meyer is erroneous, and that the orders should be modified by striking out the erroneous provision.

The conduct and incidents involved in this prosecution arose out of a jurisdictional dispute in San Diego County between the local Butchers' Union and the local Retail Clerks' Union. Preceding this dispute members of the Clerks' Union employed in markets which stocked frozen and packaged dinners had handled the sale of such dinners. The Butchers' Union determined that its members rather than members of the Clerks' Union should have the handling of the frozen dinners which included a meat or poultry serving, and demanded that the markets govern their employes accordingly. The Butchers claimed "violation of contract" by the markets' permitting Clerks to continue handling the dinner items and called a strike at one of the markets.

The Clerks endeavored to have the dispute settled through legal proceedings. About October 5, 1955, the secretary-treasurer of the Clerks' local wrote "to the market operators informing them of the jurisdictional dispute and the stand the Clerks were taking." Representatives of the Butchers and the Clerks met a few days prior to October 12 (according to one witness, prior to October 8). The secretary-treasurer of the Clerks' local "made demand upon Mr. Osslo [who held various offices, hereinafter detailed, with the Butchers] to cause to have the merchandise in dispute at Ferguson's market, as an example, placed back under the jurisdiction of the Clerks, or our organization would take *every legal means* necessary to enforce the jurisdiction." (Italics added.) Osslo "pounded the table three times, stated he was boss of the West Coast and he would fight for jurisdiction."

On October 18, 1955, four days before the assault of which defendants stand convicted, the Clerks filed with the National Labor Relations Board a petition "for the purpose of having the Board determine who the jurisdiction belonged to."

In contrast to the efforts of the Clerks to settle the controversy by legal proceedings, and inferentially to carry out the declaration of Osslo that "he was boss of the West Coast and he would fight for jurisdiction," the Butchers, assertedly for the purpose of providing "observers" to accompany Butchers' representatives and assist in "inspecting" markets which were permitting, or suspected of permitting, grocery clerks to sell the packaged foods, imported defendants Hazel, Cacio, Dempster, Dimitratos, and Tucker, hereinafter sometimes called the sailor defendants, from San Francisco and started calling on the markets.[1] The hereinafter described brutal assault and battery upon Maurer, a business agent for the local Retail Clerks, followed.

[1–3] The evidence, pertinent portions of which are hereinafter summarized or quoted, is in some respects substantially conflicting, but in every respect is ample to support the verdicts. If the jury believed the prosecution witnesses and disbelieved the testimonies of those defendants who took the stand, they properly could have felt that the cumulative effect of the evidence was not only sufficient, but overwhelming. Study of the record constrains us to conclude that the latter view is correct. "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and

1. The Clerks, too, had persons from elsewhere than San Diego assisting them in connection with the jurisdictional dispute, but they were members of the Retail Clerks' Union and they did not become involved in violence. "They accompanied the local business agents here on field trips to observe where the merchandise was located in the markets that was in dispute and to assist in making diagrams of the stores, also to assist the local men in getting petitions signed to submit to the National Labor Relations Board."

that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." (People v. Daugherty (1953), 40 Cal.2d 876, 885, 256 P.2d 911.)

Defendants' contentions require a rather extensive review of the evidence in order that they may be viewed and resolved in fair perspective to the entire case.

[4] *The Evidence.* James Ray Jackson, a business agent for the Butchers, testified for the prosecution as a rather reluctant witness. His testimony, read as a whole, and in the light of the entire record, leads inevitably to the inference that the, sailor defendants, Dimitratos, Cacio Tucker, Dempster, and Hazel, who were neither members of the Butchers' Union nor residents of San Diego, were employed by the Butchers with the expectation that they would engage in acts of violence, although in terms Jackson insisted that they were employed merely as "observers." The substance of Jackson's testimony is as follows:

Jackson's duties as business manager were "to sign contracts, work on grievances, check violations," and "I do organizing * * * and any other work that is necessary to do." During the 18 years Jackson had been a member of the Butchers, defendant Osslo had been secretary-treasurer of the San Diego local to which Jackson belonged. Osslo was president of the Western Federation of Butchers, the affiliated butchers' unions of California, and a member of the board and executive committee of the International Butchers' Union at the time of the assault and battery (October 22, 1955). In June, 1956, Osslo was elected vice president of the International. Membership in the Butchers in the United States was about 300,000. Defendant McFaden had been a business agent of the San Diego local since 1941 and defendant Meyer had been a business agent since 1955.

About September 8, 1955, there was a strike of the Butchers at the Food Basket Market because of an asserted "violation of contract" in that certain prepared and packaged complete dinners included meat items and such packages were being handled by the Clerks in the grocery department rather than by the Butchers. As a result of the strike the Food Basket Market brought an injunction suit against the San Diego local of the Butchers. The court ordered that the disputed prepared dinners be taken off sale. It may be inferred that a purpose of the order was the prevention of the sort of violent altercation which, as hereinafter related, forms the basis of defendants' conviction of assault.

Concerning the relations between the Clerks and the Butchers at the time of the Food Basket strike, Jackson testified as follows:

"Q. Now at Food Basket, * * * did you talk with the Clerks representative while you were on strike at Food Basket, by any chance? A.

Yeah, I guess we did. General conversation. * * *

"Q. Let me ask you this: Were you present at any conferences at which any of the Clerks representatives discussed the Food Basket situation with Mr. Osslo? A. Sir, I had my foot broken the day before anything like that was discussed, I believe. * * *

"Q. Do you, of your own knowledge, know whether or not any discussions were held between Mr. Osslo and representatives of the Retail Clerks Union? A. When?

"Q. After and at about the time of the Food Basket incident. A. No, sir. * * * I don't know. * * *

"Q. Now when was the contract that was in effect at Food Basket up for renewal? A. November. * * *

"Q. Yes. Now what are your functions as a business agent; just what do you do? A. My duties are to get—to sign contracts, work on grievances, check violations. * * * I do organizing, work on grievances, sign contracts, and any other work that is necessary to do."

On October 12, 1955 (a Wednesday), the Clerks struck Ferguson's Market. Jackson and McFaden went to the market. Approximately 25 clerks were present, among them Mr. Montgomery, hereinafter mentioned as one who was attacked but succeeded in escaping serious injury in the subsequent assault of October 22, 1955. In addition to the members of the Butchers who worked at the market, defendant McFaden, and Jackson, two or three other members of the Butchers' Union were present. The Clerks "gave us [the Butchers] some pretty good looks." Jackson felt that these "looks" were threatening.

Discussions were had by the Butchers as to what they would do at stores where the Clerks walked out. Defendant Osslo was present at these discussions.

Sailors Dimitratos and Hazel arrived in San Diego by airline from San Francisco on Saturday, October 15, 1955. On the following Monday they met with defendants McFaden and Meyer and the witness Jackson. Defendant Osslo had previously stated that Harry Lundeberg "was sending a couple of fellows down to help us out, go with us, be our observers, and see that we weren't jumped from behind, or bothered." "[T]hey were to accompany us and work with us." There were older, unemployed members of the Butchers who could have acted as observers but they were not called upon to do so. The sailors "were going to observe and—

"Q. Observe what? A. Observe what was going on.

"Q. What were they to do after they observed what was going on? A. To protect us and see that nobody created any trouble or violence or anything of that sort."

The witness did not call the police for protection; he did not know whether anyone else had done so.

"Q. Were the men from San Francisco, the sailors, more proficient, to your knowledge, than the San Diego Police Department? A. Well, I don't know. Maybe they might be for labor work. They know what to look for.

"Q. You mean that they are experienced in this type of an action, or this matter? A. What action are you talking about, sir?

"Q. Well, in coming down and being observers. You mean they were more experienced in that line of work? A. I believe they would be.

"Q. Than a police officer might be? A. I believe they would be, yes.

"Q. In what respect would they be more proficient? A. They worked in labor for a good many years. That is their job, working as laboring people.

"Q. What are they going to observe? I am kind of interested in that.

What are they going to observe that an older dues paying member [of the Butchers] couldn't observe? A. They could observe what goes on.

"Q. I see. In other words, what that takes is a good pair of eyes? A. It takes a little brains, too.

"Q. Well, a man that has been a master craftsman and worked up to a head meat cutter would have those qualifications, wouldn't he? A. Some might. Most of them might.

"Q. What were they to do after they observed? Were they to make any reports? A. Yeah.

"Q. To whom were they to report? A. I guess they would make them to our Secretary?

"Q. Mr. Osslo? A. And to the Western Federation of Butchers or the State Federation of Labor. * * *

"Q. What are you looking for to observe? I am not clear on that or on these reports. Did they make any reports, let me ask you that? A. They reported on what they knew and saw.

"Q. They were oral reports, were they? A. Yes.

"Q. How often did they make the reports? A. I guess daily. * * *

"Q. What I am interested in, Mr. Jackson, is this: * * * why, if you are looking for just observers to go around and find out what is going on, didn't you give any preferential treatment to the local people in San Diego in other unions? A. Well, sir, not that I know of.

"Q. Here is what I want to know: why is the Sailors Union selected as the ones you are going to go to to get observers? A. Well, I would assume that the reason is—I don't know for sure—these fellows are out on a ship and they come back in and they have got time on their hands waiting around for another ship.

"Q. Did you check any other labor hiring halls here in town, the laborers union, the plasterers union, or— A. I didn't.

"Q. Do you know whether or not anybody else checked any of the other labor hiring halls locally to see if there were any people available that could be employed as observers? A. I don't know, sir.

"Q. To your knowledge was that done? A. No, sir."

"[W]e had told the other labor organizations in San Diego what was going on. Indirectly that is asking for help and aid. As far as specifically asking for the loaning of a man or two men or more, I don't know of that being done, sir."

"Q. What did Mr. Osslo say about the two men that were coming down, if anything? * * * A. He said they were coming down to go around with us. * * *

"Q. What did you do when you went around to these stores and what did they do to earn this $150.00 a week plus expenses [the amount which the sailors were paid by the Butchers]? A. They were with us. * * *

"Q. Tell me what the work was they were doing? A. Checked the markets.

"Q. What do you do when you check a market? How did they know about a violation? They are sailors, aren't they? A. They know what they are looking for.

"Q. What were they looking for? A. A violation of our contract in the meat department.

"Q. How did they know a violation of a contract if they just flew in from San Francisco and had a short meeting with you? Is it that easy that you can become a business agent? A. As I said before, * * * they were here to go with us, act as observers

and to protect us in case there might be any violence. * * *

"Q. If there was a contract violation. How would they know what the contract was? A. We would have to tell them.

"Q. You would have to tell them what was in your contract? A. Point out the items, if there is a violation on the items.

"Q. These men are sailors and here is what I am confused about, and I would think an old timer in the meat business would have been important to you. What instructions did you give these men from San Francisco that made them proficient in a short period of time to be able to observe these contract violations, if there were any? A. The violations part of it wasn't necessarily their objective to observe. They were sent down here, or called down here, to protect us, as I said before, and see we weren't jumped from behind, or jumped at all.

"Q. And the services of the San Diego Police Department, which are free, weren't ever used in that respect? * * * A. I did not call the police department, no, sir. * * *

"Q. Were you in any way threatened? A. By certain gestures, yes, sir.

"Q. When were you threatened by certain gestures? A. At Tang's Market.

"Q. That is after Dimitratos and Hazel are with you, isn't it? A. Yes, sir.

"Q. I am talking about before, before these men are hired what gestures were made that caused you personally to feel that you had been threatened. A. The incident at Ferguson's. * * * I was in the alley between the truck and the building when several of them walked back. * * *

"Q. What did they do? A. Actually nothing but give us a good look. * * *

"Q. That scared you? A. It could have been a threatening look, yes, sir. * * *

"Q. Well, who did you report the threatening looks you got in the alley way at Ferguson's to? A. I believe they were all reported to each other, Brother Osslo, myself and Mack and Brother Meyer.

"Q. Did you ever report those threatening looks to the police department? A. I did not, no, sir.

"Q. As a matter of fact, you weren't even concerned with them, were you? A. Well, no, sir. * * * [After the question was read and reread] I was concerned. * * *

"Q. You didn't report it to the police? A. There is not much to report, sir."

"Q. * * * In the particular market how would they [Dimitratos and Hazel] know [which items were to be handled by the Butchers], just walking into the place? A. They wouldn't necessarily. They were with me or some of the rest of us. * * *".

McFaden arranged for hotel reservations for Dimitratos and Hazel and a few days later, when the additional three sailor defendants (Cacio, Tucker and Dempster) were imported from San Francisco, arranged for their reservations.

The sailor defendants each received $150 a week plus airline transportation, hotel accommodations and expenses from the Butchers. The salary of a beginning apprentice butcher was $72 a week. The "top rate" which a journeyman butcher was paid was $102 a week. A head meat cutter received $107 a week. Jackson, as business agent, received $140 a week.

Dimitratos and Hazel attended union meetings of the Butchers. Such meetings were not open to the public but "We have visitors. Anyone working for the organization is permitted," and frequently visitors not connected with the union were invited.

At Tang's (sometimes called Ming's) Market a representative of the Clerks assertedly threatened the witness Jackson by telling him that the Clerks "were taking everything that bleeds, all the red meat, everything. That is not only a threat to me, that is a threat on the organization, the way I took it. * * *

"Q. Did you report it to the police department? A. No, sir.

"Q. Did you report it to Mr. Osslo? A. Yes, sir. * * * I reported to McFaden and he, in turn, reported it, and Mr. Dimitratos and Mr. Hazel were there."

At Tang's Market one Butler, a Clerk, assertedly "displayed" a knife. Counsel asked:

"Q. Now was there any display of a knife? A. Yes, sir. * * *

"Q. And what was Butler doing with the knife? A. Playing with it, fumbling it, handling it * * * he [was] cleaning his fingernails with it * * *.

"Q. What did Butler do with the knife when you came over * * * and were introduced to him? A. He didn't have the knife in his hand at that time, sir."

He had been "say twelve to fifteen feet" away when the witness saw him with the knife. Mr. Anderson, another representative of the Clerks, "came storming in," according to the testimony of Dimitratos; the bulge of a gun was visible "On his left arm pit up in the shoulder * * *. You could just about see the shape of it." But apparently no one claimed to have actually seen a gun. The testimony of Mr. Jackson continues:

"Q. Did Mr. Anderson threaten you at all? A. Only in a way that he carried himself.

"Q. How did he carry himself? A. Pushed his way through * * * the crowd, through the store.

"Q. Who did he push? A. He didn't push anyone. I say pushed his way through."

When Jackson's recollection was refreshed he admitted that he had testified before the grand jury that at Tang's no threats were made to him or in his presence.

After the incidents at Tang's Market, defendants Cacio, Tucker, and Dempster were also hired by the Butchers and brought from San Francisco to San Diego.

At about 11 o'clock on the morning of October 22 the five sailor defendants together with McFaden, Meyer, Jackson, and one Woodard, an International representative of the Butchers, went to Ferguson's Market. This was the first occasion that Cacio, Dempster, and Tucker went out with the Butchers. There was a slowdown in the meat department for about 40 minutes. Ferguson's was said to be "one of the sensitive points" in the jurisdictional dispute. The group of Butchers' representatives accompanied by their five sailor employes then went to two other markets, in each of which they remained only a few minutes. The sailors assertedly were present "as observers, witnesses, whatever you want to call it." The group returned to Ferguson's Market and "started a conversation" with one of the proprietors. Standing in the market were Montgomery and Maurer. The proprietor pointed out Montgomery and Maurer as Clerks.

The testimony of various witnesses as to how many of the sailors actively participated in the ensuing assault and battery is conflicting. However, the following direct evidence supports a determination that all five of the sailor defendants actively participated: These five defendants surrounded Clerks Montgomery and Maurer and some of the defendants stomped on Montgomery's and Maurer's feet. "Dimitratos and Hazel attempt[ed] to get Montgomery, but he * * * [though pursued] got away and they stepped right back out * * * Maurer couldn't get * * * past the customers because of a railing and a bunch of pushcarts * * * and he was being pursued * * * until two men got hold of him and held him * * *." Cacio struck Maurer in the stomach. Dempster

and Tucker pinned Maurer's arms to his sides. "Dimitratos judo chopped him terribly, fifteen or twenty shots," and "Hazel was bombing in with his fists and with judo chops." Maurer was beaten and kicked. "[W]hen they let go and dropped him to the floor he was in kind of a hulk lying on his side. That is when Cacio used the boots on him. * * * Kicked him in the back twice and then he flopped over on his back and he was kicked, I think, right in the side terribly hard." The witness then "Checked to see if the police were called, checked to see if the ambulance had been called."

Defendants' argument that there is no "credible" evidence that Dempster, Dimitratos, and Hazel participated in the assault is obviously completely devoid of merit when presented to a reviewing court. Such argument goes to the weight of the evidence, and resolution of the conflicting evidence is for the trier of fact. (People v. Daugherty (1953), supra, 40 Cal.2d 876, 885, 256 P.2d 911).

McFaden, Meyer, Jackson, Woodard, and the five sailor defendants had gone to Ferguson's Market in two cars; some of the Butchers and some of the sailors were in each car. When they fled from the market after the assault and battery, the sailors left in one car and the Butchers left in the other car.

A cashier at the market had obtained the license number of the car in which the sailors fled. A boy also attempted to write down the license number but one of the defendants snatched it from the boy's hand. Police officers, immediately notified of the license number, stopped the car, arrested the sailors, took them to the police station, and questioned them.

Defendant Dempster stated to the police that although he had been at Ferguson's Market he knew nothing about a fight there. He also falsely denied that he had any connection with the Butchers. He stated that he had come from San Francisco on a vacation.

Defendant Tucker at first refused to answer police questions about whether he had been at Ferguson's Market. He stated that he had come to San Diego to do some drinking and to visit Tia Juana. In a subsequent conversation with the police Tucker stated that he had been at Ferguson's Market and that there had been a fight but denied that he or his friends were involved in the fight. He also falsely denied that the Butchers had hired him.

Defendant Dimitratos stated to the officers that he had come to San Diego for a vacation; that neither he nor the group he was with were involved in the fight to his knowledge. On the witness stand he admitted prior conviction of felony and that he made false statements to the officers.

Defendant Cacio told the officers that he had been drinking; that he vaguely remembered being hit or kicked, but that he did not remember hitting anyone. He denied knowing who Jackson and defendant McFaden were and also falsely denied that he was employed by the Butchers.

Defendant Hazel told the officers that he was in San Diego on a vacation and had no interest in unions; that he and defendant Dempster had gone into Ferguson's Market to buy cough drops; that he knew nothing of any fight; and that he did not know McFaden or Jackson.

On November 27, 1955, defendant Meyer told a police officer that he had not been at Ferguson's Market on October 22.

[5] The foregoing statements of defendants to the officers concerned matters which were within the defendants' own knowledge, they related materially to the issue of their guilt or innocence of the offenses of which they now stand convicted, and they were manifestly false through deliberate and willful intent. Such falsifications cogently evidence consciousness of guilt and suggest that there is no honest explanation for incriminating circumstances, and thus are admissions of guilt. (People v. Darrow (1931), 212 Cal. 167, 177 [1], 298 P. 1; People v. Tolson (1952), 109 Cal.App.2d

579, 581 [2], 241 P.2d 32; People v. Farrell (1951), 107 Cal.App.2d 25, 29 [2], 236 P.2d 424; see also People v. Wayne (1953), 41 Cal.2d 814, 822–823 [4, 5], 264 P.2d 547; concurring opinion of Mr. Justice Traynor in People v. Albertson (1944), 23 Cal.2d 550, 581–582, 145 P.2d 7.)

At the trial defendants Hazel, Dimitratos, Cacio, and Dempster testified. Defendants Osslo, McFaden, Meyer, and Tucker did not take the stand.

The Butchers paid bail bond fees of $4,500 for the sailor defendants. They paid $10,000 to a private investigator for an investigation of this matter.

It must be borne in mind that the jurors not only heard the evidence which has been summarized but also had the benefit of observing the defendants and the witnesses from day to day during the trial, and that the record shows the receipt in evidence of 59 exhibits. These exhibits include pictures of the scene of the assault, records of telephone calls among the defendants, and records of expenditures of the Butchers on behalf of and to the sailor defendants.

Defendants do not dispute that the overt acts charged in the conspiracy count of the indictment were proved.[2] But they urge that it does not appear that these overt acts were a part of a conspiracy. It is true that there is no *direct* evidence of a conspiracy; all the direct evidence bearing on the question is to the effect that the defendants who actually participated in the assault and battery had been instructed to avoid the use of violence. But "A conspiracy can generally be established only by circumstantial evidence. It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design." (People v. Robinson (1954), 43 Cal.2d 132, 136 [1], 271 P.2d 865; People v. Steccone (1950), 36 Cal.2d 234, 237–238 [2, 3], 223 P.2d 17; cases collected in 5 McKinney's New Calif.Digest, Conspiracy, § 23.)

Undisputed evidence establishes the following facts: After the jurisdictional dispute between the Butchers and the Clerks began, and prior to the assault here, prosecution witness Jackson and defendants Osslo, McFaden, and Meyer, and representatives of the Butchers, met with representatives of the Clerks; Osslo said that the Butchers were going to "show" the Clerks; he said that he was "top man" on the west coast and "that was it." Anticipating violence—assertedly that representatives of the Butchers would be "jumped" by the Clerks—Osslo, through the Sailors Union of the Pacific, imported and employed the five sailor defendants, and defendants McFaden and Meyer assented to their employment. Dimitratos, Hazel, Tucker and Dempster had been members of the Sailors Union of the Pacific for a number of years, and Cacio, a Teamster, had sailed in the Merchant Marine. Members of the Sailors Union of the Pacific had participated in other labor disputes to which that union was not a party and had committed an assault and battery in connection with one such dispute.

2. Those acts are as follows:

No. 1. That defendant Osslo had a conversation with Harry Lundeberg on October 13, 1955.

No. 2. That Dimitratos and Hazel came to San Diego on October 15, 1955.

No. 3. That McFaden, at the request of Osslo, made reservations for three rooms about October 14.

No. 4. That McFaden, Dimitratos, and Hazel met on October 15.

No. 5. That Hazel and Dimitratos met at the Butchers' local on October 17.

No. 6. That Dimitratos, Hazel, Meyer and other representatives of the Butchers met at Tang's Market on October 18.

No. 7. That Dempster, Cacio, and Tucker met in San Diego on October 21.

No. 8. That Dempster, Cacio, Tucker, Dimitratos, and Hazel met in San Diego on October 21.

No. 9. That Dimitratos, Cacio, Tucker, Dempster, and Hazel accompanied McFaden and Meyer to Ferguson's Market on October 22.

No. 10. That Dempster, Cacio, Tucker, Dimitratos, and Hazel were in an automobile leased by the Butchers on October 22.

Nos. 11 through 15. That Osslo or McFaden agreed to pay each of the sailor defendants a weekly salary and expenses.

It is a reasonable inference that Osslo, McFaden, and Meyer, who had been actively and extensively engaged in union affairs, knew of such participation and assault and battery. Pretending concern for their own safety, but never asking police protection, Osslo, with the assent and aid of McFaden and Meyer, set up a situation which inferentially was designed to, and which clearly did, increase the likelihood of violence in the jurisdictional dispute. On a view of the evidence favorable to the prosecution, which the law at this stage of the proceeding requires of us, it is fairly inferrible that Osslo, McFaden, and Meyer at least tacitly understood, anticipated, and agreed that the remaining five defendants would not merely be present to act as "observers" and protect the Butchers from violence, but would and should initiate the violence, which they subsequently did initiate, to "show" the Clerks that Osslo indeed "was boss of the West Coast and he would fight for jurisdiction" and "that was it."

[6] *Admission and Rejection of Evidence.* Defendants urge that it was prejudicial error to admit evidence that members of the Sailors Union of the Pacific participated in other labor disputes to which that union was not a party, and that some of such members (not the defendants here) were guilty of assault and battery in connection with their participation in such a dispute. This evidence, in the light of the other circumstances, including the prior activities of Osslo, McFaden, and Meyer, was properly admitted as tending to show that the last named defendants contemplated that the employment of the sailor defendants probably would result in acts of violence by the latter defendants.

[7] Evidence was received concerning fights, unconnected with union activities, in 1951 involving Dimitratos and in 1952 involving Dimitratos and Dempster. The evidence was expressly received as to the conspiracy charge only. The trial judge so instructed the jury at the time it was admitted. He further then instructed them that if they believed the evidence "it would only tend to show the characteristics of a particular defendant in this case, and if that characteristic goes to the offense and if a conspiracy is shown, it would be binding on all the defendants so far as the conspiracy count is concerned." The theory on which this evidence was received is erroneous. That Osslo, with McFaden and Meyer, employed persons who had previously participated in fights unconnected with union activity does not tend to show that those persons were hired with the expectation that they would commit assaults connected with union activity, for there is no showing that Osslo, McFaden, or Meyer knew of the 1951 and 1952 altercations. However, in view of the ample evidence that Dimitratos and Dempster participated in the assault and battery here material, and in the light of the circumstances surrounding their importation and employment, it does not appear that the jury could have been misled by evidence that they had been involved in other altercations.

[8] Defendants complain of the admission of evidence of many telephone calls between the defendants and other members of their organizations. This evidence was properly received to show defendants' association; that that association was criminal is shown by the other evidence, viewed as a whole.

Defendants complain of the admission in evidence of the testimony of a police officer concerning the arrest of Clerks Anderson and Weathers on November 1, 1955, after the assault of which defendants were convicted. This testimony was as follows: Defendant Osslo told the officer that his life had been threatened by Anderson. The officer located Anderson and Weathers was with him. At the officer's request Anderson and Weathers accompanied the officer to the police station. The district attorney, after deputies examined an affidavit furnished by the Butchers on which their charge was based, refused to take action in the matter. The city prosecutor filed charges against Anderson, but they

were dismissed. This testimony tends to show that defendant Osslo, after the assault, attempted to harass the Clerks by unsubstantiated accusations and to distract emphasis from the charges against him by countercharges; it was thus admissible as tending to show that Osslo was a conspirator carrying on an effort to make good his declaration that he "was boss of the West Coast and he would fight for jurisdiction," and not, as he argues, the innocent employer of persons who were to act as "observers" or at the most to show the Clerks that the Butchers were protected, without the exercise of force.

[9] Defendants complain that the trial judge refused to permit Jackson to testify that on October 13, 1955, defendant McFaden reported to Jackson and defendant Osslo that he had been frightened by a group of Clerks at Ferguson's Market. This testimony was relevant to the purpose of the employment of the sailor defendants and should have been admitted, but in the light of the entire record its exclusion certainly did not prejudice defendants.

[10] *The Crime of Conspiracy to Commit Assault.* Defendants urge that the charge of "Conspiracy to Commit the Crime of Assault (PC 182)" is not a charge of a crime under the laws of this state because no statute prescribes a punishment for such a crime. Section 182 of the Penal Code provides in material part:

"If two or more persons conspire:

"1. To commit any crime. [Subdivisions 2 through 6 enumerate specified objects of criminal conspiracy.] * * *

"They are punishable as follows: [The next three paragraphs prescribe the punishment for conspiracy to commit crimes against certain officials, for conspiracy to commit any other felony, and for conspiracy to commit two or more felonies which have different punishments.] * * *

"When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both."

According to defendants, conspiracy to commit a misdemeanor assault is not one of the acts "described in this section." But, as defendants concede, it was held in Doble v. Superior Court (1925), 197 Cal. 556, 565 [2], 241 P. 852 (where the question was whether section 182 of the Penal Code provided punishment for a conspiracy to violate the Corporate Securities Act), that "it was the legislative intention that the words 'any crime' should include all crimes—whether felonies or misdemeanors—which are known to the laws of this state and whether defined and made punishable by the Penal Code or by any other law or statute of this state," and (page 566 [5] of 197 Cal., page 856 of 241 P.) "the words 'any of the other acts described in this section' were meant to, and do in fact, include all other conspiracies to commit crimes or acts prohibited by the section [182] regardless of whether they are denounced by subdivision 1 or any other subdivision thereof." We conclude that the Doble case is applicable here.

Misconduct of the District Attorney. Certain specifications of misconduct of the prosecuting attorney, hereinafter discussed, present the most nearly substantial basis for attacking the verdicts, but the evidence so overwhelmingly supports the implied findings that it does not appear reasonable to believe that the misconduct was a contributing factor in the jury's arriving at such verdicts.

Defendants complain of a press release of the prosecuting attorney which was published before trial. This press release stated that the defendants were attempting to delay trial. In this connection the record indicates that on the day the case was to have gone to trial in the regular criminal department (Department 4), that department was engaged in a trial. The presid-

ing judge in Department 2 was willing to select a jury to be used for actual trial in Department 4 and for that purpose the case was transferred from Department 4 to Department 2. Defense counsel announced defendants' willingness to be tried in Department 2, either with or without a jury, but objected to having a jury selected by one judge and then having the actual trial proceed before another judge. The case was thereafter continued in Department 2 from time to time for a week until Department 4 was available for selection of the jury and further trial. The press release to the effect that defendants were attempting to delay the trial appears unfair; defendants were merely objecting, as they had a right to do, regardless of whether their objection was or was not meritorious, to the procedure (described by the presiding judge as "standard procedure in this County") of having a jury selected by one judge and the actual trial conducted by another judge. However, it does not appear that the newspaper statement prejudiced defendants in the eyes of the jury which tried their case. The trial judge, in accord with the request of defendants' counsel, specifically admonished the jurors to pay no attention to this article and generally admonished them to pay no attention to newspaper articles.

[11] During the voir dire examination of the prospective jurors the prosecuting attorney asked such questions as, "You don't believe that might makes right?," "And do you feel that a person, because he is a member of a labor union, deserves to get beat up once in a while?," and "You wouldn't permit sympathy or the feeling to 'let's give him another chance' to influence your decision in this matter?" These questions, of which defendants complain, were not improper; they were designed to elicit relevant information concerning the prospective jurors' state of mind. The question, "You know a clerk was beaten?," of which defendants complain, was not in the circumstances improper and certainly could not be prejudicial; the fact was indubitably established and it concerned the very subject of the assault charge which the jurors were being selected to try. Other questions complained of by defendants need not here be quoted; they were either proper or not prejudicial.

Complaint is made of the following matters in the prosecuting attorney's opening statement: The prosecuting attorney said, "Mr. Max J. Osslo was a member of the 1955 Grand Jury that returned the indictment." Defense counsel, moving to strike the statement, said, "Although everybody knows that, it is incompetent, irrelevant and immaterial." In view of the concession that "everybody knows that" it does not appear that the mention of the fact before the jury could have prejudiced defendants.

[12] The prosecuting attorney stated at some length details concerning the secretary-treasurer of another Butchers' local being "worried about Osslo and worried about goons." Evidence concerning this matter was subsequently excluded. It does not appear that the reference to the matter could have prejudiced defendants. This and other references to "goons" by the prosecuting attorney were no more improper, in the light of the evidence developed by the prosecution, than would be a reference to "thieves" in a case in which defendants were on trial for larceny.

The trial judge instructed the jury before the taking of evidence began, as well as at the close of the case. In the course of his preliminary instruction he commenced to read an instruction concerning assault with a deadly weapon which the prosecuting attorney had incorrectly included in his requested instructions. The judge immediately stopped reading and asked the prosecuting attorney if it was his contention that a deadly weapon was used. The attorney answered, "No. By means of force," but then said, "A prize fighter is a weapon?" This remark or query was improper, as was the request for an instruction concerning assault with a deadly weapon. But these incidents, not

persisted in before the jury, do not appear to have been prejudicial.

Defendants complain that during the course of trial the prosecution brought into the courtroom and the sight of the jury a board on which were pictures referred to by counsel as "rogue's gallery" photographs of the defendants, made at the time of their arrest. The court declined to permit the use of these photographs in evidence. It is defendants' position that the prosecution, knowing that the photographs were improper, brought them into the courtroom in a manner such that the jury saw them and were prejudiced. The record does not disclose that the jury saw these photographs clearly or at length, but only that there was a dispute between prosecution and defense counsel as to whether they could readily have been seen by the jury. In the circumstances, even assuming that the jury did see the photographs, it is not shown that defendants were harmed. The jury were clearly and repeatedly instructed that they must determine the facts from the *evidence* produced in court, and that they must not consider any offer of evidence which was rejected by the court.

Objection was made and sustained to two questions of the prosecution as to whether Mr. Lundeberg supplied "strong arm men" for use in labor disputes. The use of the term "strong arm men," in the light of the evidence of circumstances under which the sailor defendants were employed by the Butchers, appears more realistic than prejudicial. In a pre-trial statement of defendant Osslo in connection with his motion to quash the indictment it is admitted that "Osslo turned to Harry Lundeberg for help. This procedure in labor circles is not considered unusual. The mere presence of some formidable appearing men to accompany his business representatives he felt both would 'offset the pressure' and reduce the possibility of 'designs of injury.'"

[13] A witness testified that a person whom she had seen at the time of the assault "is the second gentleman," indicating the defendant Cacio. The prosecuting attorney said, "I object to the use of the word 'gentleman.'" In contrast to what occurred in People v. Williams (1942), 55 Cal.App.2d 696, 700–702, 131 P.2d 851, the trial judge here immediately rebuked the prosecuting attorney and admonished the jury to disregard his remark. In the circumstances, the rebuke and admonishment appear sufficient to cure any harm which might have resulted from the prosecuting attorney's highly improper remark, and the Williams case is not authority to the contrary.

A police officer testified that he saw two of the sailor defendants in Osslo's office. The prosecuting attorney asked, "As a matter of fact, if you hadn't seen them in Osslo's office you would have run them out of town?" This question followed the officer's testimony that "I didn't like a couple of big, husky men walking around as bodyguards and gave the appearance of being toughs of the worst sort." Defense counsel objected that the prosecuting attorney's question was misconduct and the trial judge said, "That is uncalled for, Mr. O'Laughlin [the prosecuting attorney]. Don't repeat it. Proceed." It does not appear, in the light of the trial judge's rebuke, and of the facts that the jurors had ample opportunity to determine from personal observation whether the defendants were "big, husky men," and were admonished that they must decide the issues of fact on the evidence before them, not upon remarks of counsel, that the improper question was prejudicial.

The prosecuting attorney asked defendant Dimitratos, when Dimitratos was testifying, "As a matter of fact, any time Lundeberg gets in any type of dispute that he is out for a jurisdictional grab it is the old Communist slogan he uses—." Defense counsel interrupted with an objection and the trial judge sustained the objection and directed the jury to "disregard it." In the circumstances the interrupted, improper question does not appear to have been prejudicial.

Twice defense counsel objected to the prosecuting attorney's "yelling" at the defendant Cacio while Cacio was being cross-examined. On each occasion the trial judge replied that the prosecuting attorney could use any tone of voice which he wished to use. Although conceivably there could be circumstances under which the court's ruling might be questionable, it is not shown that the asserted "yelling" intimidated the witness or harmed defendants. Hence, we cannot determine that the ruling was either erroneous or prejudicial.

In closing argument the prosecuting attorney referred to a case in which "a man died in the gas chamber" because of a battery, assertedly similar to that administered to the clerk Maurer by the sailor defendants, which resulted in the death of a woman. The judge promptly admonished the prosecuting attorney to "Confine yourself to this case." It does not appear that the defendants were harmed by the reference to the homicide case.

[14] Defendants complain of the reference of the prosecuting attorney to Mr. Lundeberg and Mr. Jackson as "unindicted co-conspirators." The reference, although unfair to those gentlemen in the sense that they were not before the court and thus were not in a position to answer the charge, could not have been prejudicial to the defendants. It suggested only that entirely tenable view of the evidence which was taken by the prosecuting attorney and which we must presume was taken by the jury. Hence it did not constitute misconduct.

[15] The prosecuting attorney in argument stated, "Meyer is the finger man." We have discovered no evidence to this effect. It appears that any prejudicial effect of the reference was corrected by the trial judge's prompt admonition that "The jury will remember the evidence. * * * [I]f the evidence isn't there the inference isn't there and they will disregard it."

It is to be noted that the prosecuting attorney at the beginning of his argument said, "what I am about to say is not evidence and if, in any way your version of the evidence is different than mine, you please take your own version of it." And the judge clearly and repeatedly instructed the jury that they were to decide the case on the basis of the *evidence* and further clearly instructed them that arguments of counsel were not evidence.[3]

Defendants object to statements in argument of the prosecuting attorney that Mr. Lundeberg was "a bed fellow of Harry Bridges," that "It is two per cent his [Lundeberg's] fight against Communism and ninety eight per cent his grab for jurisdictional power," and other similar statements. These statements were made in reply to defense counsel's argument that "The Sailors Union was the only thing that stood between complete Communist control of the Maritime industry since 1935 and Harry Lundeberg personally was responsible for that on every occasion. He held that Sailors Union right and the Sailors Union had to fight in order to hold itself to keep from coming under the Bridges' control, as every other Maritime Union did." In the circumstances the statements of the prosecution were not prejudicial.

[16] *The Conditions of Probation.* Defendants argue that the conditions of probation exceeded the trial judge's power by reason of the provision that defendants Osslo, McFaden, and Meyer shall not, dur-

3. The judge told the jury, among other things, that "it is up to you to determine what the facts are from the evidence introduced at the trial. * * * You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. * * * [Y]ou must determine the facts from the evidence produced here in court," and "argument of counsel on both sides is not evidence. * * * Whatever they say about the evidence, if you find that to be true, why you follow it. If whatever either side said about the evidence doesn't correspond with your views as you heard the evidence as it came in, why you disregard any comments they made and follow the evidence as you see it."

ing the ten year probationary period, hold any union position or receive remuneration from any union. However, since it could be and presumably was found that these defendants are guilty of crimes growing out of union activities, it appears not improper that restrictions be placed upon such activities as a condition of probation.

[17] The granting of probation is entirely within the sound discretion of the trial court; a defendant has no right to probation; he does have the right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo such sentence. (People v. Frank (1949), 94 Cal. App.2d 740, 741–742, 211 P.2d 350.) In the Frank case the defendant, a pediatrician, was convicted of contributing to the delinquency of a minor by a lewd act committed on a child in a plaster cast. It was held proper that the terms of his probation include the requirement that defendant not practice medicine during the five years he was on probation. The court specifically rejected the argument, similar to the argument of defendants Osslo, McFaden, and Meyer here, that the condition of probation was unreasonable and beyond the power of the court.

Defendants are mistaken in their argument that the trial judge imposed on Osslo, McFaden, and Meyer county jail sentences and independently of such sentences granted periods of probation. Each probation order expressly suspends imposition of sentence and provides that probation is granted on the condition, among others, that defendant spend a designated number of months in the county jail.

[18, 19] It does not appear that the trial judge had power to impose the following terms in his probation orders: "that this Court and Judge shall retain jurisdiction of this matter throughout the said period of probation and no other department of the Court or other Judge shall modify this order without notice to the Judge who tried the case." An individual judge (as distinguished from a court) is not empowered to retain jurisdiction of a cause. The cause is before the court, not the individual judge of that court, and the jurisdiction which the judge exercises is the jurisdiction of the court, not of the judge. Rules of court which provide that post-trial proceedings in a cause shall be heard by the judge who tried the matter are entirely proper, but the individual judge cannot order that such proceedings must be heard by him.

The Asserted Channeling of the Case into a Particular Department. By stipulation this case was set for trial on July 9, 1956. All proceedings up to and including the making of the stipulation were had in Department 4 (Judge John A. Hewicker). The minutes of Department 4 show that on July 9 the cause was transferred to Department 2 (Presiding Judge Turrentine) for trial. Actually, the reporter's transcript shows, the transfer was for the purpose of selecting a jury only. The reporter's transcript further shows that, as already indicated, defense counsel refused to accede to the procedure of having a jury selected in Department 2 while the trial then pending in Department 4 was being completed and then having the cause transferred to Department 4 for completion of trial. Defense counsel moved that the cause be assigned to any available department for immediate trial. The court stated, "Motion granted, and the first court available will be Judge Hewicker, the regular criminal department. * * * [T]he case will be continued until two o'clock at which time the defendants, and all attorneys, and the jury is asked to return. If we are not ready then, why we will have to have continuances half a day at a time until we have a court available to try this case. I can't tell you exactly when that will be, but the case in Judge Hewicker's court may terminate at any moment * * * or it may take the rest of the week, but there is no alternative to that procedure * * *." Defense counsel objected to the continuance "on the ground that there are courts available and that there is going to be civil trial to be started in one of the Superior Courts this morning, and a criminal case has prece-

dence over a criminal [sic] case." The court said, "Objection overruled."

The cause was continued two or three times each day until July 16 when selection of a jury began in Department 4 before Judge Hewicker. On numerous occasions defense counsel objected to the continuances, pointed out that civil cases were commenced in other departments and that a jury had been selected in another department to try a criminal case which was originally set for trial later than defendants' case, and urged that the continuances were "part of the plan to channel a case into a particular court."

Judge Turrentine, in overruling one of defense counsel's objections to a continuance, explained at some length the reasons for the continuances. He said that "the case was originally pending in that Department [4] and was to go to trial there and it was only sent to this Department by Judge Hewicker for the purpose of getting a jury to try the case. * * * [I]n view of the objection to me trying—to me selecting a jury the only thing that could logically happen would be that it would go back to the Department where it originated and should be because Department 4 is the Presiding Criminal Department, and I am complying with the suggestion and request of Judge Hewicker."

Judge Turrentine further stated that the selection of a jury by a department other than the one in which the case was to be tried "is almost routine in this County. So we assumed * * * that on July 9th we would proceed in this Department to select the jury in order to give you a speedy trial and this was done at the request and suggestion of Judge Hewicker. It necessitated a very considerable rearrangement of business in this County to do it. We have four regular judges either away or assigned to duty on the District Court of Appeal, and, of course, we have the rather long trial in Department 4 going on. It is our general policy in criminal cases to give preference to the trial of those criminals who are incarcerated in jail so if they are deprived of their liberty unlawfully they may have their day in court and get out in preference to those who have the financial means to make bail. * * * [Defendants were at liberty on bail.] If it were not for the fact that we had members of the San Diego County Bar who were willing to serve as Judges pro tem without compensation to themselves we would just simply be bogged down with nothing but a number of these short jury trials where the defendants are in jail awaiting trial."

The judge went on to explain the condition of the calendar in various departments, pointing out that a jury trial of a person confined as mentally ill was being had in one department, that the juvenile calendar was "very congested," and that "today we have three criminal trials going on out of five regular judges, one regular and two pro tems * * *."

Defendants contend that the continuance of the case after the date set for trial, when civil cases were being tried in other departments, was in violation of section 681a of the Penal Code ("The welfare of the people of the state of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice") and the provision of section 1050 of that code that "Criminal cases shall be given precedence over all civil matters and proceedings."

[20, 21] It does not appear that the policy of sections 681a and 1050 was disregarded. Judge Turrentine's explanation of the condition of the calendar shows that defendants were not being deprived of precedence over civil cases for any arbitrary reason and that the continuances to enable trial in Department 4 were not made for the purpose of improperly channeling the case into that department. Rather, it appears that the orderly administration of a crowded calendar required the continuances to enable trial of the case in a proper department. The precedence to which crim-

inal cases are entitled is not of such an absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned. And certainly it does not appear, as defendants suggest, that the "channeling" of this cause to Department 4, where it had been from its inception, was an improper channeling to a particular judge as an individual rather than as the judge of the presiding criminal department.

For the reasons above stated, the provisions by which the individual judge purported to retain jurisdiction of the cause are stricken from the orders granting probation. In all other respects such orders, and the judgments and order denying a new trial, are affirmed.

SHENK, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

This case demonstrates, more than any other which has come under my observation, the abuse of our conspiracy statute. While the statute has a salutary objective, it may become a weapon in the hands of an overzealous prosecutor to make felonies out of mere misdemeanors and thus inflict great injustice upon people who are entirely innocent of any crime, but who may have had some connection or association with a person who has committed a misdemeanor. Under the holding of the majority in this case, it would be possible to obtain a felony conviction against all five occupants of an automobile for illegal parking, a misdemeanor, for which the driver of the car was entirely responsible. Take the case where a city ordinance prohibits parking within ten feet of a fire plug—a car with five persons in it parks within the restricted zone. A police officer arrests all five occupants on the theory that the illegal parking was the result of an agreement between them—conspiracy to violate the parking ordinance. Under the majority holding here, the mere presence of the five in the automobile would give rise to a permissible inference of conspiracy to violate the parking ordinance and all five could be prosecuted and convicted of conspiracy which is a felony under section 182 of the Penal Code (People v. Malotte, 46 Cal.2d 59, 292 P.2d 517) and all five could be sentenced to a state prison even in the face of their uncontradicted testimony that none of them except the driver had anything to do or say about the parking of the car. Such an outrageous travesty would be no greater than the prosecution, verdicts, judgments, sentences and affirmance of the judgments in this case. The foregoing statement is based upon the undeniable fact that there is not one word of testimony or any evidence in the record in this case of any agreement or understanding between any of the defendants that any crime would be committed by any defendant or that any conspiracy existed between them to violate any law, and there is no basis whatever for an inference that such a conspiracy existed.

The majority has quoted extensively from the testimony of some of the witnesses, but in all of this testimony there is not even a suggestion that there was an agreement or understanding between the defendants that any of them would commit a crime or that there was a plan, design or scheme to violate any law in any respect whatsoever, and the majority opinion does not refer to any evidence in the record which even remotely gives rise to an inference that a conspiracy existed between the defendants to violate a law.

True, a misdemeanor may have been committed by one or more of the defendants, but it requires something more than legal reasoning or judicial interpretation to find evidence of a conspiracy between the defendants that any defendant should engage in the commission of an unlawful act.

The record shows that a jurisdictional dispute existed in San Diego County between the local butchers' union and the local retail clerks' union. The butchers' union was of the opinion that its members should handle certain merchandise such as frozen TV dinners rather than members of the clerks' union. Defendant Osslo was secre-

tary-treasurer of the butchers' local, McFaden and Meyer were business agents for the same union. Four of the other five defendants were members of the Sailors Union of the Pacific and Cacio was a member of the Teamsters Union who had come from San Francisco to San Diego to accompany and protect the business agents of the butchers' local. The five defendants arrived in San Diego several days prior to October 22, 1955 and were in contact with Osslo, McFaden and Meyer; they attended a butchers' union meeting on October 21st. The record shows that these five defendants were paid weekly by the butchers.

The altercation out of which this case arose took place in Ferguson's Market in Chula Vista. The facts giving rise to the fight in which one Maurer, a retail clerk, was struck and injured are hotly disputed and present a very close question.

Defendants' major contentions are these:

(1) That there is no evidence that they conspired to commit assault;

(2) That the district attorney was guilty of prejudicial misconduct in numerous instances;

(3) That the court committed prejudicial error in the admission and exclusion of certain evidence;

(4) That the punishment imposed as to defendants Osslo, McFaden and Meyer is improper, excessive and unauthorized under the laws of the state and constitutes cruel and unusual punishment in violation of the Constitution.

The evidence, fairly stated, is as follows:

Early in September, 1955, there had been a strike of the butchers at the Food Basket Market in Pacific Beach which was authorized by Osslo, who was secretary-treasurer of the local union as well as the President of the Western Federation of Butchers, and the executive board. This strike arose over some 23 disputed items containing meat which were handled in the grocery department. After the strike in which about 20 persons were involved, the market brought an action for an injunction, and after the hearing the items were taken off sale. On October 13, 1955, there was a retail clerks' strike at Ferguson's Market and there were pickets carrying signs. Outside the market, there were about 25 persons including business agents for the clerks and butchers, as well as some butchers employed elsewhere. Defendants Osslo, McFaden and Meyer claim that they were threatened at this time by members of the clerks' union and that as a result Harry Lundeberg of the Sailors Union of the Pacific was contacted and requested to send some men to accompany them during their rounds of checking contracts to see that they were not jumped from behind or injured by members of the clerks' union. Defendants Dimitratos and Hazel arrived in San Diego and reported to McFaden and on October 19th accompanied Jackson (butchers' union) and Meyer to Tang's Market where they were, apparently, threatened by a member of the clerks' union who had a switch-blade knife and an outsider who had a gun. Osslo was contacted in Honolulu and advised Dimitratos to get some additional assistance which he did in the persons of Dempster, Cacio and Tucker.

On October 22nd, Osslo, McFaden and Meyer, accompanied by the five other defendants, visited several markets in San Diego. They arrived at Ferguson's Market at about 11 o'clock in the morning for the purpose of seeing one Linnville, partner and manager of the market. They were told to return at 1 o'clock. At 1 o'clock Dimitratos, Cacio, Hazel, Jackson, Meyer, Woodard, Dempster, Tucker and McFaden returned and went into the market. McFaden, Jackson and Meyer stayed near the entrance talking to Linnville; Hazel went to the back to talk to a young lady in the delicatessen department (the young lady testified that Hazel was with her at the time of the assault); Dimitratos went to the back and observed the meat department at the right; Tucker and Cacio, who had been to Tia Juana the night before and who had been drinking heavily, went in search of buttermilk and when they

did not find it turned back and came across Maurer and Montgomery who were representatives of the Clerks from outside San Diego. Defendants claim that as Dempster walked past them, followed by Tucker and Cacio, Maurer put his foot out; that Dempster saw it and stepped over it, but that Tucker, thinking Maurer was trying to trip him, stepped on Maurer's foot; that Maurer struck at Tucker and missed and hit Cacio; and Cacio struck back at which time Maurer grabbed Cacio by the testicles and lifted him off the ground; that Tucker and Cacio then struck Maurer until he dropped Cacio and Maurer went down; that Cacio and Tucker thought Maurer was reaching for a gun and Tucker kicked him until he was knocked out. Dempster came back and caught Cacio who was in great pain. Montgomery had disappeared at the first sign of trouble.

Dempster took Cacio whose trousers were torn and who was in pain to one of the two cars. He then asked McFaden for the keys and Dimitratos, Hazel, Cacio and Dempster then drove off looking for the Ace Motel where they were staying. They lost their way and were picked up by the police who found that Cacio and Tucker had been drinking and noted Cacio's condition and that of Tucker's hands. Maurer arrived at the police station that afternoon and identified them.

A bakery clerk at the market said that Tucker, Cacio and Dempster were the ones responsible for the beating. Maurer's testimony implicated Dimitratos in the fight; and showed that he thought he had hit Cacio in the stomach; that up until the time he was called a foul name and had been hit he did nothing at all to provoke a fight; that he and Montgomery had been trying to leave the store when they were "surrounded" by men. An organizer for the Clerks testified that Dempster was also in the fight; that Dimitratos and Hazel attempted to "get" Montgomery by chasing him.

The record contains testimony from both members of the clerks' and butchers' unions who were working in the market. A member of the Butchers testified that Maurer was "looking for trouble" on the day in question. The Clerks, on the other hand, testified that Mauer was just standing and minding his own business. It is obvious from the record that the testimony from both sides of the controversy was diametrically opposed.

The police officers testified that they had been alerted by radio from the Chula Vista police department; that when they stopped the car, Cacio, Dempster, Dimitratos and Tucker got out; that Cacio and Tucker said that "someone" had been reaching for a gun; that Tucker's hand was red and swollen; that Cacio's trouser leg was torn in two places at the thigh and that the men had been drinking. Dempster stated to the police that he had come from San Francisco on a vacation with his friends Tucker and Cacio; that he knew Dimitratos was in San Diego; that he did not know anything about a fight; that he knew nothing about a dispute between the Butchers and Clerks; that he had not attended a union meeting and that he had nothing to do with the butchers' union. Tucker stated that he had come to San Diego with Cacio to do some drinking and visit Tia Juana; that he had not come with Dempster; that he had nothing to say about going to Ferguson's Market; that he had attended a union meeting; that he had heard about the jurisdictional dispute between the Butchers and Clerks. He denied any connection with the butchers' union; he denied that the butchers' union had hired him to come to San Diego. Dimitratos told the officers he had come to San Diego with Hazel for a vacation; that they were staying at the Grant Hotel; that he had spent time with his friend McFaden; that he had not, nor had his friends, been involved in the fight at Ferguson's Market. Cacio denied being employed by the butchers' union; or that he had any interest in, or knowledge of, the dispute between the Butchers and the Clerks. Hazel's answers to police questions were also confusing and inconsistent.

Meyer denied being at Ferguson's Market on the day of the fight.

The People allege the following overt acts with respect to the conspiracy to commit assault count:

(1) That Osslo had a conversation with Harry Lundeberg, on or about October 13, 1955, in San Diego;

(2) That Dimitratos and Hazel met in San Diego on or about October 15, 1955;

(3) That McFaden, at Osslo's request, made reservations for three rooms at the U. S. Grant Hotel in San Diego on or about October 14, 1955;

(4) That McFaden, Dimitratos and Hazel met at the U. S. Grant Hotel on or about October 15, 1955;

(5) That Dimitratos and Hazel met at Butchers' Local 229, 227 E. Street, San Diego, on or about October 17, 1955;

(6) That Dimitratos, Hazel and Meyer, and other representatives of butchers' local met at Tang's Market, 4508 Cass Street, San Diego on or about October 18, 1955;

(7) That Dempster, Cacio and Tucker met in San Diego, on or about October 21, 1955;

(8) That Dempster, Cacio, Tucker, Dimitratos and Hazel met at the Ace Motel, San Diego, on or about October 21, 1955;

(9) That Dempster, Cacio, Tucker, Dimitratos and Hazel accompanied McFaden and Meyer to Ferguson's Market in Chula Vista on or about October 22, 1955;

(10) That Dempster, Cacio, Tucker, Dimitratos and Hazel were in a certain Ford sedan leased by butchers' local in San Diego on October 22nd;

(11) That Osslo and/or McFaden agreed to pay Dimitratos his expenses and a weekly salary on or about October 15, 1955;

(12) (13) (14) (15) That there was a similar agreement with Hazel, Tucker, Dempster and Cacio.

The People argue that from the above alleged overt acts, a jury could reasonably infer that a conspiracy to commit assault existed between the defendants; that the jury could reasonably determine that Osslo, with the knowledge and approval of McFaden and Meyer procured the services of the five sailor defendants for the purpose of intimidating the Clerks "by their appearance *and that if this was not sufficient, of perpetrating an assault upon a clerk who should happen into their proximity.*"

There is evidence in the record which tends to prove all of the alleged overt acts. As I read the record, however, there is no evidence (*and the People point to none*) that the fight was planned, or premeditated, or that any of the proved overt acts lead to that conclusion. Assuming that Cacio provoked the altercation and that Maurer did not (although the evidence is extremely close on that point) telephone calls between the defendants, payment of expenses, salaries, and the making of hotel reservations, do not lead to the conclusion that the defendants were engaged in a conspiracy to commit an assault. The People argue, by quoting from the remarks made by the trial court, that because the five defendants were furnished bail, counsel, and their salaries were paid after the assault, that the assault had been planned between all defendants prior to its commission. In People v. Williams, 30 Cal.App.2d 234, 85 P.2d 974, relied on by the People, there was direct evidence that a conspiracy existed to commit assault. The same is also true of the case of People v. Dail, 22 Cal.2d 642, 140 P.2d 828, relied upon by the People. It is my conclusion that the alleged and proved overt acts charged against these defendants do not support the judgment convicting them of conspiracy to commit assault.

Misconduct of District Attorney:

It is the defendants' contention that the district attorney engaged in a course of prejudicial misconduct during the course of the voir dire examination of prospective jurors, throughout the course of the trial, and during the arguments to the jury. Defendants cite numerous examples of misconduct, among which are the following:

On voir dire examination, prospective jurors were asked whether they felt that "any segment of our society should be im-

mune from the law" or "should take the law unto themselves" and whether they felt that because a person was a "member of a labor union, [he] deserves to get beat up once in awhile"; whether (after the sustaining of an objection) the prospective juror felt that "might makes right"; whether because the Clerks and Butchers had settled their difficulties it would cause the prospective juror to adopt a "let's forget it" attitude; whether the prospective juror felt that "the community might have some interest in the matter"; whether the prospective juror had read "Victor Riesel's column 'Inside Labor' "; whether any of the people in the jury box had read the column; whether the prospective juror realized that every time the district attorney introduced a "bit of evidence in this case that in some way or other I am going to be prejudicing these defendants in your eyes"; that the juror realized "don't you, that we are not up here in a criminal department to elect Mr. San Diego"; that "if in the course of this trial and as you examine the facts surrounding the beating of the clerk in Chula Vista, if you become aroused, and as a public citizen as to what happened, will you try and remove that from your mind and just try the case on the evidence and the Court's instructions and use that to arrive at your conclusion"; whether the prospective juror had heard that Mr. Osslo was a member of the Grand Jury that indicted him. (An objection was sustained to the last question.) It should be here noted that defense counsel objected throughout the course of the questioning that the questions were argumentative; that the district attorney was attempting to prejudice the jury; that the questions were irrelevant and immaterial; that the questions were for the purpose of inflaming the minds of the jurors.

During the opening statement, the district attorney again referred to the fact that Osslo had been a member of the Grand Jury that indicted him and defense counsel's objection was overruled. The district attorney then stated that the evidence would show that "in the middle of October, 1955, another person was worried about Osslo and worried about goons." When defense counsel asked what the last word was, the district attorney replied: "Goons, Another man was worried about Osslo and about goons. G-o-o-n-s (spelling). That man is Mr. Herb De Motte. He is a Secretary-Treasurer of a Butchers Local in Wilmington." Defense counsel's objection was overruled and the district attorney then made a long and involved statement concerning the internal affairs of the butchers' union and the difficulties between De Motte and Osslo; that De Motte was afraid of "goons. He was afraid to hold meetings." The district attorney's statement was obviously an attempt to show that Osslo was a man to be feared because he would set "goons" upon any person with whom he disagreed. Defense counsel's objections were overruled and the district attorney told the jury that De Motte would testify as to his fear of "goons." The defendants were constantly referred to as "goons."

Prior to the taking of testimony, the trial court inadvertently started to instruct the jury concerning assault with a deadly weapon. When defense counsel objected that no use of a weapon had been charged and that the evidence would show that no weapon had been employed, the district attorney asked his co-counsel in the hearing of the jury: "A prize fighter is a weapon?" Also assigned as misconduct is the fact that before the court had ruled on the matter, and during a conference in chambers concerning the admissibility thereof, a board containing photographs of all the defendants, some of which were taken on the day they were arrested, was so carried and placed in the courtroom that it was visible to the jury.

During the course of the trial, a witness was asked if he knew that Harry Lundeberg supplied "strong arm men in the labor movement." When an objection was sustained, the district attorney again asked if the witness knew whether or not on any prior occasion Lundeberg sent strong arm men into jurisdictional disputes or disputes with management. When a witness re-

ferred to Cacio as the "second gentleman there * * *" the district attorney said, "I object to the use of the word 'gentleman.'" The district attorney also managed to get in evidence the general strike in Oakland in 1948, or 1949, the Wall Street strike in 1948, the Western Union strike in 1952, the United Financial Employees strike in 1948, in an attempt to show that Harry Lundeberg furnished "strong-arm" men from the Sailors of the Pacific to aid in the strikes. To all of this evidence, defense counsel's objections were overruled. The district attorney in his questioning referred to sending two sailors out to "bird dog Anderson" and to sending two sailors out "to finger Anderson." When Captain Roland, a police officer, testified that he "didn't like a couple of big, husky men walking around as bodyguards and [that they] gave the appearance of being toughs of the worst sort. I didn't like it, but it wasn't their physical appearance, other than they were big and husky," the district attorney asked him "As a matter of fact, if you hadn't seen them in Osslo's office you would have run them out of town?" In questioning the defendant Dimitratos, the district attorney asked: "As a matter of fact, any time Lundeberg gets in any type of dispute that he is out for a jurisdictional grab it is the old Communist slogan he uses. * * *"

During closing argument to the jury, the district attorney stated "Incidentally, let me say this: a man died in the gas chamber not too long ago for just this type of conduct. He beat a woman in the face and when she fell he kicked and killed her and he died for that." He also stated: "Incidentally, while mentioning him, let me say this: one or more of the jurors may say, 'Well, that Jackson was in this thing and he was at the scene and he did as much as some of the other people. Why isn't Jackson indicted? Why isn't Lundeberg indicted?' Those are unindicted co-conspirators. That shouldn't concern you here. In other words. * * *" After objection, the court stated that the district attorney's "remarks weren't directly in conformity with the Indictment. The indictment does not name them as unindicted co-conspirators, but if he feels under the evidence they are co-conspirators he may so state." After other objections, the court again stated that if the district attorney felt that "some of his witnesses were co-conspirators he may so tell the jury, if he bases it on the evidence." The district attorney also told the jury "You hear about the great man, Harry Lundeberg, that is clearing the waterfront of Communists. Let me say this: Harry Lundeberg, Barney Mayes and Harry Bridges were all bed fellows at one time. * * *" After being told by the court to proceed with his argument, the district attorney said: "The water tenders, the firemen and what have you is an independent union and Lundeberg, in his grab for power, has used that old slogan to grab these unions, so that is malarky when they try to inject Communism in this case. It has been something Lundeberg used to control the docks. It is two percent his fight against Communism and ninety eight per cent his grab for jurisdictional power. That is what it amounts to. So don't let them get you off base on this big man who, as I said, was a bed fellow of Harry Bridges back in the thirties. Bridges sponsored him to be head of the Maritime Federation of the Pacific." After the court told the district attorney to confine himself to the evidence, he said: "So that fellow Lundeberg, don't get any misconception about him. That fellow Lundeberg, where were the Communists on Wall Street when they had five hundred men—

"The Court: Mr. O'Laughlin, I kept that out of evidence.

"Mr. O'Laughlin: Well, where were the Communists in the Western Union strike? When old Thompson got beat up because he happened to cross a picket line? None of that at all. Lundeberg—and the reason we were bringing it in, counsel says what has Wall Street to do with it and the general strike in Oakland, or what has the Western Union strike to do with it. It shows a pattern that Lundeberg supplies the noise and the muscle. He can swing a jurisdictional dispute; he can swing an election. You

and I might be members of a union and be sore at the particular administration and we might want it out for one reason or another, but if the pack that is in brings down the muscle, brings down some of Lundeberg's boys, we are going to be silenced because we are going to be afraid of our lives, afraid to open our mouths, because if we do we might get the treatment Maurer and Thompson got." When this was objected to by defense counsel as unsupported by the evidence and as improper and inflammatory, the court merely told the district attorney to "Proceed."

While numerous additional instances of the same type of conduct could be cited, it appears that the above is sufficient to show that the district attorney was guilty of prejudicial misconduct insofar as all of these defendants are concerned. As we said in People v. Dail, 22 Cal.2d 642, 650, 140 P.2d 828, 832, "It is also true, however, that in a close case where the evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal. People v. Silver, 16 Cal.2d 714, 723, 108 P.2d 4." In the case at bar, the district attorney managed to interject much immaterial and irrelevant matter concerning strikes, the use of pickets, and assaults in other strikes which could not have had any other effect than to prejudice these defendants who were not claimed to have taken part therein. Further, the numerous references to the defendants as "goons," "strong-arm" men, "muscle" men, and the objections to the term "gentleman" as applied to one of the defendants were highly inflammatory and prejudicial, as were the district attorney's references to Lundeberg as a former Communist. From the district attorney's comments, arguments and questions, it appears that the entire labor movement was on trial and that anyone connected therewith was suspect as a participant in the trial of this particular case. Such conduct is reprehensible and should not be condoned. In People v. Lyons, 47 Cal.2d 311, 318, 303 P.2d 329, 333, we said, quoting from Viereck v. United States, 318 U.S. 236, 248, 63 S.Ct. 561, 87 L.Ed. 734: "'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" Here, as in People v. Teixeira, 136 Cal.App.2d 136, 288 P.2d 535, 542, "* * * it is hard to believe that this experienced prosecutor asked them [questions] in good faith and for any purpose other than to degrade defendants." In People v. Vienne, 142 Cal. App.2d 172, 297 P.2d 1027, it was held that the district attorney is bound to refrain from making inflammatory statements (see, also, People v. Wilkes, 44 Cal.2d 679, 284 P.2d 481); in People v. Henderson, 144 Cal. App.2d 706, 301 P.2d 468 (where the same district attorney was involved), it was held prejudicial and reversible error for the prosecutor to state or imply the existence of facts concerning which no evidence had been introduced.

Admission and Exclusion of Evidence:

It is first claimed by the defendants that the court erred in admitting the testimony of Captain Hodson. This testimony included the admission in evidence of part of the log book of the steamship Luckenbach concerning a fight in *1952* in which defendants Dimitratos and Dempster were involved. Defendants contend, and their counsel argued at the time the evidence was admitted that the evidence was immaterial, irrelevant, too remote from the San Diego incident, and that it was prejudicial error

for the prosecution in the first instance to put in evidence the bad character of the defendants. The trial court also permitted the People to put in evidence testimony that defendant Dimitratos had been stabbed in a fight on board ship in *1951*; and that Dempster and Hazel were in the same crew. In People v. Teixeira, 136 Cal.App.2d 136, 148, 288 P.2d 535; People v. Adams, 76 Cal.App. 178, 244 P. 106; People v. Nunley, 142 Cal. 441, 76 P. 45, it was held that such evidence was inadmissible as an attack on the character of the defendant by the prosecution and constituted prejudicial error. In People v. Lyons, 47 Cal.2d 311, 317, 303 P.2d 329, 332, where the prosecution alluded on the cross-examination of the defendant's wife to a prior conviction of defendant, we said: "It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid questions to be *improper, wholly unjustifiable and peculiarly calculated to prejudice the appellant before the jury.*" (Emphasis added.) See, also, People v. Hardy, 33 Cal.2d 52, 61, 198 P.2d 865; People v. McKelvey, 85 Cal. App. 769, 771, 260 P. 397.

The above evidence was held admissible by the trial court on the theory that a conspiracy had been charged even though the People did not contend that the conspiracy had dated back to 1951 and 1952. Defense counsel's motion to strike was denied by the trial court. From the trial court's remarks, it is obvious that the evidence was held admissible on the theory that a *conspiracy presently existed* between all defendants.

The evidence was inadmissible on any theory and its prejudicial effect is at once apparent.

The admission of evidence concerning the Wall Street strike, the general strike in Oakland and the Western Union strike has heretofore been commented upon in the discussion concerning the prejudicial misconduct of the district attorney. The trial court's statement that "The reason I let this testimony in was to show other instances where the members of the Sailors Union were used and what transpired, to show the demeanor of the sailors used on the picket lines. In this conspiracy count you are entitled to know all the surrounding circumstances of the people that were employed in the incident down here, if one happened," and the court's later admission that there was an entirely different group of sailors in San Diego, clearly show the error that was committed. The case at bar involved an assault and a conspiracy to commit an assault and the fact that other sailors were used in picket lines in other areas remote in place and time is completely immaterial and irrelevant and was highly prejudicial to the defendants in the case at bar. People v. Lyons, 47 Cal.2d 311, 303 P.2d 329; People v. Hardy, 33 Cal.2d 52, 61–62, 198 P.2d 865; People v. Wynn, 44 Cal.App.2d 723, 732–733, 112 P.2d 979; People v. Freitas, 34 Cal.App.2d 684, 687, 94 P.2d 397; People v. Stafford, 108 Cal.App. 26, 29–31, 290 P. 920.

Defendants contend that the court erred in excluding testimony offered by them to show that threats had been made against some of them which necessitated the request to Lundeberg for bodyguards to accompany the Butchers' business agents on their rounds. Inasmuch as the evidence is in sharp conflict as to which side started the fight, this testimony should have been admitted. If threats had been shown to have been made against the business agents of the Butchers by members of the clerks' union, the evidence would be admissible as tending to prove the defense theory that the five defendants were summoned to San Diego to act as bodyguards only and to disprove the People's theory that a conspiracy to commit assault existed between all eight of the defendants.

Punishment of Osslo, McFaden and Meyer as Improper, Excessive and Unlawful:

Osslo and McFaden were each fined $1,500 to be paid from their own funds; Meyer was fined $750 to be paid from his own funds.

Osslo and McFaden were ordered to serve six months in the county jail; Meyer was ordered to serve three months in the county jail.

These three defendants were placed on ten years' probation, during which time they could hold no union office and receive no salary for any union services, or participate in any union negotiations. In addition, these defendants were required to fill out an annual affidavit that the fine payments were made from their own funds and that they held no union office, etc., and "*further, that this Court and Judge shall retain jurisdiction of this matter throughout the said period of probation and no other department of the Court or other Judge shall modify this order without notice to the Judge who tried the case.* * * *"

Defendants argue that the terms of their probation cut off their ability to earn a livelihood; that said terms violate the principle back of probation which "is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted," (People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16, 17; Lee v. Superior Court, 89 Cal.App.2d 716, 717, 201 P.2d 882) and that it violates the principle that the terms and conditions of probation must be reasonable under all the circumstances (In re Trombley, 31 Cal.2d 801, 811, 193 P.2d 734).

While these three defendants were found guilty of both conspiracy to commit assault, and assault with force likely to produce great bodily harm, it is apparent from the record that they were not involved in the actual assault. Defendants claim, with merit, that it is impossible to determine whether they were convicted of a felony or a misdemeanor since they were charged with and found guilty of conspiracy to commit assault and charged with, and found guilty of, assault with force likely to produce great bodily injury.

Defendants' arguments in this respect have merit. It appears that the terms of probation are such as would deprive defendants of their means of livelihood and also violate the principles of probation. The purpose of probation is not to impose penalties (In re Hays, 120 Cal.App.2d 308, 310, 260 P.2d 1030; In re Martin, 82 Cal. App.2d 16, 22, 185 P.2d 645). It is my opinion that the trial court was guilty of an abuse of discretion with respect to the terms and conditions of probation imposed on defendants Osslo, McFaden and Meyer.

Errors in the Majority Opinion:

The Evidence:

I have heretofore set forth a fair statement of the evidence as it relates to the case at bar. We are here concerned with evidence to support a judgment of conviction of *conspiracy* to commit assault. There is no doubt that an assault was committed by *some* of the defendants. Defendants Osslo, McFaden and Meyer were not involved in the actual assault and the People do not so argue. The majority opinion quotes at length from the testimony of one Jackson, a business agent for the butchers. Nothing said by the witness, or quoted in the majority opinion, leads to the conclusion that these defendants were engaged in a conspiracy to commit assault. The majority makes much of the statements of the witness that the police force was not called for protection rather than members of the sailors' union, that older, unemployed members of the butchers' union of San Diego were not called upon to act as observers and that members of other San Diego labor unions were not called upon. The witness' testimony regarding his belief that members of the butchers had reason to fear violence from the clerks is quoted extensively in an endeavor by the majority to show that no such fear could reasonably have existed. In the first instance there is no law that I am aware of which would require these defendants to ask police protection or to hire any particular segment of society to act as their observers. I also know of no law prohibiting the hiring of a bodyguard for protection. It also appears to me highly unlikely that any police force would have sufficient men available to accompany members of labor unions on their rounds in order to *prevent* trouble which at that time was only a possibility. Insofar as the fear of trouble was concerned and any threats,

by conduct, or otherwise, made by members of the clerks to members of the butchers were concerned it appears to me that fear is subjective and that these men, who were there at the time, were far more able to recognize it than the members of the majority of this court who only know what appears in the record as we see it today.

Because defendant Osslo said he was "top man" on the west coast and "that was it" and because he said the butchers would "show" the clerks, the majority infers that Osslo "set up a situation which inferentially was designed to, and which clearly did, increase the likelihood of violence in the jurisdictional dispute. On a view of the evidence favorable to the prosecution, which the law at this stage of the proceeding requires of us, it is fairly inferrible that Osslo, McFaden, and Meyer at least tacitly understood, anticipated, and agreed that the remaining five defendants would not merely be present to act as 'observers' and protect the Butchers from violence, but would and should initiate the violence, which they subsequently did initiate, to 'show' the Clerks that Osslo indeed 'was boss of the West Coast and he would fight for jurisdiction' and 'that was it.'" *No such inferences can be fairly drawn from the record.* It should be borne in mind that the conspiracy charged here was to commit assault—*not* a conspiracy to make Osslo "boss" of the west coast! There is absolutely nothing in the record from which an inference may be drawn that Osslo intended the five defendants to "initiate" violence and in the state of this record with its numerous instances of prejudicial misconduct and the close question of fact presented concerning just which labor union instigated the altercation, this court should not concern itself with drawing such an inference. Because *other* members of the sailors' union had participated in other labor union disputes in other parts of the country in 1948, 1949 and 1952, and had, *according to the majority*, been guilty of assault and battery in connection therewith, we are told that we may infer that Osslo, McFaden and Meyer knew that these defendants would *initiate* violence. So far as this record is concerned we do not know whether or not the members of the sailors' union engaged in those other strikes were the guilty ones in the crime of assault and battery. For all we know, the other parties involved may have been the guilty ones and the sailors' members completely innocent. Even if the members of the sailors' union involved in those other strikes were the guilty ones, should every member of a labor union to which he must belong if he is to earn his livelihood be held guilty of the same crime? The question answers itself and shows the fallacy in the reasoning of the majority. That reasoning carries the philosophy of "guilt by association" to its ultimate extreme.

Admission and Rejection of Evidence:

The majority feels that the admission of evidence concerning other and remote labor disputes in which other members of the sailors' union were involved was not prejudicial error when considered in the "light of other circumstances, including the prior activities of Osslo, McFaden, and Meyer" to show that these men "contemplated that the employment of the sailor defendants probably would result in acts of violence by" the other five defendants. First we are told to rely on the asserted violent tendencies of other members of the sailors' union to show that Osslo, McFaden and Meyer are guilty as charged and, secondly, that "the prior [unexplained] activities" of the three men made such evidence admissible because it showed their knowledge that violence would result. There is absolutely nothing in the record to show any connection between the other strikes in which other members of the sailors' union participated and any of these defendants except that some of them belonged to the sailors' union.

The majority finds that the jury could not have been misled because of the admission of evidence of fights, unconnected with labor activities, which occurred in 1951 and 1952, and which occurred on board ships on which Dimitratos and Dempster were sailors. It is said that "in the light

of the circumstances surrounding their importation and employment, it does not appear that the jury could have been misled by evidence that they had been involved in other altercations." The only reason for the admission of such evidence would be to show the allegedly bad character of these two defendants and was wholly inadmissible as I have heretofore pointed out and such evidence has, up until this case, been held to constitute an unwarranted attack on the character of a defendant and to constitute prejudicial error. The question is not one of misleading the jury but goes to the question of due process in that every person accused of a crime is entitled to a fair trial on the merits of his particular case.

Concerning the admission of evidence of telephone calls between the defendants and other members of their organizations of which the defendants complain, the majority says "This evidence was properly received to show defendants' association; *that that association was criminal is shown by the other evidence, viewed as a whole.*" This statement assumes the answer to the main question involved—whether defendants *conspired* to commit the assault and battery which occurred. Mere association and telephone calls, the subject matter of which is completely unknown, have never, until now been sufficient to show that a conspiracy to commit a crime existed. Under the holding here, no association, no telephone call, can be innocent and immune from a later charge of conspiracy if one of the parties should later be accused of a crime of any type.

With respect to the admission of evidence of the arrest of two members of the clerks' union *after* the assault and battery involved here occurred, and of which defendants complain, the majority says that "This testimony tends to show that defendant Osslo, after the assault, attempted to harass the Clerks by unsubstantiated accusations and to distract emphasis from the charges against him by countercharges; it was thus admissible as tending to show that Osslo was a conspirator carrying on an effort to make good his declaration that he 'was boss of the West Coast and he would fight for jurisdiction,' and not, as he argues, the innocent employer of persons who were to act as 'observers' or at the most to show the Clerks that the Butchers were protected, without the exercise of force." The conspiracy charged here was that of assault and battery, *not* the promotion of Osslo as "boss" of the west coast. The assault and battery had occurred before the arrest of the clerks and hence the conspiracy, if any, had been terminated. To be admissible, the act or declaration must have been made during the pendency and *prior to the termination of the enterprise and in furtherance of the common design* (People v. Brown, 59 Cal. 345; In re Estate of Strachan, 166 Cal. 162, 135 P. 296; Budd v. Morgan, 187 Cal. 741, 203 P. 754; People v. Ferlin, 203 Cal. 587, 265 P. 230; People v. Smith, 151 Cal. 619, 91 P. 511; People v. Kynette, 15 Cal.2d 731, 104 P.2d 794; People v. Steccone, 36 Cal.2d 234, 223 P.2d 17).

The majority holds that the exclusion of evidence concerning McFaden's report to Jackson and Osslo that he had been frightened by the clerks could not, in the "light of the record" have prejudiced defendants. This evidence was patently admissible under the defendants' theory and should have been admitted. It is clearly seen that evidence damning to them is held properly admitted while evidence in their favor is held properly excluded. A fair trial encompasses all the relevant and material admissible evidence whether favorable or unfavorable to either side. A fair trial does not mean a trial where the prosecution uses every means, whether fair, or foul, to gain a conviction and no court should condone such a practice. As we said in People v. Lyons, 47 Cal.2d 311, 317, 303 P.2d 329, 332, it would be an impeachment of the legal learning of counsel for the People to intimate that he did not know that what he was doing was improper, wholly unjustifiable and peculiarly calculated to prejudice the appellant before the jury. Counsel for the People knew, or should have known, that his conduct and a great deal

of the evidence produced by him was wholly irrelevant and that it was "peculiarly calculated to prejudice" the defendants in the eyes of the jury. He should also have known that evidence relevant to defendants' side of the case was admissible and a part of the entire background of the American system of jurisprudence—a fair trial.

Misconduct of the District Attorney:

I have heretofore set forth in detail some of the instances in which the district attorney was guilty of prejudicial misconduct and the majority has cited some additional examples all of which were calculated to and did inflame the minds of the jurors. The majority, however, finds that "the evidence so overwhelmingly supports the implied findings that it does not appear reasonable to believe that the misconduct was a contributing factor" in arriving at the verdicts. As I have pointed out at length the evidence is far from overwhelming—it is non-existent so far as a conspiracy is involved since the overt acts, in and of themselves, while proved, do not lead to the inevitable conclusion that defendants conspired to commit assault and battery. The overt acts charged consisted of a number of conversations and meetings between the defendants, a labor meeting at which defendants were present, hotel reservations made for some of the defendants; defendants' presence in cars leased by the butchers' local of San Diego; salaries agreed to be paid to the five defendants by Osslo or McFaden. There was no proof, either direct or circumstantial, of what the conversations were at either the meetings or at the labor meeting; there was no proof either direct or circumstantial that at any of the times charged, defendants conspired to commit assault and battery. The majority, however, infers that all of these meetings were used for an evil and unlawful purpose and concludes that the evidence against all the defendants is so "overwhelming" that no misconduct could have prejudiced the defendants in the eyes of the jury.

It can hardly be doubted that the interjection of Communism in the case was prejudicial to the defendants as was the use of the words "goon," "finger man," "strong-arm men," and "toughs." All of these things tended to attack the character of the defendants so as to prejudice them in the minds of the jurors and from the state of the record were obviously calculated to do just that by the prosecutor.

An admonition to the jury to decide the case on the evidence produced is insufficient to cure the errors and misconduct which occurred in this case. A reading of the record shows that from the voir dire examination of prospective jurors, throughout the trial, and until its close, the prosecution was guilty of a deliberate attempt to harass, embarrass, and prejudice these defendants. The majority finds nothing wrong with the trial judge permitting counsel for the People to "yell" at one of the defendants while on the stand. It is said that the record does not show that the "yelling" intimidated the witness. The district attorney is a representative of the People and as such is not "at liberty to strike foul" blows. Here, as in People v. Teixeira, 136 Cal.App.2d 136, 288 P.2d 535, 542, "* * * it is hard to believe that this experienced prosecutor" yelled at a witness "in good faith and for any purpose other than to degrade" him.

Conditions of Probation:

I have heretofore discussed these conditions and my reasons for feeling that they were excessive and in violation of the principle of probation. The majority cites People v. Frank, 94 Cal.App.2d 740, 741–742, 211 P.2d 350, as authority for its holding that the punishment imposed was perfectly proper. In the Frank case the defendant was himself guilty of committing a crime. In the case at bar, defendants Osslo, McFaden and Meyer were not guilty of the actual assault and it is only by means of the improper use of the conspiracy statute that they are in any way involved. As I have pointed out the record shows a total lack of evidence that these defendants con-

spired with the others to commit the crime with which they were charged and a majority of this court, in affirming the judgments of conviction and the terms of probation, has deprived these three defendants of their means of earning a livelihood since they may not even work as the most menial of laborers in their own union and cannot receive remuneration "from *any* union." The terms of probation are wholly out of line with the cases holding that probation is an act of grace and clemency for the purpose of permitting rehabilitation of a defendant who is "seemingly deserving" and for the purpose of permitting him to "escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted" (People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16, 17; Lee v. Superior Court, 89 Cal.App.2d 716, 717, 201 P.2d 882).

Summation:

In my opinion:

1. The judgment should be reversed with directions to dismiss the charge of conspiracy to commit assault as to all defendants because of the total lack of evidence in the record to support the charge.

2. The record shows that only the defendants, *Cacio, Tucker* and possibly *Dempster* and *Dimitratos,* could have engaged in the assault. There is *no* evidence to show that it was other than a spontaneous assault and, in view of the sharp conflict in the evidence as to the person responsible for starting the altercation and the prejudicial misconduct of the district attorney, as well as the highly prejudicial character of the evidence erroneously admitted (as heretofore discussed), the judgments should be reversed as to them in order that they may have a fair trial on the merits. We held in People v. Lyons, 47 Cal.2d 311, 319, 303 P.2d 329, 334, that "It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law (Powell v. State of Alabama [1932], 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527])."

3. Since there is no evidence which tends to connect defendants Osslo, McFaden, Meyer and Hazel with the actual assault, the trial court should be directed to dismiss as to these defendants the charge of assault by means of force likely to produce great bodily injury.

GIBSON, C. J., and TRAYNOR, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



50 Cal.2d 137

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bernard P. CALHOUN, Defendant and Appellant.

Cr. 6111.

Supreme Court of California, In Bank.

March 27, 1958.

Rehearing Denied April 23, 1958.

Defendant was convicted of conspiring to violate the Elections Code, conspiring to commit acts injurious to public morals, to obstruct justice and to prepare false records for fraudulent purposes for use in proceedings and inquiries authorized by law, and from a judgment and order denying a motion for new trial in the Superior Court, San Diego County, John A. Hewicker, J., the defendant appealed. The Supreme Court, McComb, J., held that the trial court did not err in telling the jury that although a codefendant was not present, the jury could try all acts committed by codefendant as though he were present in the case being tried; that evidence tending to prove the existence of the conspiracy was admissible; but that the trial court erred in holding that evidence that defendant claimed the Fifth Amendment before the grand jury could be received in evidence as an admission and be used to support a verdict.

Reversed.

Opinion, 310 P.2d 94, vacated.

1. Conspiracy ⇐48

In prosecution for conspiring to violate the Elections Code, trial court's statement to jury, that although codefendant was not present, the jury would have to try each and all acts committed by codefendant as though he were present and being tried was not error, on ground that court implied that if codefendant was guilty of conspiring with any of the unnamed but unindicted alleged conspirators, defendant would also be guilty. West's Ann.Elections Code, § 5002.5.

2. Criminal Law ⇐423(1)

Where the existence of a conspiracy is established, evidence of acts and declarations of the conspirators in furtherance thereof is admissible.

3. Conspiracy ⇐23

In prosecution for conspiracy, it is not essential to conviction of a coconspirator that any or all other coconspirators shall be tried and convicted.

4. Conspiracy ⇐45

In prosecution for a conspiracy to violate the Elections Code, admitting testimony relating to matters occurring before the formation of the conspiracy was not an abuse of discretion. West's Ann.Elections Code, § 5002.5; West's Ann.Pen. Code, § 182, subd. 5.

5. Criminal Law ⇐680(1)

The trial court has a reasonable discretion as to the order of proof.

6. Conspiracy ⇐24, 47

A conspiracy may be established by direct evidence or circumstantial evidence or a combination of both, and it need not be shown that the parties entered into a definite agreement, but it is sufficient they positively or tacitly come to a mutual understanding to accomplish the act and unlawful design. West's Ann.Pen.Code, § 182, subd. 5.

7. Conspiracy ⇐45

Any competent evidence tending to prove the existence of a conspiracy or any competent acts or declarations tending to show a common design is admissible. West's Ann.Pen.Code, § 182, subd. 5.

8. Conspiracy ⇐45
Criminal Law ⇐419(1)

In prosecution for conspiring to violate the Elections Code, testimony of witness concerning payment of attorney's fees to defendant and of payments to witness' employee was properly admitted as against claim of hearsay and as material to show the conspiracy. West's Ann.Elections Code, § 5002.5; West's Ann.Pen.Code, § 182, subd. 5.

9. Criminal Law ⇐1169(1)

In prosecution for conspiring to violate the Elections Code, testimony that defendant paid $3,000 from fund of an organization soliciting contributions from liquor licensees to another for attorney's fees in defending a person in a prior action while not very material was not prejudicial where it was one of a long list of things done by the various conspirators. West's Ann.Elections Code, § 5002.5; West's Ann.Pen.Code, § 182, subd. 5.

10. Conspiracy ⇐45

In prosecution for conspiring to violate the Elections Code by soliciting contributions from liquor licensees for use in re-election campaigns of equalization board member, admitting testimony respecting deposits and disbursements and checks and other documents was proper to establish the conspiracy. West's Ann.Elections Code, § 5002.5; West's Ann.Pen.Code, § 182, subd. 5.

11. Witnesses ⇐309

There is no implication of guilt to be drawn from defendant's reliance on the constitutional guarantees of the Fifth Amendment. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 5.

12. Criminal Law ⇐407(2)

In prosecution for conspiracy, where defendant appeared before the grand jury in response to a subpoena, evidence of defendant's refusal to answer questions before the grand jury based on the Fifth Amendment was inadmissible as an admis-

sion and could not be used to support the verdict. West's Ann.Pen.Code, §§ 688, 1323, 1323.5; U.S.C.A.Const. Amend. 5; West's Ann.Const. art. 1, § 13.

13. Witnesses ⇐269(1), 297

No person can be compelled in a criminal action to be a witness against himself and if he offers himself he can be cross-examined by the People's counsel only about matters to which he testified in chief. U.S.C.A.Const. Amend. 5; West's Ann.Const. art. 1, § 13.

14. Grand Jury ⇐35

In grand jury proceedings, a defendant shall at his own request but not otherwise be deemed a competent witness. U. S.C.A.Const. Amend. 5; West's Ann. Const. art. 1, § 13.

John W. Preston, Los Angeles, William P. Mahedy, San Diego, and Charles H. Carr, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., and Jack R. Levitt, Deputy Dist. Atty., San Diego, for respondent.

McCOMB, Justice.

Defendant, with William G. Bonelli and certain John Does, was charged in an indictment with conspiring to violate section 5002.5 of the Elections Code.[1] The indictment alleged that the persons so charged, together with ten unindicted coconspirators, conspired to commit the crimes of soliciting, asking and receiving political contributions, from persons licensed to sell liquor by the Board of Equalization, such contributions being for use in campaigns for the re-election of Bonelli as a member of that board.

In the second and third counts they were charged with conspiring to commit acts injurious to public morals, to pervert and obstruct justice, and to prepare false papers and records for fraudulent purposes for use in proceedings and inquiries authorized by law, in violation of section 182, subd. 5, of the Penal Code.[2]

Mr. Bonelli was not available for the trial, and it proceeded as to defendant Calhoun alone. After trial before a jury, he was found guilty on all three counts. He appeals from the judgment and the order denying his motion for a new trial.

The evidence, viewed in the light most favorable to the People, discloses a plan which was followed in various counties in soliciting, receiving and using campaign contributions from liquor licensees in connection with the 1950 and 1954 campaigns of Bonelli for re-election to the Board of Equalization. Checks for contributions from retail liquor licensees were made payable to the National Democratic Club, the Aldine Printing Company, the Woolever Press, and a fictitious company known as the Allied Printing Company. Defendant was general counsel and "Public Relations Man" for the Southern California Spirits Foundation, an association composed of wholesale liquor distributors whose members paid regular dues which were supposed to be used for certain purposes only.

1. Section 5002.5 of the Elections Code reads: "Any elective State officer who is authorized by law to issue licenses, or who is a member of any board or agency authorized to issue licenses, or any person seeking election to such office, board or agency, or any appointee or employee of such office, board or agency, who directly or indirectly solicits, receives or agrees to receive any money or other thing of value, or any promise thereof, from any licensee named in, or any holder of, any license issued by such officer, board or agency, or from any agent of such licensee or license holder, for any political campaign of any person seeking election or reelection to the office, board or agency authorized to issue such license, is guilty of a misdemeanor."

2. Section 182 of the Penal Code reads in part: "If two or more persons conspire: * * * 5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws * * * they are punishable as follows: * * *."

Another fund existed known as the "Research and Public Relations Fund," to which the Spirits Foundation was the largest contributor, but which contained other contributions arranged for by defendant. As a practical matter, defendant exercised control over the expenditure of the money in this fund. On his instructions large amounts were drawn on this fund by checks payable to cash, and other checks were drawn in payment of bills presented by the above-named printing companies and an advertising company for expenses in connection with the Bonelli campaign.

These funds and checks were manipulated in various ways. For instance, the evidence indicated that a check payable to defendant, as trustee, was used to replace several small checks made payable to Aldine and signed by retail liquor licensees.

At the trial 59 witnesses testified for the prosecution and 17 for defendant. The reporter's transcript contains 2498 pages, including 370 pages of testimony by defendant.

The record discloses that defendant spent many thousands of dollars from funds of the Spirits Foundation and Research Fund without direct authorization for the particular expenditures, the checks being made to the same printers and advertisers as were the checks of the retail licensees. None of them showed on their face that they were for Bonelli's campaign, and the way many checks were issued, receipts handled, and entries made on the records may have been designed to conceal that fact.

Defendant ordered a large amount of the printing for Bonelli's campaign, conferred with Bonelli and with the printers, and cashed certain checks and had others issued in their place before paying some of these bills.

In many instances individuals and firms were told to send checks to these printing companies, and later received invoices for printing which they had never ordered or received. Several witnesses testified that they were told to do this by defendant.

Defendant told one Casteel, who offered to make a contribution to Bonelli's 1954 campaign, to make the check payable to the National Democratic Club. When Casteel objected, defendant told him to make it to the Aldine Printing Company and said, "We will see that you get a bill for printing or something of that sort and that will take care of it." Defendant admitted telling Casteel how to make a contribution on Bonelli's behalf.

One member of the Spirits Foundation testified that he asked defendant at several meetings where the funds of the Foundation were being spent and was told by several people, and possibly by defendant, that he had "probably better not know."

There is a great deal of evidence that checks from liquor licensees, for contributions solicited on Bonelli's behalf, were payable to these printing firms, which were doing large amounts of printing for the Bonelli campaigns, and that defendant played an important part in connection with the solicitation, receipt, and disbursement of these funds which were used for the purpose of securing the re-election of Bonelli.

Defendant was charged not only with soliciting but with receiving such contributions, and the evidence shows that, aside from the dues paid into the Spirits Foundation, he received political contributions from six other concerns and individuals which were used for the benefit of the Bonelli campaigns.

While defendant insisted that he had used the dues paid by the members of the Spirits Foundation strictly in accordance with their authorization and desires, several of them testified that they did not know how he was using this money and that they would not have approved of the way it was in fact used.

Defendant testified that in 1954 he spent more time wtih Bonelli than in any prior campaign, primarily because of Proposition Number 3; that "* * * it is almost impossible to segregate the two campaigns"; that "The bills that I paid were bills he [Bonelli] always gave to me and

asked if I could take care of. That was the net result. I paid those bills directly to the parties who had sent in the bills and paid them by check"; and that "I think all of the payments that went for Bonelli's bills came out of the Research and Public Relations Fund." When asked why he had used this money in the Bonelli campaigns, he replied that he did it because the members of the association had to keep Bonelli on their side; and that "They had to conduct their business under Mr. Bonelli's direction and the liquor business is very highly regulated and suspensions can be had very easily for violations, intentional or otherwise, many times unintentional."

Although not separately so stated or argued, defendant's basic contentions are that he was the mere agent of the Spirits Foundation and his acts and conduct in receiving and handling funds and paying bills in connection with Bonelli's campaigns were solely those of such an agent; that these funds came from regular dues paid by the members and were in no way solicited; and that if any conspiracy existed, the evidence is not sufficient to connect him with the acts and conduct of Bonelli and other actors in any such conspiracy.

Defendant's Contentions

[1] *First:* That the trial court erred in telling the jury that although Bonelli was not present at the trial, the jury would have to try each and all acts committed by Bonelli as though he were present and being tried.

This contention is untenable. It is argued that the court implied that if Bonelli was guilty of conspiring with any of the named but unindicted alleged coconspirators, then defendant would also be guilty; that Bonelli could be guilty and defendant innocent of the crime charged, and it was reversible error "to indissolubly connect them together"; and that there was no evidence reasonably tending to show that there was a conspiracy between Bonelli and defendant.

The judge told the jury, in effect, that there would be no change in the testimony because of the absence of Mr. Bonelli; that the case would have to be tried on the same basis as if Bonelli were present and represented by counsel; and that "* * * you have to try each and every act that he committed, *if there was a conspiracy here*, try each and every act within the conspiracy, *if one existed*, as though he were sitting down there." (Italics added.)

[2] This was a correct statement. Where the existence of a conspiracy is established, evidence of the acts and declarations of the conspirators in furtherance of the conspiracy is admissible, and the judge in no way intimated that a conspiracy did exist or that any act was done within the scope of any conspiracy.

[3] In a prosecution for conspiracy it is not essential to the conviction of a coconspirator that any or all other coconspirators shall be tried and convicted. (People v. Gilbert, 26 Cal.App.2d 1, 26, 78 P.2d 770.) Where the conspirators are not jointly tried, the admissibility of evidence as to the conspiracy may well be the same, as a coconspirator is liable for the acts of the other conspirators done in furtherance of the conspiracy.

[4] *Second:* That the court erred in admitting in evidence hundreds of pages of testimony relating to matters occurring before the formation of the alleged conspiracy, in the absence of any evidence that a conspiracy existed or that defendant was a member thereof if one existed.

This contention is unsound. It is urged by defendant that the court admitted the testimony of the first 20 witnesses without any showing that a conspiracy existed or that defendant was a member thereof and that "the great bulk of the testimony of the other 39 witnesses for the State also failed to show that a conspiracy existed between Bonelli and defendant to solicit, ask and receive campaign contributions for Bonelli from liquor licensees of the Board of Equalization."

The record does not bear out the contention that 20 witnesses were allowed to testify before any evidence was intro-

duced to establish the existence of a conspiracy.

The testimony of the first witness, Al Tossas, was directed to the conspiracy charged in the first count. The testimony of the second witness, Mary Forsythe, was directed to count two, and that of the third witness, Raymond McCullough, to count three.

[5] It was not necessary to connect defendant with the conspiracy at the beginning of the evidence or before any other evidence of a conspiracy was received. As defendant concedes, the court had a reasonable discretion as to the order of proof, and there is nothing to indicate that this discretion was abused.

[6] It is settled that a conspiracy may be established by direct evidence or circumstantial evidence, or a combination of both. It need not be shown that the parties entered into a definite agreement, but it is sufficient if they positively or tacitly come to a mutal understanding to accomplish the act and unlawful design. The evidence may cover many transactions, extend over a long period of time, and show acts which occurred some time before the alleged formation of the conspiracy, as long as the facts shown have some bearing or some tendency to prove the ultimate facts in issue.

[7] Any competent evidence which tends to prove the existence of the conspiracy or any competent acts or declarations tending to show a common design is admissible. (People v. Steccone, 36 Cal.2d 234, 237 [2, 3], 223 P.2d 17; People v. Lyon, 135 Cal.App.2d 558, 578 [5], 288 P.2d 57; People v. Chait, 69 Cal.App.2d 503, 515 [10], 159 P.2d 445; People v. Malone, 20 Cal.App.2d 1, 6 [3], 66 P.2d 216; People v. Stevens, 78 Cal.App. 395, 407 [6], 248 P. 696.)

No particular evidence is pointed out in this connection as being inadmissible, and the contention that all of this evidence was inadmissible is without merit.

[8] *Third:* That the court erred in admitting the testimony of one Tomerlin concerning payment of (1) attorney's fees to defendant, and (2) $4,500 to Tomerlin's employee, Dennis Moore; and in admitting evidence that defendant paid $3,000 from the funds of the Spirits Foundation to Leonard Wilson as attorney's fees in defending Charles E. Berry in a prior action.

This evidence was properly admitted. It is argued with respect to the Tomerlin matters that this testimony was hearsay, that it is not shown to have any connection with the offenses charged in the indictment, and that there was no evidence of what Moore did with the money paid to him. This testimony was in connection with a contribution by the Wilton Hotel, that hotel being one of four to which defendant had promised assistance in obtaining a reduction or revocation of a license suspension. There was evidence that Tomerlin gave the money to Moore upon instructions from defendant in connection with an effort to have the suspension of the hotel's liquor license revoked and that no legal work was done or appearance made by defendant.

Defendant had told Tomerlin that someone would contact him for certain money which was to go to Bonelli, and the evidence was therefore material, although it did not directly show exactly where the money went.

[9] Regarding the Berry matter, it is claimed that the testimony was not relevant to any issue in this case. This matter, while not very material, was one of a long list of things done by the various conspirators, and the evidence respecting it was not prejudicial.

[10] *Fourth:* That the court erred in admitting "hundreds of pages of testimony concerning the deposits of cash and checks" by one Snyder in the bank account of the National Democratic Club and disbursements from said fund by Snyder; in admitting the testimony of Al Weigel and other witnesses concerning deposits in and checks drawn upon the Research and Public Relations Fund; and in admitting scores of checks, deposit slips, invoices and other documents without showing that defendant was connected therewith, and

without first establishing prima facie that a conspiracy existed and that defendant was a member thereof.

This contention is unsound. All of this evidence was properly admitted under well-established rules governing the receipt of evidence for the purpose of establishing a conspiracy.

Fifth: That defendant was not given a fair and impartial trial (1) because of certain statements made by the trial judge, and (2) because of alleged prejudicial misconduct by the district attorney. Since the judgment must be reversed for the reasons set forth below and it is unlikely that the statements and conduct complained of will recur on a retrial, it is unnecessary to consider this contention.

Sixth: That the trial court committed prejudicial error in admitting, over objection, statements made by defendant before the 1954 San Diego Grand Jury in response to a grand jury subpoena.

This contention is sound. In his opening statement to the trial jury, the district attorney, referring to defendant's appearance before the grand jury and his refusal to answer questions, stated:

"You will also hear from the evidence that Mr. Calhoun testified before the San Diego County Grand Jury on December 22, 1954. At that time Mr. Calhoun invoked the Fifth Amendment privilege against self-incrimination 47 times and thereby refused to answer 47 questions that were put to him. Some of the questions were this:

"'Question. Is it a fact that the Research and Public Relations Fund account paid approximately $31,000.00 in the year 1954 in the campaign, Bonelli's campaign?

"'Answer. I am going to decline to answer that question on the grounds that the answer might tend to incriminate me.

"'Question. Did you ever discuss campaign expenditures with Mr. Bonelli?

"'Answer. I am going to decline to answer that question on the same grounds.

"'Question. When was the last time you saw Mr. Bonelli?

"'Answer. Well, I am going to decline to answer that question on the same grounds. I am going to decline to answer any questions in any way involving Mr. Bonelli.

"'Question. Have you talked to Mr. Bonelli since you have been served with this subpoena?

"'Answer. I think I will decline the answer that question on the same grounds, Mr. Sheela.

"'Question. Has Mr. Bonelli ever asked you to pick up his printing bills or his outdoor advertising bills?

"'Answer. I am going to refuse or decline to answer that question.'"

Defendant's counsel then moved to strike the objectionable matter as "not proper in an opening statement," to which the trial judge said, "Well, I think he has gone far enough."

Thereafter during the trial, before the People had closed its case-in-chief and before defendant had taken the stand and testified, questions propounded to defendant before the grand jury and his responses thereto were, over his objection, read to the trial jury. In this way, evidence of defendant's refusal to answer 47 questions asked him by the district attorney when he was before the grand jury was put before the trial jury. To each question defendant had said, "I am going to decline to answer that question on the grounds that the answer might tend to incriminate me."

Defendant appeared before the grand jury in response to a subpoena. He was not there in the position of one who voluntarily appeared or one who appeared by mere request of the grand jury as in the cases of People v. Lyon, 135 Cal.App.2d 558, 288 P.2d 57; People v. Byers, 5 Cal.2d 676, 55 P.2d 1177; and People v. Walsh, 47 Cal.2d 36, 301 P.2d 247.

The People contend that the testimony was admissible because (1) it was an admission made by a party in response to an accusatory statement, and (2) defendant's reaction thereto showed a consciousness of guilt.

[11] Neither of these grounds is tenable, for the reason that no implication of guilt can be drawn from a defendant's relying on the constitutional guarantee of the fifth amendment to the Constitution of the United States,[3] article I, section 13, of the Constitution of the State of California,[4] or Penal Code sections 688,[5] 1323,[6] and 1323.5.[7] (People v. Simmons, 28 Cal. 2d 699, 702 [12], 172 P.2d 18; Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 982 [21] et seq., 1 L.Ed.2d 931; People v. Talle, 111 Cal.App.2d 650, 663 [1] et seq., 245 P.2d 633).

[12] In view of the foregoing rule, the trial court prejudicially erred in holding that the grand jury testimony could be received in evidence as an admission and used to support a verdict. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above. Such evidence does not fall within the scope of the 1934 amendment to article I, section 13, of the Constitution of the State of California, which provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Any inferences to the contrary in People v. Byers, 5 Cal.2d 676, 55 P.2d 1177, are overruled.

[13, 14] Provisions of the federal and state Constitutions and the Penal Code sections referred to above establish that: (1) No person can be compelled in a criminal action to be a witness against himself; (2) if he offers himself, he can be cross-examined by the People's counsel only about matters to which he testified in chief; and (3) in grand jury proceedings, among others, he shall "at his own request, but not otherwise, be deemed a competent witness."

In view of the error in the admission of this testimony, the judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.

3. The fifth amendment to the United States Constitution reads in part: "No person * * * shall be compelled in any criminal case to be a witness against himself."

4. Article I, section 13, of the California Constitution reads in part: "No person shall * * * be compelled, in any criminal case, to be a witness against himself."

5. Section 688 of the Penal Code reads in part: "No person can be compelled, in a criminal action, to be a witness against himself * * *."

6. Section 1323 of the Penal Code reads: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

7. Section 1323.5 of the Penal Code reads: "In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.

"This section shall not be construed as compelling any such person to testify."

50 Cal.2d 149

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lawrence O'Neil SMITH, Defendant and Appellant.

Cr. 6139.

Supreme Court of California,
In Bank.
March 27, 1958.

Defendant was convicted of possession of heroin with a prior conviction of narcotic addiction. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment, and the defendant appealed. The Supreme Court, Traynor, J., held that where defendant was not misled in making his defense because of fact that information gave date of offense as April 8, 1956 and proof was that offense occurred on March 8, 1956, because defendant knew from testimony given at preliminary hearing that date of alleged offense was March 8, 1956, and his own witnesses testified to events on that date, and he was not in danger of being placed in double jeopardy, variance was not fatal.

Judgment affirmed.

Opinion 311 P.2d 857, vacated.

1. Criminal Law ⇐395

In prosecution for possession of heroin, wherein defendant made a motion to suppress the heroin, on ground that it had been obtained from defendant, who had it in his mouth, by police officer by use of brutal force, evidence sustained finding that officer did not choke defendant and did not use brutal force to obtain the heroin. West's Ann.Health and Safety Code, § 11500.

2. Arrest ⇐63(4)

Where police officers had no search warrant and apparently no warrant for arrest of defendant, lawfulness of the arrest turned on question of whether officers had reasonable cause to believe that defendant had committed a felony.

3. Arrest ⇐63(4)

Reasonable cause to justify an arrest without a warrant may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on issue of guilt.

4. Arrest ⇐63(4)

If police officers had reasonable grounds to rely on informer's report that defendant had just purchased heroin and that he could be found with it, at the place where he was arrested, they were justified in arresting him without a warrant.

5. Arrest ⇐63(4)

Where past experience of police officer with informer gave officer reasonable grounds to rely on reports of informer, and that officer and another officer had knowledge that defendant was a drug addict, and the informer reported that defendant had just purchased heroin and could be found with it at certain place, officers had right to arrest defendant at such place without a warrant.

6. Indictment and Information ⇐171

Test of materiality of variance is whether indictment or information so fully and correctly informed defendant of criminal acts, with which he is charged, that, taking into consideration proof which is introduced against him, he is not misled in making his defense, or is placed in danger of being twice put in jeopardy for same offense.

7. Indictment and Information ⇐176

Where defendant was not misled in making his defense in prosecution for possession of heroin, because of fact that information gave date of offense as April 8, 1956 and proof was that offense occurred on March 8, 1956, because defendant knew from testimony given at preliminary hearing that date of alleged offense was March 8, 1956, and his own witnesses testified to events on that date, and he was not in danger of being placed in double jeopardy, variance was not fatal. West's Ann. Health and Safety Code, §§ 11500, 11712, 11721.

8. Criminal Law ⇐295

On plea of double jeopardy, extrinsic evidence is admissible on the trial to identify crime of which defendant has been convicted.

Lawrence O'Neil Smith, in pro. per., and Ward Sullivan, Los Angeles, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

The trial court sitting without a jury, found defendant guilty of a felony violation of section 11500 of the Health and Safety Code. It also found that he was previously convicted of narcotic addiction (Health & Safety Code, § 11721), a misdemeanor, and sentenced him to imprisonment in the state prison for a term prescribed by law. (See Health & Safety Code, § 11712.) Defendant appeals.

A police officer of the Los Angeles Police Department, on the day before the arrest, received information from an informer that defendant had just purchased a "spoonful of heroin" and that it would be on his person at a certain residence. The officer knew that defendant was a narcotic addict. On the day of the arrest, two officers approached the house in question and through a window observed defendant and a woman sitting on a bed, but saw nothing incriminating. They went to the front door and knocked. An elderly lady opened the door. The officers identified themselves, entered, and walked toward the room where they had seen defendant. One of the officers testified that the elderly lady then shouted, "Lawrence, the police are here." The bedroom door was closed, but the officer did not know if it was locked. Defendant's witnesses testified that the door was locked. When the officers entered the bedroom, they saw defendant move his hand to his mouth and told him to "Spit it out." There is a conflict in the testimony as to whether defendant was choked by one of the officers. Defendant spat out a package containing five rubber ballons later shown to contain heroin. He admitted that the package was his and that he attempted to swallow it when he heard the police at the door. The officers then arrested him. The package containing the heroin was introduced in evidence at the preliminary hearing.

[1] At the trial the transcript of the preliminary hearing was introduced in evidence. Defendant's motion to suppress the evidence on the ground that it had been obtained in violation of the rules stated in Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 209, 96 L.Ed. 183 and People v. Martinez, 130 Cal.App.2d 54, 278 P.2d 26, was denied. In those cases the conduct condemned was brutal force, "conduct that shocks the conscience." In the Martinez case the court said: "It is clear that the substance was choked out of Martinez. The fact that the officers and Martinez were thrown to the ground indicates the extent of the force that was deemed necessary and that sufficient force was used to accomplish that purpose." 130 Cal.App.2d 54, 56, 278 P.2d 26, 27. Although defendant's testimony would tend to show that the officer choked him, there was testimony to the contrary by one of the arresting officers. We cannot hold that the trial court erred in believing the officer's testimony.

[2] The officers had no search warrant and, apparently, no warrant for defendant's arrest. Thus, the lawfulness of the arrest turns on the question whether the officers had reasonable cause to believe that the defendant had committed a felony. People v. Boyles, 45 Cal.2d 652, 655–656, 290 P.2d 535.

[3–5] Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. People v. Boyles, supra; Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36. If the officers had reasonable grounds to rely on the informer's

report that defendant had just purchased heroin and that he could be found with it, at the place where he was arrested, they were justified in arresting him. Willson v. Superior Court, supra. The record supports the trial court's conclusion that the officer's past experience with the informer,[1] together with their knowledge that defendant was a drug addict, gave the officers reasonable cause to believe that defendant had committed a felony. Moreover, at the trial defendant made no attempt to determine the identity of the informer or to question his reliability.

[6–8] In his brief in propria persona, filed before the appointment of counsel, defendant contends, that there was a fatal variance between the date of the offense charged in the information, April 8, 1956, and the date of the offense proved, March 8, 1956. In People v. LaMarr, 20 Cal.2d 705, 711, 128 P.2d 345, 348, this court stated: "An immaterial variance should be disregarded. 14 Cal.Jur. 96; People v. Mizer (1940), 37 Cal.App.2d 148, 153, 154, 99 P.2d 333. The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense." Defendant was not misled in making his defense, for he knew from the testimony given at the preliminary hearing that the date of the alleged offense was March 8, 1956, and his own witnesses testified to events on that date. Nor is he in danger of being placed in double jeopardy, for it is "well settled that on a plea of double jeopardy, extrinsic evidence is admissible on the trial to identify the crime of which a defendant has been convicted." People v. Williams, 27 Cal.2d 220, 226, 163 P.2d 692, 695.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

1. One of the arresting officers testified:
"A. I have been there when he [the informant] has given us approximately six other bits of information and about three of them have been—on three of them we have made arrests and the other three we just hit it too late.
"Q. Well, in those three bits of information where you made arrests, those have been narcotic cases; is that correct? A. Yes.
"Q. And when you would go out to where he would tell you to go did you find any narcotics? A. Yes.
"The Court: In other words, this informer is a reliable informer?
"The Witness: Very reliable."



49 Cal.2d 855

HENRY R. JAHN & SON, Inc. (a Corporation), Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY of SAN MATEO, Respondent,

American Drying Systems, Inc. (a Corporation), Real Party In Interest.

S. F. 19841.

Supreme Court of California,
In Bank.
March 26, 1958.

Petition by defendant for writ of mandamus to compel Superior Court to set aside order for substituted service of process and to quash service of summons on defendant. The Supreme Court, Traynor, J., held that where defendant made regular purchases of goods in California from plaintiff as its exclusive export agent and it took title to goods in California and directed its agent how and where to ship goods and after defendant ceased doing business with plaintiff it entered into a

similar course of business dealings with a partnership in California, defendant was doing business in state and was amenable to suit in California.

Alternative writ discharged and peremptory writ denied.

Schauer and McComb, JJ., dissented.

1. Corporations ⇐668(14)

Affidavit for service of process on Secretary of State against a foreign corporation can be made by plaintiff's attorney. West's Ann.Corp.Code, § 6501.

2. Constitutional Law ⇐309(3)
Corporations ⇐642(1)

Under statute authorizing service of process on foreign corporations that are "doing business in this state", the quoted words are a descriptive term that courts have equated with such minimum contacts with state that maintenance of suit does not offend traditional notions of fair play and substantial justice, and whatever limitation it imposes is equivalent to that of due process clause and is synonymous with power of state to subject foreign corporations to local process. West's Ann.Code Civ.Proc. § 411, subd. 2.

3. Corporations ⇐642(4½)

Where defendant made regular purchases of goods in California from plaintiff as its exclusive export agent and it took title to goods in California and directed its agent how and where to ship them and after defendant ceased doing business with plaintiff it entered into a similar course of business dealings with a partnership in California, defendant was doing business in state and was amenable to suit in California. West's Ann.Code Civ.Proc. § 411, subd. 2.

4. Courts ⇐4

Where defendant's burden of defending in California was no greater than plaintiff's burden of suing in New York and cause of action directly related to defendant's dealings with California plaintiff and other California defendants and a denial of jurisdiction would lead only to a duplicity of litigation, quality and nature of activity in relation to fair and orderly administration of laws justified subjecting defendant to jurisdiction of California courts.

Joseph C. Meyerstein, San Francisco, and Donald J. Kennedy, Palo Alto, for petitioner.

No appearance for respondent.

Pedder, Ferguson & Pedder and Robert J. Pedder, San Francisco, for real party in interest.

TRAYNOR, Justice.

Petitioner, Henry R. Jahn & Son, Inc., seeks a writ of mandate to compel the Superior Court of San Mateo County to set aside its order for substituted service of process and to quash service of summons on petitioner in an action brought by plaintiff, the real party in interest in this proceeding. See Code Civ.Proc. § 416.3. Dante J. Cacciari and Alexander Columbo, individually and as copartners doing business as the C & C Company, were joined as defendants in plaintiff's action. The superior court made an order allowing plaintiff to serve process on petitioner pursuant to section 6501 of the Corporations Code.[1] Thereafter petitioner

1. Section 6501 of the Corporations Code reads: "If the agent designated for the service of process be a natural person and cannot be found with due diligence at the address stated in the designation or if such agent be a corporation and no person can be found with due diligence to whom the delivery authorized by Section 6500 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state of two copies of the process together with two copies of the order, except that if the corporation to be served has not

appeared specially and moved to set aside the order for service of process and to quash the service of summons. These motions were denied.

Plaintiff alleged in its complaint that it entered into a series of three-party contracts with Jahn and various distributors in South and Central America for the purpose of marketing grain driers in those areas. Jahn had the exclusive right to sell plaintiff's products, and the distributors agreed not to handle competing products. Pursuant to these contracts, Jahn purchased driers from plaintiff and resold them through the various distributors. Business was conducted accordingly for over two years.

Defendants Cacciari and Columbo were associated with a company that manufactured driers for plaintiff according to secret plans and specifications supplied by plaintiff. They resigned from that company, taking plaintiff's plans and specifications with them. Thereafter they conspired with Jahn to take over plaintiff's business. Cacciari and Columbo formed a California partnership to manufacture and sell driers similar to plaintiff's driers, making use of plaintiff's plans and specifications. Jahn became the partnership's exclusive agent for exporting its driers. Jahn and the partners conspired to induce breaches of plaintiff's exclusive contracts with distributors, making use of confidential mailing lists and other data bearing on plaintiff's South and Central American business.

Plaintiff prayed that defendants be enjoined from inducing breaches of its distributorship contracts, using plaintiff's confidential mailing lists and other customer data, manufacturing and selling driers similar to plaintiff's driers, and using plaintiff's plans and specifications. It also prayed for an accounting of the business diverted by the foregoing activities, the appointment of a receiver, and exemplary damages.

[1] There is no merit in Jahn's contention that the affidavit for service on the Secretary of State did not meet the requirements of Corporations Code, section 6501. The existence of the required facts was alleged directly and without qualification. Cf., Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 447, 71 P. 498. The statute does not provide that the affidavit cannot be made by the plaintiff's attorney.

Jahn further contends that it was not and is not doing business in this state within the meaning of Code of Civil Procedure, section 411(2) and is therefore not subject to service of process pursuant to Corporations Code, section 6501.

[2] The statute authorizes service of process on foreign corporations that are "doing business in this State." That term is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95. Whatever limitation it imposes is equivalent to that of the due process clause. "'[D]oing business' within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process." Eclipse Fuel etc. Co. v. Superior Court, 148 Cal.App.2d 736, 738, 307 P.2d 739, 741; see also, Gray v. Montgomery Ward, Inc., 155 Cal.App.2d 55, 317 P.2d 114; McClanahan v. Trans-America Ins. Co., 149 Cal.App.2d 171, 172, 307 P.2d 1023; Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 387, 265 P.2d 130; Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 218–224, 257 P.2d 727, and cases cited; LeVecke v. Griesedieck Western Brewing Co., 9 Cir., 233 F.2d 772, 775; Kenny v. Alaska Airlines, D.C., 132 F.Supp. 838, 850.

filed the statement required to be filed by Section 6403 then only one copy of the process and order need be delivered but the order shall include and set forth an address to which such process shall be sent by the Secretary of State."

[3] Jahn's purchase of goods in this state is a regular part of its business. It nevertheless contends that it is not amenable to suit here, invoking Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372. The United States Supreme Court, however, has advanced beyond the presence theory of jurisdiction underlying that case. McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 200, 2 L.Ed.2d 223; see also, International Shoe Co. v. Washington, 326 U.S. 310, 316–317, 66 S.Ct. 154. Under the minimum contacts test of the International Shoe case regular sales solicitation alone can constitute doing business rendering the foreign corporation amenable to process in actions engendered by such activities. See Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648–649, 70 S.Ct. 927, 94 L.Ed. 1154; Nippert v. Richmond, 327 U.S. 416, 426, 66 S.Ct. 586, 90 L.Ed. 760; Scholnik v. National Airlines, 6 Cir., 219 F.2d 115, 119; Frene v. Louisville Cement Co., 77 U.S. App.D.C. 129, 134 F.2d 511, 515–517, 146 A.L.R. 926; Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 385, 265 P.2d 130; Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal.App.2d 495, 500, 237 P.2d 297. Since there is no distinction for jurisdictional purposes between regular selling and regular buying (Sterling Novelty Corp. v. Frank & Hirsch D. Co., 299 N.Y. 208, 210, 86 N.E.2d 564, 12 A.L.R.2d 1435; Star Elkorn Coal Co. v. Red Ash Pocahontas Coal Co., D.C., 102 F.Supp. 258, 259), the Rosenberg case is as obsolete for the one as for the other. Many cases anteceding the Rosenberg case and many since the International Shoe case have sustained jurisdiction on the basis of the defendant's purchasing activities in the state. Colorado Iron-Works v. Sierra Grande Min. Co., 15 Colo. 499, 25 P. 325, 327–328; Premo Specialty Mfg. Co. v. Jersey-Creme Co., 9 Cir., 200 F. 352, 356, 43 L.R.A.,N.S., 1015; Dungan, Hood & Co. v. C. F. Bally, Limited, D.C., 271 F. 517, 519; Payne & Joubert v. East Union Lumber Co., 109 La. 706, 33 So. 739, 740–741; Duluth Log Co. v. Pulpwood Co., 137 Minn. 312, 163 N.W. 520, 521; Sterling Nov. Corp. v. Frank & Hirsch D. Co., 299 N.Y. 208, 212, 86 N.E.2d 564, 12 A.L.R.2d 1435; National Furniture Co. v. Wm. Spiegelman & Co., 198 App.Div. 672, 190 N.Y.S. 831, 832; Scheier v. Stoff, Sup., 142 N.Y.S.2d 716, 717; Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co., D.C., 102 F.Supp. 258, 259; see also, Johnson v. Atlantic & Pacific Fisheries Co., 128 Wash. 578, 224 P. 13, 14.

The Supreme Court has emphasized its departure from the presence test by the significance it now attaches to the fact that the cause of action arises out of the defendant's contacts with the state asserting jurisdiction. The Rosenberg case deemed it immaterial that the cause of action arose out of the corporation's New York activities, on the ground that its total activities there did not support the conclusion that it was present. Now, however, it "is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the] State." McGee v. International Life Insurance Company, 78 S.Ct. 199, 201. "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 160.

Whenever litigation arises out of business transactions conducted across state lines between parties whose principal places of business are in different states, there may be hardship to the party required to litigate away from home. There is no constitutional requirement, however, that this hardship must invariably be borne by the plaintiff whenever the defendant is not deemed present in the state of plaintiff's residence. In some circumstances there is

adequate basis for jurisdiction when the defendant has elected to deal with the plaintiff even though only by mail. McGee v. International Life Insurance Co., 78 S.Ct. 199, 201; Parmalee v. Iowa State Traveling Men's Ass'n, 5 Cir., 206 F.2d 518, 522, 44 A.L.R.2d 410. Again, there is jurisdiction when the cause of action arose out of the breach of a contract made and to be performed in the state (Compania De Astral, S. A. v. Boston Metals Co., 205 Md., 237, 107 A.2d 357, 108 A.2d 372, 49 A.L.R.2d 646, certiorari denied 348 U.S. 943, 75 S.Ct. 365, 99 L.Ed. 738; see also, S. Howes Co. v. W. P. Milling Co., Okl., 277 P.2d 655, 657–658) or even out of a mere isolated act in the state by the defendant or his agent. Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673; Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193; Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; Johns v. Bay State Abrasive Products Co., D.C., 89 F.Supp. 654.

We need not here determine whether an action arising from an isolated purchase of goods here through interstate communication would subject Jahn to the jurisdiction of the California courts. Jahn made regular purchases from plaintiff as its exclusive export agent. It took title to the goods in this state. It directed its agent how and where to ship them. Even after it ceased doing business with plaintiff, it entered into a similar course of business dealings with defendant partnership. It reaped the benefits of our laws that protected its goods while they were here, and it had access to our courts to enforce any rights in regard to these transactions. The alleged cause of action grew directly out of Jahn's relationship with plaintiff and the partnership in this state. See Giusti v. Pyrotechnic Industries, 9 Cir., 156 F.2d 351, 354; Steiner v. 20th Century-Fox Film Corp., 9 Cir., 232 F.2d 190, 198; DeGolia v. Twenticth Century-Fox Films Corp., D.C., 140 F.Supp. 316. Although some of the evidence may be more readily available in New York, there is other evidence already here. That which must be secured from overseas can as easily be presented here as in New York. The inconvenience to Jahn in defending here is relevant (International Shoe Co. v. Washington, 326 U.S. 310, 317, 66 S.Ct. 154, 90 L.Ed 95), but "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." McGee v. International Life Insurance Company, 78 S.Ct. 199, 201. It also bears emphasis that if plaintiff were unable to bring an action against Jahn here, it would be similarly frustrated with regard to Jahn's codefendants in New York. Two actions instead of one would then be necessary to litigate the existence or nonexistence of a single tortious conspiracy.

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. [Citations.] Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 159.

[4] Jahn's burden of defending here is no greater than plaintiff's burden of suing in New York. The cause of action is directly related to Jahn's dealings with the California plaintiff and the California defendants. A denial of jurisdiction would lead only to a duplicity of litigation. "[T]he quality and nature of the activity in relation to the fair and orderly administration of the laws" fully justifies subjecting Jahn to the jurisdiction of our courts.

The alternative writ is discharged and the peremptory writ denied.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concur.

McCOMB, J., dissents.

SCHAUER, Justice (dissenting).

From the record in this case the following facts appear: Petitioner has at no time maintained any offices in California, or made any sales or sales solicitations here. It is the exclusive export agent for American Drying Systems, Inc. (Real Party in Interest), and also the agent for one other California manufacturer. Petitioner places its orders for purchase of the products of these two manufacturers by mail or telephone from New York, and, although the course of purchases is regular, no purchase orders are placed from California. The goods are shipped f. o. b. California, are packaged for shipping in California, and are shipped by the manufacturers to a general forwarding company in California. The forwarding company is selected by petitioner, and receives its shipping instructions directly from petitioner. On two occasions, when the orders were rather large, petitioner sent one of its auditors to California with the check for payment, and he ascertained that the order was properly filled before making payment. Petitioner has apparently had no contacts with California other than those just mentioned.

In the light of the basic facts it appears that in holding that petitioner was "doing business in this State" so as to subject it to service of process pursuant to section 6501 of the Corporations Code, the majority opinion indicates a trend toward, if not implicitly an actual, holding that all persons residing and doing business outside California but who place orders by telephone or correspondence for goods in this state and who arrange (as they must, if the orders are to be filled) for packing, shipping and delivery of the goods so purchased, will thereby become subject to the jurisdiction of California courts and subject to suit in this state. Such a holding seems especially unfortunate and undesirable, particularly for the manufacturers and producers of California, as it must inevitably tend to deter those who are in the market for California products from sending to this state for them. It is a matter of common knowledge that efforts are constantly being made by the various states on both a governmental and a private industry level to attract additional industry and commerce, and I believe that where, as here, the law is at least equally open to a contrary ruling, the court should not choose the course which will be detrimental to the interests of California.

I would grant the peremptory writ.



50 Cal.2d 127

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Elmer TAHTINEN, Defendant and Appellant.

Cr. 6108.

Supreme Court of California, In Bank.

March 27, 1958.

Prosecution for unlawful possession of narcotics. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment of conviction and defendant ap-

pealed. The Supreme Court, Traynor, J., held that where police officers had reasonable cause to believe that narcotics were being sold by a certain person at his residence, defendant's conduct in the vicinity of such house, parking across the street from such house, entering an alley near such house, driving past such house and stopping and reaching towards the ground at the base of a tree, near alley he had previously entered, gave officers reasonable cause to believe defendant had purchased narcotics and had them in his possession, and therefore, their arrest and search of defendant without a warrant was lawful, and narcotics found as a result of such search were admissible.

Judgment affirmed.

Carter, J., dissented.

Opinion, 309 P.2d 497, vacated.

1. **Criminal Law** ⇐576(5)

Constitutional right of a defendant to a speedy trial, and statutory requirements as to a speedy trial may be waived. West's Ann.Const. art. 1, § 13; West's Ann.Pen. Code, §§ 681a, 686, 995, 1050, 1382.

2. **Criminal Law** ⇐576(5)

Where defendant in criminal prosecution was represented by counsel, and did not object to date set for trial, even though such date was more than 30 days after entry of his plea of not guilty, he waived his right to have trial set for an earlier date. West's Ann.Pen.Code, § 1050.

3. **Criminal Law** ⇐576(5)

Where defendant in a criminal prosecution agreed to a delay in retrial following a mistrial, as requested by the public defender, defendant waived any right to be tried prior to date agreed upon.

4. **Criminal Law** ⇐589(1), 608

Where the condition of a court's business will not permit a trial to proceed, good cause is shown for a delay in trial, and a continuance is justified, although burden of showing existence of such condition is upon the prosecution.

5. **Criminal Law** ⇐576(5)

Although a minute notation that criminal case was continued for trial "owing to congested condition of the calendar" fell short of establishing good cause for the delay, in view of fact defendant did not object to the continuance and did not move to dismiss the action, his consent to the delay would be presumed.

6. **Criminal Law** ⇐576(5)

Assent of a defendant's counsel to a continuance waived defendant's right to complain of continuance of trial date. West's Ann.Pen.Code, § 1050.

7. **Arrest** ⇐63(4), 71
Criminal Law ⇐395

Where police officers had reasonable cause to believe that narcotics were being sold by a certain person at his residence, defendant's conduct in the vicinity of such house, parking across the street from such house, entering an alley near such house, driving past such house and stopping and reaching towards the ground at base of a tree, near alley he had previousy entered, gave officers reasonable cause to believe defendant had purchased narcotics and had them in his possession, and therefore their arrest and search of defendant without a warrant was lawful, and narcotics found as a result of such search were admissible, in prosecution of defendant for unlawful possession of narcotics. West's Ann.Health & Safety Code, § 11500.

8. **Criminal Law** ⇐261(2)

In prosecution for unlawful possession of narcotics, rearraignment of defendant after a mistrial was not necessary, and defendant's admission of prior convictions was conclusive in subsequent proceeding. West's Ann.Pen.Code, § 1025.

9. **Indictment and Information** ⇐114

In prosecution for unlawful possession of narcotics, information properly charged defendant's prior conviction of a misdemeanor violation of narcotics statute. West's Ann.Health & Safety Code, §§ 11500, 11712.

10. Criminal Law ⇐566

In criminal prosecution, mere fact that arresting officers did not identify defendant by name, but merely referred to him as a defendant, did not mean that there was no evidence that defendant was the person who committed the crime, in view of fact it was clear from the record that defendant was the person referred to by the witnesses.

11. Criminal Law ⇐641(1)

In criminal prosecution, defendant would not be deemed to have been denied effective assistance of counsel by virtue of fact that, after a mistrial, when court set a date for retrial, defendant's counsel was not present, in view of fact nothing occurred on such occasion other than setting of a date for retrial, and in view of fact defendant did not suggest how he was injured by absence of counsel on such occasion.

Elmer Tahtinen, in pro. per., and Albert C. Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William E. James and William M. Bennett, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

The trial court, sitting without a jury found defendant guilty of a felony violation of section 11500 of the Health and Safety Code. It also found that he was previously convicted of a felony violation of federal narcotics laws and a misdemeanor violation of section 11500 of the Health and Safety Code and sentenced him to imprisonment in the state penitentiary for the term prescribed by law. See Health & Safety Code, § 11712. Defendant appeals.

It is contended at the outset that defendant was deprived of his right to a speedy trial. See Cal.Const. art I, § 13; Pen. Code, §§ 681a, 686, 1050, 1382. The information was filed November 29, 1955. On December 1, 1955, defendant appeared for arraignment. The public defender was appointed to represent him, and the case was continued to December 6 for plea. On December 6, defendant by his counsel moved to set aside the information (Pen. Code, § 995), and the case was continued for disposition of the motion until December 21. On December 21 the court denied the motion to set aside the information. Defendant pleaded not guilty and denied the prior convictions, and trial was set for January 26, 1956. On January 26, trial was postponed until February 10. On February 10, trial was postponed until February 14. On February 14, trial was postponed until February 15. On February 15, trial was postponed until February 16. On February 16, trial was postponed until February 17. On February 17, trial was postponed until February 20. On February 20, defendant withdrew his former denial and admitted the prior convictions, and trial commenced. On February 21, the jury announced that it was unable to reach a verdict, and the court declared a mistrial and continued the case to February 24. On February 24 trial was reset for March 28. On March 28, defendant waived jury trial and by his counsel stipulated that the case be decided on the evidence produced at the preliminary hearing and such other testimony as either side might adduce. Trial was continued to April 20. On April 20, trial was again continued to April 23. On April 23, trial was completed, and the court found defendant guilty as charged.

[1] Section 1050 of the Penal Code provides: "The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. * * * Criminal cases shall be given precedence over all civil matters and proceedings. If any court is unable to hear all criminal cases pending before it within thirty (30) days after the respective defendants have entered their pleas, it must immediately notify the Chairman of the Judicial Council." Section

1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after * * * filing of the information * * *." It is well settled, however, that the constitutional right to a speedy trial and the foregoing statutory requirements may be waived. Ray v. Superior Court, 208 Cal. 357, 281 P. 391; People v. Echols, 125 Cal.App.2d 810, 818, 271 P.2d 595.

The record does not disclose upon whose application the continuances for plea and for disposition of the motion to set aside the information were granted. Since they were for defendant's benefit, however, they are fairly chargeable to him.

[2] Trial was set for January 26, 1956, more than 30 days after entry of defendant's plea on December 21. It appears, therefore, that section 1050 was not complied with. Since defendant was represented by counsel, however, and did not object to the date set, he waived his right to have the trial set for an earlier date. Ray v. Superior Court, supra, 208 Cal. 357, 358, 281 P. 391; People v. Bradford, 130 Cal.App.2d 606, 607–608, 279 P.2d 561.

[3] The public defender requested the delay from January 26 to February 10 because of his crowded calendar. The court asked defendant whether, under the circumstances, he waived trial at an earlier date. Defendant answered, "Yes." Thus defendant consented to the delay and thereby waived any right to be tried before February 10. In re Lopez, 39 Cal.2d 118, 120, 245 P.2d 1.

[4, 5] By consenting to trial on a date beyond the 60 day period, however, a defendant does not waive the right to speedy trial thereafter, nor does he waive the requirement that further delay be justified by a showing of good cause therefor. In re Lopez, supra, 39 Cal.2d at page 120, 245 P.2d at page 2. Defendant contends that the several postponements from February 10 to February 20 were not justified. The court's minutes disclose that each of these postponements was granted because of the "congested condition of the calendar." In In re Lopez, supra, 39 Cal.2d at page 120, 245 P.2d at page 2, we held that "where the condition of the court's business would not permit the trial to proceed" good cause is shown and a continuance is justified. The burden of showing the existence of this condition, however, is upon the prosecution (People v. Echols, supra, 125 Cal. App.2d at page 816, 271 P.2d at page 599), and on the record before us the prosecution has failed to sustain that burden. The minute notation that the case is continued for trial "owing to congested condition of the calendar" falls short of establishing that trial could not proceed in any department of the Superior Court of Los Angeles County. Herrick v. Municipal Court, 151 Cal.App.2d 804, 312 P.2d 264, and cases there cited; People v. Echols, supra, 125 Cal.App.2d at pages 816–817, 271 P.2d at pages 598–599; Pen.Code, § 1050. Since defendant, however, did not object to these postponements or move to dismiss the action, his consent to the delay is presumed. Ray v. Superior Court, supra, 208 Cal. 357, 358, 281 P. 391.

[6] The People had 60 days from February 21, 1956, the date of the mistrial, to bring defendant to trial a second time. People v. Angelopoulos, 30 Cal.App.2d 538, 543, 86 P.2d 873. On March 28 the transcript of the preliminary hearing was introduced into evidence, and the trial commenced. Further continuances had to be grounded on good cause. Pen.Code, § 1050. The record discloses that the trial did not proceed on March 28 owing to the People's unpreparedness. Apparently April 20 was the earliest date next available to the court, and trial was continued to that date. The public defender accepted the continuance as "satisfactory." His counsel's assent to the continuance waived defendant's right to complain. Ray v. Superior Court, supra, 208 Cal. 357, 358–359, 281 P. 391.

With respect to the continuance from April 20 to April 23, the reporter's transcript reveals the following conversation:

"Mr. Jackson [district attorney]: Your Honor, I think I have already indicated that the People are not ready to proceed at this time because a necessary witness is not here, officer Berteaux and Sergeant Vega, his fellow officer, is on vacation. I heard from officer Berteaux a short time ago, and it will be about forty minutes before he can make it, and I believe counsel would not have any objection to a continuance for one week.

"The Defendant: Your Honor, may I say something? I thought I was entitled to a quick and speedy trial. I have been in jail for five months and twelve days already.

"The Court: You have been in jail five months and twelve days. That is a long time. There is no question about it.

"Mr. Jackson: Your Honor, if the defendant insists on going to trial here today, we can wait for the officer to be here.

"The Court: How about continuing it until Monday at 1:30?

"Mr. Brill [public defender]: I think that would be more satisfactory, your Honor.

* * * * * *

"The Court: Will that be agreeable with you [defendant]?

"The Defendant: It will have to be, I guess."

This conversation reveals that had defendant insisted, trial would have proceeded on April 20. Thus, he consented, even though reluctantly, to the continuance.

[7] The most incriminating evidence introduced by the People was two packages containing 38 capsules of heroin taken from defendant's automobile at the time of his arrest and another capsule of heroin taken from his pocket. Defendant contends that this evidence should have been excluded as the product of an unlawful search.

The police had separately arrested three persons for narcotics offenses, each of whom, at different times and places, informed the police that they had obtained narcotics from one Joe Hernandes at his home at 112 East 111th Street. On November 8, 1955, two officers assigned to the narcotics detail went to the vicinity of Hernandes' residence. As they drove past the house, the officers saw defendant sitting in a 1941 Buick automobile parked across the street. They knew that defendant was not Hernandes. The officers drove around the block, and when they returned defendant was gone. The officers continued to patrol the area. They observed defendant traveling south on Main Street. He turned left on 111th Street, parked on the south side of the street, made a U-turn, and then parked on the north side, across the street from Hernandes' house. Defendant remained in his automobile approximately half an hour and then walked towards Hernandes' house. He disappeared into an alley next to the house, which Hernandes used as a driveway. After 10 or 15 minutes defendant returned to his automobile, drove to the corner of Main Street and 111th, turned right on Main and proceeded north to 110th Street, turned right on 110th and drove east to San Pedro Street, turned right on San Pedro and proceeded south to 111th Place, drove along 111th Place and parked just east of the end of the alley that he had formerly entered. He opened the car door on the passenger side, reached towards the ground at the base of a tree and appeared to pick up some object. Defendant then drove away. The officers followed him a distance of one to three miles, and when defendant stopped at a red light, the officers approached his automobile, identified themselves and arrested him on suspicion of possessing narcotics. A search of the automobile disclosed the two packages of heroin. Defendant was taken to a nearby gas station and searched. The single cap-

sule of heroin was found in his pocket. The officers had no search warrant, nor did they have a warrant for defendant's arrest.

Defendant contends that the officers arrested him without reasonable cause to believe that he had committed a felony (Pen. Code, § 836, subd. 3), and that therefore the search incident to the arrest was illegal. This contention cannot be sustained. The information obtained from the three persons previously arrested gave the officers reasonable cause to believe that narcotics were being sold by Hernandes at his residence, and defendant's furtive conduct in the vicinity of Hernandes' house gave the officers reasonable cause to believe that defendant had purchased narcotics and had them in his possession. This conduct distinguishes the present case from People v. Schraier, 141 Cal.App.2d 600, 297 P.2d 81, which held that merely leaving a house that had been under surveillance is not sufficient to justify arrest. People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Yet Ning Yee, 145 Cal.App.2d 513, 302 P.2d 616; People v. Harvey, 142 Cal.App. 2d 728, 299 P.2d 310; and Hernandez v. United States, 9 Cir., 17 F.2d 373, cited in appellant's brief are distinguishable on like grounds.

[8] Other contentions were made by defendant in his brief in *propria persona* before this court appointed counsel to represent him. He contends that since he was not rearraigned after the mistrial, he did not admit the prior convictions for purposes of retrial. He cites no authority requiring rearraignment after a mistrial and we have discovered none. Nor do we perceive any logical or practical necessity for such a procedure. The record plainly discloses that defendant admitted the prior convictions, and section 1025 of the Penal Code provides that, unless withdrawn by consent of the court, such admission is conclusive in all subsequent proceedings.

[9] Defendant's contention that his prior conviction of a misdemeanor violation of section 11500 of the Health and Safety Code, not being a felony, should not have been charged in the information is likewise without merit. Health & Safety Code, § 11712; see People v. Burke, 47 Cal.2d 45, 50, 301 P.2d 241.

[10] Neither at the preliminary hearing nor at the trial did the arresting officers identify defendant by name. They referred to him simply as "the defendant." Defendant contends that there is, therefore, no evidence that he is the person who committed the crime. It is abundantly clear from the record that defendant is the person referred to by the witnesses.

[11] Lastly, defendant contends that he was denied effective assistance of counsel by virtue of the fact that, after the mistrial, when the court set retrial for March 28, 1956, defendant's counsel was not present. The record does not disclose the reason for counsel's absence. Nothing occurred on this occasion other than the setting of a date for retrial. The date set was well within 60 days after the mistrial (see People v. Angelopoulos, supra, 30 Cal.App. 2d at page 543, 86 P.2d at page 876), and defendant does not suggest how he was injured by the absence of counsel. People v. Rice, 73 Cal. 220, 221–222, 14 P. 851. Moreover, defendant was represented by counsel at the retrial, and the error now complained of was never brought to the attention of the trial court.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice (dissenting).

I do not agree with the holding of the majority that the arresting officers had reasonable cause to believe that defendant was guilty of a crime and that the search of his automobile was legal, and therefore the heroin found therein was admissible in evidence against him.

In the first place the officers had no reason to be more than merely suspicious that Hernandes was selling drugs, near whose

home defendant had parked his car. The officers had arrested three persons on separate occasions who had told them they had obtained the drugs from Hernandes at his home. It does not appear what they were arrested for or that they had possession of or dealt in narcotics.

Secondly, the officers had no reason whatsoever to believe that defendant was committing a crime. They knew nothing of him until they drove by Hernandes' house and saw defendant in a parked car across the street. That certainly gave them no grounds to believe he was committing a crime even if we assume Hernandes was selling narcotics. Next, defendant got out of his car and went into the alley near Hernandes' home. Such conduct gives rise to no grounds for belief of the commission of a crime. There are many reasons why he may have gone into the alley wholly inconsistent with the theory that he had launched on a course of criminal conduct. Later, when defendant drove away in his car for a time and stopped his car, and reached toward the ground, the officers had no reason to believe he was picking up narcotics. There are likewise many reasonable causes for stopping having no connection with criminality. To say that it appeared that defendant had first gone to Hernandes' house and made arrangements to buy some narcotics and later picked them up is pure speculation. If he were going to get narcotics he would have gotten them when he went down the alley, since he apparently was unaware of any police surveillance. The assumptions that must be made are too many and too great. It must be assumed that he went to Hernandes' house merely because he was near there; that Hernandes was selling narcotics; and that he picked up narcotics from the base of the tree although it was not known whether he picked up anything. The majority opinion states he was acting in a furtive manner but there is nothing to show that he was acting furtively or sculking. There is no more here than there was in People v. Martin, 46 Cal.2d 106, 293 P.2d 52, where two men were searched merely because they were in a car parked in lovers' lane. I refer to my discussion there (46 Cal.2d 108, 293 P.2d 53) as being clearly applicable to the case at bar.

Because the evidence against defendant was obtained as the result of an illegal search, I would reverse the judgment.



159 Cal.App.2d 109

In the Matter of the ESTATE of Walter L. LEE, Deceased.

ALMA INVESTMENT COMPANY, a corporation, Appellant,

v.

Leonard T. LEE, Administrator of the Estate of Walter L. Lee, Deceased, and Laurence DeTilla, Respondents.

Civ. 5639.

District Court of Appeal, Fourth District, California.

April 2, 1958.

Estate proceeding. The Superior Court, Kern County, Norman F. Main, J., vacated order confirming sale of realty, and purchaser appealed. The District Court of Appeal, Mussell, J., held that where successful bidder at private sale conducted by administrator was advised that no further bids could be made at hearing for confirmation of sale and bidder was not given notice of time and place of hearing, his failure to be present at the hearing was through mistake, inadvertence, surprise or excusable neglect, and consequently it was not abuse of discretion to set aside order confirming sale to higher bidder at the hearing.

Order affirmed.

1. Executors and Administrators ⇐149

Where successful bidder at private sale conducted by administrator was advised that no further bids could be made

at hearing for confirmation of sale and bidder was not given notice of time and place of hearing, his failure to be present at the hearing was through mistake, inadvertence, surprise or excusable neglect, and consequently it was not abuse of discretion to set aside order confirming sale to higher bidder at the hearing. West's Ann.Code Civ.Proc. § 473.

2. Executors and Administrators ⇐149

Where money paid by higher bidder at hearing to confirm administrator's sale to previous high bidder at private sale was on deposit in trust fund of estate, court could set aside order confirming sale to higher bidder at hearing without ordering return of such money to such bidder; instead, the court could assume that proper disposition of the money would be made by the administrator upon the final determination of the matter. West's Ann.Code Civ.Proc. § 473.

Norbert Baumgarten, Lompac, for appellant.

S. B. Gill, Bakersfield, for respondents.

MUSSELL, Justice.

On December 12, 1956, the administrator of the estate of Walter L. Lee, deceased, sold at private sale a parcel of real property belonging to the estate to Laurence DeTilla for the sum of $500. On January 23, 1957, the administrator filed a petition for confirmation of this sale and the petition came on regularly for hearing in the Superior Court on February 11, 1957. Laurence DeTilla was not present at this hearing. The court ordered that the property be sold to appellant Alma Investment Company, a corporation, for the sum of $550 as the corporation had increased DeTilla's bid in open court by ten per cent. and there were no higher bids for the property. This sale was confirmed and the administrator was authorized to transfer and deliver the property to the appellant. On the same day the appellant paid the amount of its bid to DiGiorgio and Davis, attorneys for the administrator, and a receipt was given therefor. No deed to this property has been delivered to the appellant.

On March 5, 1957, Laurence DeTilla filed in the Superior Court a notice of motion to set aside the court's order confirming the said sale to appellant. This motion was based on section 473 of the Code of Civil Procedure and on the ground that DeTilla was prevented from being present at the time and place of the hearing of said confirmation for the purpose of protecting his bid and that his failure to be present was through mistake, inadvertence, surprise or excusable neglect. Affidavits of DeTilla and Naomi Dennis, one of the heirs, and of V. P. DiGiorgio were filed in support of the motion. Affidavits were also filed by Fred Drinkhouse, agent of appellant, and by the administrator. The matter was then heard on these affidavits and the court made and entered an order vacating and setting aside its previous order confirming the sale. This appeal followed.

Appellant claims that the court abused its discretion in vacating the sale to appellant and that the court further abused its discretion in failing to make the return of the purchase price to the buyer as a condition to its order. These arguments are untenable.

In Estate of Herz, 147 Cal.App.2d 100, 106, 305 P.2d 278, this court held that relief under section 473 of the Code of Civil Procedure may be granted for the purpose of vacating an order confirming a probate sale. (Citing Estate of Moreland, 49 Cal. App.2d 484, 121 P.2d 867, 868; Estate of McCrae, 133 Cal.App.2d 634, 284 P.2d 914, 915.)

In Estate of Moreland, supra, it was held that the probate court has power to vacate an order of confirmation of sale under section 473 of the Code of Civil Procedure on motion of either a prospective bidder or the administrator. In that case the administrator had by inadvertence and mistake notified both the original and a prospective bidder that the hearing upon the return of sale would be held on a cer-

tain date instead of the day for which the hearing had been duly noticed and in fact was held. Relief was granted under section 473, and the court said: "It is the settled law that the section is addressed to the legal discretion of the trial court 'and in the absence of a clear showing of abuse in the exercise thereof an appellate court will not disturb the order of the court below,' * *"

In Estate of McCrae, supra, Ruth and H. A. Grinnell, high bidders at the private sale, were "desirous and anxious" of attending the hearing of the petition for confirmation of sale. Immediately prior to the date set for the hearing, H. A. Grinnell became very ill and it was necessary that Ruth Grinnell attend him during his illness. By reason thereof, neither of said bidders was able to attend the hearing and they were unable to arrange for any representative to be present. The petitioners were prepared to protect their bid for the property and offered to increase it substantially. Relief was granted under section 473 and it was held that there was no abuse of discretion shown; that the vital interest that respondents had in the property, the illness which prevented them from being present at the hearing, and the fact that respondents were thereby rendered unable to protect their prior bid at said hearing, with the further result that the estate was prevented from realizing an increased amount for the property, were all factors to be considered; and that section 473 is remedial in nature, and, in the interest of disposing of matters upon their merit, must be liberally construed.

In Estate of Efird, 130 Cal.App.2d 227, 230, 278 P.2d 730, 732, it was held that "Section 473 of the Code of Civil Procedure is applicable to probate proceedings, Estate of Moreland, 49 Cal.App.2d 484, 487, 121 P.2d 867, and is a remedial statute designed to make judicial proceedings equitable and fair and to relieve a party from excusable neglect to take the procedural steps at the precise time designated. Denke v. Bowes, 77 Cal.App.2d 642, 645, 176 P.2d 81."

[1] In the instant case it is stated in the affidavits of Laurence DeTilla, filed in support of his motion, that he was the successful bidder for the property involved at the private sale thereof conducted by the administrator; that he discussed his bid and the sale with V. P. DiGiorgio, the then attorney of record for the administrator; that as a result of said conversation and bid he was informed that it would not be necessary for him to be present at any future court hearing for the purpose of protecting his bid; that he further understood he would be informed of the time and place of any hearing for the confirmation of said sale; that he did not receive any notice of the time and place of hearing of such confirmation and further believed that no one could make any bid in excess of his and thereby acquire title to said property; that had he been advised of the time and place of said hearing, he would have been present; that had he been advised that his successful bid could be set aside in the event of a higher bid in court, he would have taken every precaution to protect his bid and interest in the property; that if the court grants his motion to vacate the sale to Alma Investment Company, he will be present at the new time and place of confirmation and will protect his bid; that he is now prepared to make an offer to purchase the property for the sum of $600, which bid he will reassert in open court at the time of the new hearing; that at the time he was advised by attorney DiGiorgio that he was the successful bidder for the property, DiGiorgio stated that he (affiant) was then the owner of the property and that he could sell or assign his rights in the property to any one whom he desired; that he was informed at this time that a court order would be issued confirming the sale and that he would receive a deed to the property forthwith.

Naomi Dennis stated in her affidavit that prior to the confirmation of the sale to appellant she discussed the sale and the bid of DeTilla with V. P. DiGiorgio, attorney for the administrator; that she understood from said discussion that no further bids

could be made at the hearing for confirmation and that notice thereof would be mailed to her; that she did not know the time and place actually set and for that reason was not present.

The facts set forth in the foregoing affidavits were sufficient to justify the trial court in setting aside the sale to appellant under the rules heretofore announced.

[2] We find no reversible error in the failure of the trial court to make the return of the purchase price to appellant a condition of the order setting aside the sale. The record indicates that the money paid by appellant was and is deposited in a trust fund of the estate and it is assumed that proper disposition of this sum will be made by the administrator upon the final determination of the matters here involved.

Order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



159 Cal.App.2d 67

Alice M. WALKER, Plaintiff and Appellant,

v.

Jefferson WALKER, Defendant and Respondent.

No. 17576.

District Court of Appeal, First District, Division 1, California.

April 1, 1958.

Divorce action. The Superior Court, San Mateo County, Aylett R. Cotton, J., entered an order refusing to find husband guilty of contempt and denying wife's application for support and maintenance pendente lite, counsel fees and costs, and wife appealed. The District Court of Appeal, Bray, J., held that where husband failed to file a reply brief, and failed to comply with a previous order for support, District Court of Appeal would assume that point made by wife for reversal of order denying her application for support and maintenance pendente lite, counsel fees and costs, was meritorious, and would reverse order denying such application.

Appeal from order dismissing contempt application dismissed; remaining portions of order reversed.

1. Contempt ⇐66(2)

An order refusing to hold a litigant in contempt, as well as one holding him in contempt, is not appealable.

2. Divorce ⇐262, 286

Where husband failed to file a reply brief, and failed to comply with a previous order for support, District Court of Appeal would assume that point made by wife for reversal of order denying her application for support and maintenance pendente lite, counsel fees and costs was meritorious, and would reverse order denying such application.

3. Divorce ⇐188, 213, 225

A property settlement agreement pursuant to a divorce action does not deprive a court of power to award temporary support, attorney's fees and costs pendente lite. West's Ann.Civ.Code, §§ 137.2, 137.3.

Athearn & Athearn, San Francisco, for appellant.

Joseph B. Bates, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a minute order refusing to find defendant guilty of contempt of court and denying her application for support and maintenance pendente lite, counsel fees and costs.[1]

1. Defendant heretofore appealed from an order setting aside and vacating the interlocutory decree of divorce. February 13, 1958, we dismissed this appeal under rule 17(a), Rules on Appeal, for defendant's failure to file an appellant's brief.

Questions Presented.

1. Is order denying contempt appealable?

2. Effect of defendant's failure to file reply brief.

Record.

March 19, 1956, an interlocutory decree of divorce was granted plaintiff on the ground of desertion. It approved a property settlement agreement dated March 2, 1956. June 8, said decree, on plaintiff's motion on the ground of mistake, inadvertence, etc., was set aside as of May 25. May 25, plaintiff filed an amended complaint adding extreme cruelty and adultery as additional grounds of divorce. June 8, 1956, an order was filed terminating as of March 2 temporary support payments (apparently ordered February 15, 1955) without prejudice to plaintiff's right to again apply therefor. Thereafter, by order to show cause, plaintiff sought to have defendant adjudged guilty of contempt of court for failure to pay the temporary support due as of March 2.[2] At the same time she applied for support pendente lite, counsel fees and costs. The minute order of June 28 provided "Contempt order dismissed; * * * property settlement and agreement made 2nd day of March, '56, in full force and effect; temporary support and counsel fees denied without prejudice." It further provided that defendant must pay support accrued prior to March 2.

1. Denial of Contempt Not Appealable.

[1] It is well settled that an order refusing to hold a litigant in contempt, as well as one holding him in contempt, is not appealable. "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." Code Civ. Proc. § 1222; Thomas v. Thomas, 4 Cal.App.2d 317, 318, 40 P.2d 581; Cesena v. Cesena, 103 Cal.App.2d 212, 229 P.2d 453; John Breuner Co. v. Bryant, 36 Cal.2d 877, 229 P.2d 356.

2. Defendant's Failure To File Brief.

[2, 3] Applicable here is the following from Postin v. Griggs, 66 Cal.App.2d 147, 148, 151 P.2d 887: "Although given ample opportunity to do so, respondent has not seen fit to file a brief on this appeal. As a result, the cause has been submitted on appellant's opening brief pursuant to Rule 17(b) of the Rules on Appeal. Under the provisions of that rule we are entitled to accept as true the statement of facts in the opening brief. We are under no duty to seek out points of law in support of the judgment, are entitled to assume that respondent has abandoned any attempt to support the judgment, and that the point made by appellant for reversal is meritorious." See also Yarbrough v. Yarbrough, 144 Cal.App.2d 610, 301 P.2d 426; 4 Cal. Jur.2d 334–335. In the Postin and Yarbrough cases we discussed the merits of the appeal in spite of the respondents' failures to file briefs. Under the circumstances of this case, however, where in addition to failing to perfect his own appeal and to file a reply brief on plaintiff's appeal, defendant has failed to comply with the court's order for support from which no appeal was taken, we see no reason to depart from the rule above mentioned other than to call the trial court's attention to Locke Paddon v. Locke Paddon, 194 Cal. 73, 81, 227 P. 715, and Steinmetz v. Steinmetz, 67 Cal.App. 195, 196, 227 P. 713, holding that a property settlement agreement does not deprive the court of the power under former section 137, Civil Code (now § 137.2 and § 137.3) to award temporary support, attorney's fees and costs pendente lite.

Plaintiff's appeal from that part of the order which dismisses the contempt application is dismissed. The remaining portions of the order are reversed. Plaintiff will recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

2. The order vacating the interlocutory decree of divorce stated that it was without prejudice to plaintiff's right to the support payments which had accrued prior to March 2, 1956.

159 Cal.App.2d 160

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank BAHARA, Defendant and Appellant.

Cr. 6102.

District Court of Appeal, Second District, Division 3, California.

April 3, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, John G. Barnes, J., for statutory rape, and he appealed. The District Court of Appeals, Vallée, J., held that effect on complaining witness' testimony of her failure to inform anyone of alleged offense for a period of two months was a matter for trial court rather than for reviewing court.

Affirmed.

1. Criminal Law ⇐260(11)

It was function of trial court, not reviewing court, to resolve inconsistencies and contradictions, if any, in testimony of complaining witness in statutory rape prosecution.

2. Criminal Law ⇐553

Trier of fact may believe and accept part of testimony of witness and disbelieve remainder.

3. Criminal Law ⇐1144(13)

On appeal, that part of evidence which supports the judgment, rather than that which tends to defeat it, must be accepted.

4. Criminal Law ⇐553

Testimony is not inherently improbable unless it appears that what was related or described could not have occurred.

5. Criminal Law ⇐1159(2)

Even testimony which is subject to justifiable suspicion does not warrant reversal of judgment.

6. Criminal Law ⇐260(11)

Effect on complaining witness' testimony of her failure to inform anyone of alleged offense for a period of two months was a matter for trial court, in statutory rape prosecution, rather than for reviewing court.

7. Rape ⇐52(1)

Statutory rape conviction was sustained by evidence.

Frank Bahara, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of statutory rape. The complaining witness was an unmarried girl 16 years of age. Defendant appeals from the decision finding him guilty and from the judgment.

On a Thursday in March 1957 six or seven young folks, including the complaining witness and defendant, had a party in a home in Sun Valley, Los Angeles County. All of the participants except the complaining witness and defendant left the party to go to a liquor store. The complaining witness testified that while the others were gone defendant committed the act charged.

Defendant's only contention is that the testimony of the complaining witness was internally conflicting; that it was so inherently improbable as to be unworthy of belief; and that it was contradicted by his testimony. He asserts that at one time the complaining witness testified she and defendant were alone 45 minutes and at another time they were alone an hour. He says at one time she testified there were seven persons at the party and at another time there were ten persons present. And he says he contradicted her testimony by positively testifying they were alone only ten minutes, and there were only six persons present.

[1–3] It was the function of the trial court, not this court, to resolve inconsistencies and contradictions, if any, in

the testimony of the complaining witness. The trier of fact may believe and accept a part of the testimony of a witness and disbelieve the remainder. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836.

[4, 5] Testimony is not inherently improbable unless it appears that what was related or described could not have occurred. Trancoso v. Trancoso, 96 Cal.App.2d 797, 798, 216 P.2d 172. "[T]he rule is well settled that to warrant the rejection of the statements given by a witness who has been believed by a jury, or trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions, People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, and it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends, Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850." People v. Simpson, 43 Cal.2d 553, 562, 275 P.2d 31, 36. Even testimony which is subject to justifiable suspicion does not warrant the reversal of a judgment. People v. Cahan, 141 Cal.App.2d 891, 897, 297 P.2d 715.

[6, 7] We find no physical impossibility in the facts testified to by the complaining witness and there is no apparent falsity in her story. Defendant argues her testimony should be rejected because she waited two months before informing anyone the act had been committed. That fact does not brand her statements as false. She testified she revealed the fact when she discovered she was pregnant. The effect on her testimony of her failure to inform anyone for a period of two months was a matter for the trial court, not this court. The finding of guilt is amply supported by the record.

The appeal from the nonappealable decision finding defendant guilty is dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



158 Cal.App.2d 756

CARL E. ANDERSON COMPANY, Plaintiff and Appellant,

v.

John W. MAUCK, Defendant and Respondent.

Civ. 17560.

District Court of Appeal, First District, Division 2, California.

March 27, 1958.

Rehearing Denied April 25, 1958.

Hearing Denied May 21, 1958.

Proceeding on motion to set aside default judgment in action for goods sold and delivered over a period of years. The Superior Court, County of Santa Clara, William W. Jacka, J., entered order setting aside default judgment and plaintiff appealed. The District Court of Appeal, Dooling, J., held that where record showed that defendant's bookkeeper had died after complaint had been served and another bookkeeper was employed to examine and recapitulate records, but after working thereon past date on which default was taken, advised defendant that he could not properly compile such accounting information, there was no abuse of discretion by trial court in finding that neglect of defendant's attorney in failing to file answer until he had a report, was excusable.

Order affirmed.

1. Appeal and Error ⇐935(2)
Judgment ⇐135

Fixed policy of law always is to allow a controversy to be tried and determined on

its merits, and appellate courts are disposed to affirm an order to that effect and in determining an appeal from such an order appellate court will resolve any doubts in favor of application for such relief.

2. Judgment ⇐143(3)

In proceeding on motion to set aside default judgment in action for goods sold and delivered over a period of years, where record disclosed that defendant's bookkeeper died subsequent to service of summons and complaint and that another person was employed to examine books and recapitulate records but on date after which default was taken he reported that he could not properly compile accounting information, there was no abuse of discretion by trial court in finding that the neglect of defendant's attorney in waiting for report before filing answer, was excusable.

Costello & Johnson, Palo Alto, for appellant.

Haley & Rockefeller, Sunnyvale, for respondent.

DOOLING, Justice.

This is an appeal from an order setting aside a default judgment. The complaint was for goods sold and delivered over a period of years. The complaint was filed on November 28, 1955, and respondent's bank account was attached on December 27, 1955. By stipulation this attachment was dissolved on January 11, 1956, upon respondent's filing a bond.

Summons and complaint were not served on respondent until February 28, 1956. After several oral demands that an answer be filed, on March 29, 1956, counsel for respondent sent a letter to counsel for appellant stating that respondent's accountant had recently died and for that reason there had been a delay in compiling the necessary information and promising an answer the following week. No answer was filed and on May 2, 1956, demand was made on respondent's attorneys to file an answer within ten days or a default would be taken. Default was taken and a default judgment entered on June 4, 1956.

The affidavit in support of the motion to set aside the default stated that on March 16, 1956, respondent's regular accountant and bookkeeper, who had kept all of his books for seven years, had died; that the action involves accounting information of a varied and intricate nature and to properly file a pleading it is necessary that the accounting records be recapitulated back to the year 1953; that respondent employed an accountant named Zink to examine and recapitulate said records and that after working thereon from about April 1, 1956, to June 15, 1956, Zink advised respondent that it would be impossible for him to properly compile said accounting information.

[1] In Beckley v. Reclamation Board, 48 Cal.2d 710, 718, 312 P.2d 1098, 1103, our Supreme Court reaffirmed the long-settled rule that it is "* * * the fixed policy of the law always to allow a controversy to be tried and determined on its merits"; that appellate courts "* * * are disposed to affirm an order to that effect [citation] and in determining an appeal from such an order will resolve any doubts in favor of the application for such relief."

So in Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 525, 190 P.2d 593, 594, the same court said: "This court has always looked with favor upon orders excusing defaults and permitting controversies to be heard upon their merits. Such orders are rarely reversed, and never 'unless it clearly appears that there has been a plain abuse of discretion.'"

[2] Here, while the neglect of respondent's attorneys is clear, the excuse for that neglect is that counsel did not have sufficient facts upon which to base an answer by reason of the death of respondent's bookkeeper and that respondent's attorneys were awaiting a report from another accountant to whom the matter was entrusted and who was actually examining the accounts from April 1, 1956, until June 15, 1956—a date after the default was in fact entered.

Whether the conduct of respondent's attorneys in waiting for this report before filing an answer was "excusable" presented a question for the trial court, and under the liberal rules established for the consideration of appeals from orders granting relief from defaults we cannot find that the trial judge was clearly guilty of a plain abuse of discretion in finding that the neglect of respondent's counsel was excusable under the circumstances.

Order affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



158 Cal.App.2d 785

Patrick Thomas HANCOCK, Travis Lafferty, Joseph Chasin, and Holden Hayden, Plaintiffs and Appellants,

v.

Hugh M. BURNS, individually and as Chairman of the Senate Fact Finding Committee on Un-American Activities (a California Legislative Committee); The Senate Fact Finding Committee on Un-American Activities (a California Legislative Committee); Nathan F. Coombs, Earl D. Desmond, John F. McCarthy and John F. Thompson, individually and as members of said Committee; Richard E. Combs, individually and as Chief Counsel for said Committee, Defendants and Respondents.

No. 16902.

District Court of Appeal, First District, Division 1, California.

March 28, 1958.

Rehearing Denied April 25, 1958.

Hearing Denied May 21, 1958.

Suit against members of Senate Fact Finding Committee on Un-American Activities, in their official and individual capacities, on ground that defendants maliciously induced plaintiffs' employer to discharge plaintiffs for plaintiffs' alleged refusal to cooperate with Committee. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered a judgment in favor of defendants after demurrer to complaint had been sustained without leave to amend, and the plaintiffs appealed. The District Court of Appeal, McMurray, J. pro tem., held that the action of the members of Senate Fact Finding Committee on Un-American Activities in recommending that plaintiffs' employer discharge plaintiffs was protected by members' legislative immunity from suit.

Affirmed.

1. Torts ⇐12

A cause of action may lie for wrongfully inducing one to breach a contract of employment if such act is not protected by some privilege of immunity.

2. Pleading ⇐214(2)

The general rule of pleading that a demurrer admits the fact pleaded has no application to facts of which the court may take judicial notice.

3. Pleading ⇐214(5)

A demurrer does not give statements of contentions and conclusions alleged in complaint the status of admitted facts, nor does it admit deductions the pleader draws from the facts alleged, nor does it admit allegations of conclusions of law.

4. Pleading ⇐214(5)

In suit against members of Senate Fact Finding Committee on Un-American Activities on ground that defendants maliciously induced plaintiffs' employer to discharge plaintiffs for plaintiffs' alleged refusals to cooperate with Committee, allegations that defendants acted in their individual capacities was a "conclusion of law" not required to be accepted as true on demurrer to the complaint.

See publication Words and Phrases, for other judicial constructions and definitions of "Conclusion of Law".

5. Pleading ⇐214(5)

In suit against members of Senate Fact Finding Committee on Un-American Activities on ground that defendants maliciously induced plaintiffs' employer to discharge

plaintiffs for plaintiffs' alleged refusals to cooperate with Committee, allegations that defendants had no authority to make recommendations to employer, that defendants' acts were not within sphere of any legitimate legislative activity and that such acts were done maliciously were "conclusions of law" not required to be accepted as true on demurrer to complaint.

6. Pleading ⇐225(1)

The right to amend a complaint after a demurrer is sustained should not be lightly denied, but it is proper to sustain demurrer without leave to amend when complaint cannot be amended to state a cause of action.

7. Action ⇐12

The courts have privilege and duty of protecting personal civil rights of citizens, but when enforcement of such personal civil rights results in erosion of the government which alone can guarantee such rights, the obligation to society as a whole may dictate that individual forego personal recovery for injuries suffered so that government may continue.

8. Officers ⇐114

The doctrine of separation of powers is recognized as essential to a free form of government wherein public officers may perform their duties untrammelled by fear of sanction in the form of personal liability if it transpires that their acts were unwise or based upon a misinterpretation of the law.

9. States ⇐28(2)

Action of members of Senate Fact Finding Committee on Un-American activities in recommending that plaintiffs' employer discharge plaintiffs for plaintiffs' alleged refusals to cooperate with Committee was protected by members' legislative immunity from suit. Const. art. 4, § 37.

Albert M. Bendich, Staff Counsel, American Civil Liberties Union, Lawrence Speiser, Rubin Tepper, San Francisco, Edward F. Newman, Hayward, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Ralph N. Kleps, Legislative Counsel, Charles W. Johnson, Chief Deputy Counsel, Sacramento, Melvin, Faulkner, Sheehan & Wiseman, San Francisco, for respondents.

McMURRAY, Justice pro tem.

The four plaintiffs filed a complaint against the several named defendants in their individual capacities and as members of "The Senate Fact Finding Committee on Un-American Activities" (a California Legislative Committee) except in the case of Hugh M. Burns who was sued individually and as chairman of said committee and Richard E. Combs who was sued individually and as chief counsel for said committee.

Each plaintiff sued for the violation of rights common to all plaintiffs and alleged in the complaint that the same right to relief arose out of the same series of acts of the defendants therein named.

Each plaintiff alleged employment by the Pacific Gas and Electric Company in the following respective employment: meter reader, apprentice electrician, cable splicer and power lineman; and each alleged different damages for the injuries sought to be alleged in the complaint. Other than these differences, the causes of action sought to be alleged by plaintiffs were identical.

Each plaintiff alleged that the respective defendants were chairman, members, and chief counsel of the named committee at all times mentioned in the complaint; each plaintiff alleged his employment by the Pacific Gas and Electric Company in his particular capacity and alleged that he "always conducted himself in an efficient and punctual manner and was deservedly held in great esteem and credit by his employer and those with whom he worked. That by means of such employment, plaintiff daily acquired divers great gains, profits and emoluments to the support and maintenance of himself and his

family and the great increase of his future."

Each plaintiff alleged that at a subcommittee meeting on August 10, 1953, after being subpoenaed, he was asked questions by defendants Burns, Thompson, Coombs, and Desmond as members and defendant Combs as chief counsel, of the said committee and that the said plaintiffs and each of them relying on their rights and privileges under the Constitutions of the United States and of the State of California, including the right not to be witnesses against themselves as provided in the Fifth Amendment of the United States Constitution, refused to answer questions concerning their political beliefs, associations and affiliations. Each plaintiff alleged that subsequent to said hearing the subcommittee and said defendant committee and the defendants individually and as chairman, members, and chief counsel for said committee "did wilfully, wrongfully and maliciously recommend that the said Pacific Gas and Electric Company discharge the plaintiffs and each of them and did wilfully, wrongfully and maliciously induce the said Company to discharge plaintiffs for the plaintiffs' alleged refusals to co-operate with said Committee and on the grounds that the plaintiffs were poor security risks. That said defendant Committee and defendants Burns, Coombs, Desmond, McCarthy and Thompson, individually and as members of said Committee, and defendant Combs, individually and as chief counsel of said Committee, have no authority by reason of legislative action or authority, or by law or custom to make such recommendations nor to induce said Company to discharge the plaintiffs, and that such actions on the part of the defendants were not within the sphere of any legitimate legislative activity. That said recommendations and inducements were made for the sole purpose of injuring the plaintiffs in their employment and the divers great gains, profits the plaintiffs would accrue from their continued employment with said Company."

Each plaintiff alleged that the Pacific Gas and Electric Company on August 14, 1953, acting solely on the basis of the above stated recommendations and inducements, discharged the plaintiffs and each plaintiff further alleges that Pacific Gas and Electric Company thereafter notified the union to which plaintiffs belonged to the effect that said company was acting solely on the basis of the above stated recommendations and inducements in discharging said plaintiffs. A copy of the notification from the company to the union is incorporated by reference in each count of the complaint.

Each plaintiff alleged that he was ready, willing and able to resume his employment for the company. Each plaintiff alleged "[t]he plaintiffs are not potential saboteurs, security risks, nor are they unfit for continued employment by said Pacific Gas and Electric Company. The plaintiffs are loyal citizens of the United States of America and would not commit any action to hurt the security of said nation." Each plaintiff also alleged that the acts and things complained of were a violation of plaintiffs' rights under the Constitution and laws of the United States and the Constitution and laws of the State of California. A demurrer was interposed to the above complaint. Defendants annexed to their demurrer a copy of Senate Resolution No. 127, as amended, relative to creating the Senate Fact Finding Committee on Un-American Activities. The demurrer was sustained without leave to amend and judgment was entered in favor of defendants. From this judgment the plaintiffs appeal.

Appellants here contend that their complaint sufficiently states a cause of action in tort for wrongful inducement of a breach of contract; that the complaint does not contain facts either on its face or from facts of which judicial notice must be taken which show that respondents' conduct was privileged; and that defendants were not protected by the doctrine of sovereign immunity, and ask that judgment of dismissal entered on the demurrer sustained without leave to amend be reversed.

Respondents contend that the demurrer was properly sustained without leave to amend because the lower court, having taken judicial notice of certain facts which, when read with the complaint, disclose the following defenses: absolute privilege for legislative acts within the sphere of legislative authority; qualified privilege for fair and true reports of the proceedings of a public meeting lawfully convened for a lawful purpose and open to the public; privilege to induce a breach of contract under section 767 of the Restatement of Torts (social interest to be protected; relationship of the parties); and privilege to induce another to stand upon his legal rights. They also urge that by allowing a cause of action for wrongful inducement to breach a contract under the facts here presented would destroy the immunity given public officials when acting in their official capacity and mention that a judgment should not be reversed to permit recovery of nominal damages.

[1] At the outset, it may be said that in this state a cause of action may lie for wrongfully inducing one to breach a contract of employment if such act is not protected by some privilege of immunity. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631. The principal question before this court, therefore, is whether or not, under the facts stated in the complaint, defendants may rely on a privilege for making a communication such as is here alleged or whether they may assert an immunity to suit for damages by reason of their status as legislators.

[2] Although it is often stated that in considering a demurrer a court is bound to accept the truth of the allegations thereof, this statement may, in certain instances, be modified where, by the nature of the pleading, the court is apprised of the existence of a fact or facts of which it is bound to take judicial notice under the laws of this state. In 39 Cal.Jur.2d, § 22, under the title "Facts Judicially Noticed" it is said: "* * * In determining the sufficiency of a pleading, it may be read as though it included all such facts, though not pleaded, and even when the pleading contains an express allegation to the contrary. But the general rule of pleading that a demurrer admits the facts pleaded has no application to facts of which the court may take judicial notice. Allegations contrary to facts which the court may judicially notice are not admitted by demurrer, but must be disregarded and treated as a nullity." The complaint here containing, as it does, a reference to Senate Resolution No. 127 would appear well within this rule. The trial court was bound to consider the contents of this Senate Resolution.

[3, 4] Furthermore, it is well settled that a demurrer does not give statements of contentions and conclusions alleged in a complaint the status of admitted facts (Howard v. City of Los Angeles, 143 Cal. App.2d 195, 299 P.2d 294), nor does it admit the deductions the pleader draws from the facts alleged, nor does it admit allegations of conclusions of law. The allegations contained in the complaint before us relative to the capacity in which defendants here acted is a conclusion of law. See Jackson & Perkins Co. of California v. Byron-Bethany Irr. Dist., 136 Cal.App. 375, 29 P.2d 217, 30 P.2d 516. Neither does the use of the words "wilfully, wrongfully and maliciously" add to the pleadings except as they may convey a sense of outrage on the part of plaintiff.

[5] The allegation that the defendants had no authority to make such recommendations is a conclusion as is the statement that defendants' acts were not within the sphere of any legitimate legislative activity. The allegation that an act was done maliciously has been held to be a conclusion (Locke v. Mitchell, 7 Cal.2d 599, 61 P.2d 922).

[6] It is a familiar rule in this state that the right to amend a complaint after a demurrer is sustained should not be lightly denied (Romano v. Wilbur Ellis & Co., 82 Cal.App.2d 670, 186 P.2d 1012). It is, however, proper to sustain a demurrer without leave to amend when the complaint

cannot be amended to state a cause of action.

The appellants ably and forcefully contend that the mere fact that some of the complaint is based upon conclusions does not justify the ruling of the court below and state that the real question here presented is whether respondents may claim that they had a privileged relationship with Pacific Gas and Electric Company to induce a breach of contract between that company and appellants.

The respondents urge that the complaint, when read in conjunction with the Senate Resolution creating the committee, discloses that respondents were acting under color of their legislative authority and were immune from civil liability. The contents of Senate Resolution No. 127 are sufficient to constitute the committee as a committee of that body as expressly authorized by our state Constitution in Article IV, section 37. The committee, by this resolution, is created and authorized and directed to investigate, ascertain, study and analyze all facts relating directly or indirectly to certain outlined un-American activities. The committee, by this resolution, is also empowered and directed in paragraph 5(d) thereof "[t]o report its findings and recommendations to the Legislature and to the people from time to time and at any time, not later than herein provided." The argument of appellants as to the possible immunity of defendants for the acts here complained of may be summarized as contending that the respondents may not avail themselves of any sovereign immunity since, by exceeding the sphere of proper legislative power, the defendants have lost the right to claim such immunity.

There is no question that Article IV, section 11, of our state Constitution, providing for legislators' privilege from arrest does not here apply, nor is it here involved. Appellants further urge that by the demurrer here interposed the respondents waived any defense which they might have upon this ground as this demurrer was in fact a general appearance. This latter contention would seem to be more sophistic than real. The first ground of demurrer stated is that the court has no jurisdiction of the defendants or any of them or of the subject matter of the action. Appellants suggest that, even by reading the complaint in conjunction with Senate Resolution No. 127, it cannot be assumed that the defendants did not exceed the scope of legislative authority.

While Senate Resolution No. 127 does not, nor could it, authorize the commission of a tortious act, nevertheless, it does establish a committee of the state Senate authorized to act as an official adjunct of that body. Such committees are expressly authorized by our state Constitution in Article IV, section 37. Therefore, by reading the Resolution in conjunction with the complaint, it becomes apparent that the conjunctive pleading of respondents' status (as to respondents' having acted both as committee members and as individuals in doing the acts here complained of) must be grounded on reasoning that by going outside the legislative sphere the defendants were stripped of any legislative immunity and stand before the court as individuals.

This theory of the evaporative quality of legislative immunity, by its very statement, discloses its own vice. If government, operating through the individuals who form it, is afforded immunity from private suit only when its actions are beyond any question, and loses that immunity upon mere allegation of improper motives or unlawful acts in a complaint seeking damages, then those persons who form government are subject to the threat of personal liability in any matter in which their discretion is exercised.

The fact that a legislative committee erroneously exercised powers, in a mistaken belief that it has such powers, would immediately subject its members to the harassment of litigation. What would a logical extension of this rule lead to so far as the judiciary is concerned? Would a judge who mistakenly assumed jurisdiction in a proceeding be liable to personal suit by an aggrieved party litigant who merely alleged wilfullness, wrongfullness and mal-

ice? Would not such a rule require the examination of the motives as well as the propriety of all governmental actions by our courts? We think so.

The basic principle of separation of powers which is one of the bases for our entire form of constitutional government would be diluted to a point where the judicial branch, because of artful allegations in a complaint, would be required to reexamine every act of the executive and legislative branches which had an adverse effect upon any individual.

[7] Granting that the courts have the privilege and the duty of protecting the personal civil rights of the citizens of this country from abuse, nevertheless, when the enforcement of such personal civil rights results in an erosion of the government which alone can guarantee such rights, the obligation to society as a whole may dictate that the individual forego personal recovery for injury suffered so that government may continue.

It has often been said that when elected officials so conduct themselves as to indicate a lack of essential obligation to their responsibilities there are remedies available to the electorate which can correct these abuses; also the power of impeachment still exists. "The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Colegrove v. Green, 328 U.S. 549, 556, 66 S.Ct. 1198, 1201, 90 L.Ed. 1432.

It will no doubt be argued that, by holding the action here taken by the committee as within the protection afforded by legislative immunity, the members of such a committee could commit any tortious act by claiming it to be within the same rule. The argument would, however, fail. Were the committee or its members charged with the commission of some bodily injury inflicted on another in the course of conducting their hearings, such act could not reasonably be urged to come within the immunity here stated, as the mere recitation of the infliction of bodily harm is a statement of an act which by no reasonable means could be encompassed by the immunity.

The act here complained of is one which was committed by the use of the ordinary means adopted by such committees in reporting their findings and conclusions; namely, the preparation and forwarding of a written communication.

[8] One of the basic foundations of our constitutional government is to be found in the separation of powers. This doctrine has been recognized as essential to a free form of government wherein public officers may perform their duties untrammelled by fear of sanction in the form of personal liability if it transpires that their acts were unwise or based upon a misinterpretation of the law. Much has been written, commencing with Montesquieu in the 18th century, and continuing up to date, regarding the necessity or advisability of continuing the doctrine of the separation of powers. It has been said, "The problems of government are complicated and difficult of solution. But must it not be apparent to everyone, as we gaze into the future, that we cannot hope to maintain the way of life which we call American without exercising every effort to preserve to each branch of government its proper sphere and to the states and the Union a due recognition of their proper functions." (The Doctrine of the Separation of Powers and its Present Day Significance, Arthur T. Vanderbilt, p. 142.)

The rights here sought to be enforced are assuredly rights to which a citizen of this country is entitled unless, in the exercise of those rights, the person committing the act is protected by some privilege or immunity. This concept is recognized in section 767 of Restatement of Torts, where it is said, "In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:

"(a) the nature of the actor's conduct,

"(b) the nature of the expectancy with which his conduct interferes,

"(c) the relations between the parties,

"(d) the interest sought to be advanced by the actor and

"(e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand."

It will be noted that under subdivision (e) the social interest of the persons involved must be considered by a court. When so considered, we feel that the continuance of the basic doctrine of the separation of powers has more social importance than is here presented by the individual defendants.

[9] In view of our holding that the action of respondents here was protected by their legislative immunity from suit, it is not necessary to discuss the other points urged by appellants. The immunity appearing on the face of the complaint, it would be useless to allow amendment.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



159 Cal.App.2d 18

W. C. DILLON & COMPANY, Inc., Plaintiff and Appellant,

v.

James William BARTON and Francis McCoach Barton, as Individuals and as Executors of the Estate of John A. Barton, Deceased, Defendants and Respondents.

Civ. 22765.

District Court of Appeal, Second District, Division 1, California.

March 31, 1958.

Action by grantee to quiet title to southerly 30 feet of lot conveyed to grantee under deed reserving southerly 30 feet for future road purposes. From adverse judgment of the Superior Court, Los Angeles County, Alfred Paonessa, J., the grantee appealed. The District Court of Appeal, White, P. J., held that evidence was insufficient to sustain finding that grantee had erected a fence on easements of defendants preventing use of said easements by defendants and grantor's successors in interest, and that fence constituted an unlawful interference with defendants' easement rights.

Judgment reversed and cause remanded for new trial.

1. Evidence ⇐450(3)

When a deed does not expressly declare easement to be appurtenant or when language of deed is ambiguous, and it does not clearly appear whether easement was intended to be in gross or appurtenant to land, evidence aliunde the document is admissible to determine nature of easement and to establish a dominant tenement.

2. Appeal and Error ⇐671(1)

Reviewing court must review the record as it was actually made and not as it should have been made.

3. Easements ⇐61(9)

In action by grantee to quiet title to southerly 30 feet of lot conveyed to grantee under deed reserving the southerly 30 feet for future road purposes, evidence was insufficient to sustain finding that grantee had erected a fence on easements of defendants preventing use of said easements by the defendants and grantor's successors in interest and that fence constituted an unlawful interference with defendants' easement rights.

4. Easements ⇐50, 51

Owner of servient estate has right to use lands subject to a nonexclusive easement for any purpose or in any manner that does not interfere unreasonably with rights of owner of dominant estate.

5. Easements ⇐61(8)

A judgment requiring removal of any existing fence allegedly interfering with easement rights of another should be supported by pleading and proof showing that

its existence constitutes such an interference.

Managh, Reese & Christl, Beverly Hills, by John D. Glynn, Beverly Hills, for appellant.

Dryer, Hails, Burris & Lagerlof, Los Angeles, by H. Jess Senecal, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant, a subdivider, conveyed three residential lots to the plaintiff by grant deeds which reserved an easement in the following language: "Reserving therefrom unto the Grantor herein the described property for reservation of future road purposes the southerly 30 feet * * *" of the described lots. Prior to the conveyances to plaintiff of said lots, numbered 12, 13 and 14, defendant owned lots 12 to 18 inclusive which were in a series numbered from west to east. The apparent purpose of the reservation was to provide for an east-west roadway or street along and over the southerly ends of the lots mentioned. After the conveyances to plaintiff, defendant conveyed lots 15 and 16 to third parties by a deed which contained no reservation of any easement for road or street purposes. This latter deed made no reference to the easement reserved in plaintiff's deeds. The purchasers of lots 15 and 16 constructed improvements and fences which apparently indicated no intention to provide for any street or roadway over the southerly portion of their property.

Plaintiff filed this suit to quiet title, alleging that it consented to the reservation of the easement in reliance upon the defendant's representation that the easement would be used only if defendant found it necessary or convenient to provide for a road or alley in order to sell his remaining lots lying to the east, that is lots 15 to 18 inclusive. Plaintiff alleged that the subsequent sale of lots 15 and 16, with no provision for the easement, terminated all of defendant's right, title and interest in and to lots 12, 13 and 14, and operated completely to extinguish the servitude.

The record in this case discloses errors and irregularities which render it necessary for us to reverse the judgment. The sole party defendant named in the pleadings is John A. Barton. The trial was commenced on January 25, 1957. The findings recite that John A. Barton died on January 17, 1956. The record, however, discloses no substitution of parties. In the captions of the findings of fact, conclusions of law and judgment the defendants are designated as James William Barton and Francis McCoach Barton "as individuals and as executors of the Estate of John A. Barton, Deceased." In appellant's opening brief it is stated that John A. Barton was the sole party defendant and that there was never any substitution of parties in the trial court. The record discloses no substitution of parties. In respondent's brief we are told that in July, 1956, a stipulation was signed providing for the substitution of the defendants as designated in the findings, that plaintiff's counsel promised to file the stipulation and obtain an order of court thereon, but that he failed to do so. The attorney who represented plaintiff in the trial court, and who prepared its opening brief on appeal, has since died. Present counsel for appellant were later substituted.

The irregularity above discussed, standing alone, perhaps would not necessitate a reversal, but its relation to certain unsupported findings hereinafter discussed is such as to make that result unavoidable.

[1] The essence of the problem presented to the trial court in this case was to determine whether the easement created by the inartificial and uncertain language of the deeds was an easement in gross or whether it was intended to be appurtenant to certain dominant tenements. If found to be appurtenant, there was the further need to ascertain and define the dominant tenements. Basically, this was a problem of ascertaining the intent of the parties from the language of the deeds and from relevant parol evidence, including that which disclosed the surrounding facts and circumstances existent at the time of the conveyances in question. As stated in Wright

v. Best, 19 Cal.2d 368, at page 383, 121 P.2d 702, at page 711: "* * * when the deed does not expressly declare the easement to be appurtenant, or when the language of the deed is ambiguous, and it does not clearly appear whether the easement was intended to be in gross or appurtenant to land, evidence aliunde the document is admissible to determine the nature of the easement and to establish a dominant tenement." (See also, Elliott v. McCombs, 17 Cal.2d 23, 29, 109 P.2d 329; Balestra v. Button, 54 Cal.App.2d 192, 198, 128 P.2d 816; Eastman v. Piper, 68 Cal.App. 554, 568, 229 P. 1002.

The judgment under review fails to define the nature of the easement. It simply decrees that "defendants are the owners of non-exclusive easements for road purposes over the south 30 feet of lots 12, 13 and 14" of the described tract. The findings, however, indicate that the easement was found to be appurtenant to lot 11 and lots 14 to 18 of said tract. Lot 11 was located in the same tract and adjoined lot 12 on the south.

[2] The finding of the trial court that John A. Barton was the owner of lot 11 at the time of the conveyance to appellant of lots 12, 13 and 14, and the finding that on January 10, 1957, John A. Barton conveyed said lot 11 to defendants (evidently referring to James William Barton and Francis McCoach Barton) are without any support in the evidence. Respondent's brief goes outside the record to relate that prior to the trial plaintiff's attorney was provided with evidence which would have supported these findings. Unfortunately, however, no such evidence was offered at the trial. We must review the record as it was actually made and not as it should have been made.

[3–5] Finding number X recites "That plaintiff has erected a fence upon the easements of defendants thus preventing the use of said easements by defendants and successors in interest of John A. Barton." The conclusions of law recite "That plaintiff's fence constitutes an unlawful interference with the easement rights of defendants and should be ordered removed." The judgment orders "That the fence erected by plaintiff upon said easement be removed." Our search of the record confirms appellant's assertion that there is no evidence whatsoever either to support the quoted finding and conclusion or to justify the quoted portion of the judgment. The owner of a servient estate has the right to use land subject to a non-exclusive easement for any purpose or in any manner that does not interfere unreasonably with the rights of the owner of the dominant estate. City of Pasadena v. California-Michigan Land & Water Co., 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186; Hoyt v. Hart, 149 Cal. 722, 728, 87 P. 569; 17 Cal.Jur.2d 133, 134. A judgment requiring removal of any existing fence should be supported by pleading and proof showing that its existence constitutes such an interference. (See Herzog v. Grosso, 41 Cal.2d 219, 224, 259 P.2d 429.)

Prior to a retrial an appropriate substitution of parties should be effected so that all parties claiming to be interested in the easement may be properly before the court. It is to be assumed that upon retrial the court will be provided with evidence sufficient for the purposes of a complete and accurate adjudication of the nature and extent of the easement, if it continues to exist, and the particular estates, if any, which are dominant with respect to it.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

FOURT and LILLIE, JJ., concur.

159 Cal.App.2d 77

Otto J. WEBER, doing business under the firm name and style of California Realty Investment Center, and Robert L. Miller, Plaintiffs, Cross-Defendants and Respondents,

v.

Maude E. ROSS, Defendant, Cross-Complainant and Appellant.

Civ. 17782.

District Court of Appeal, First District, Division 2, California.

April 1, 1958.

Hearing Denied May 27, 1958.

Broker's action to recover commission for effecting exchange of properties. The Superior Court, Contra Costa County, Harold Jacoby, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Brazil, J. pro tem., held that finding of performance of condition precedent to binding contract of exchange was implicit in findings actually made by trial court.

Affirmed.

1. Brokers ⇐60

Broker engaged to obtain acceptance of offer for exchange of properties would be entitled to commission if binding contract of exchange was entered into, regardless of whether such agreement was thereafter consummated.

2. Brokers ⇐52

Exchange of Properties ⇐4

Where offer to exchange properties was expressly made "subject to inspection of books and properties of both parties," there could be no binding contract until such inspections were completed; and broker, who had been engaged to obtain acceptance of offer, would not be entitled to his commission until that condition had been satisfied.

3. Brokers ⇐88(14)

In broker's action to recover commission for effecting exchange of properties, finding of performance of condition precedent to binding contract of exchange was implicit in findings actually made by trial court. West's Ann.Code Civ.Proc. § 956a.

Robert D. Carter, Modesto, for appellant.

Wagener & Brailsford, Oakland, for respondents.

BRAZIL, Justice pro tem.

The respondent is a real estate broker who was employed by appellant and one Goldenson to effect an exchange of properties. The appellant refused to complete the exchange after Mr. Goldenson had accepted her offer, whereupon the broker sued her for the commission he claimed became due upon the fulfillment of his obligations under the contract of exchange. From a judgment against her, the defendant, Mrs. Ross, has appealed.

Viewing the evidence in the light most favorable to the respondent and resolving conflicts therein in favor of the judgment, we find the following to be a substantial summary of what took place. In December 1954, Mrs. Ross, the appellant, signed an offer of exchange of her properties for a motel in Stockton belonging to Mr. Goldenson. The broker was given the exclusive right for five days to obtain its acceptance. Within the offer there is a provision that Mrs. Ross agrees to pay the broker $3,500 commission upon execution of the agreement by all parties. Mr. Goldenson, after inspecting the properties offered by Mrs. Ross, signed an acceptance thereof on December 4, 1954, without making any reservation or exception.

The written offer, following a recitation of the payment and obligation features of the proposed contract, under the heading "Terms and Conditions of Exchange" contains this clause: "Subject to inspection of books and properties of both parties." On the contract of exchange, as introduced in evidence, there appears opposite the expression last quoted the initials of Mrs. Ross and those of Mr. Goldenson. There is no question on appeal that, as to the latter, the condition was fulfilled and that his signed acceptance at the end of the con-

tract was unconditional. The appellant contends that, as to her, the condition was not performed, that the inspection of books and properties was not complete, that further inspection was contemplated, and that her initialing of the condition was for a purpose other than as an indication that, as to her, the condition had been complied with.

Although the offer was dated December 3, 1954, Mrs. Ross actually signed the paper at her home about nine o'clock p. m. of the day before. The respondent's salesman, Mr. Miller, who handled all the details for the broker, called at Mrs. Ross' home in San Mateo on that evening for the purpose of getting the written offer signed in order that he might thereafter present it to Mr. Goldenson. She was not feeling very well at the time, so only a tentative appointment was made by Mr. Miller to pick her up early the next morning to drive her to Stockton to inspect the books and the property. If Mrs. Ross were too ill to make the trip, she was to have phoned Mr. Miller, otherwise, the appointment was to be kept. Not having heard from her, the salesman called for her at eight o'clock the next morning. In the meantime, Mr. Miller had submitted the written offer to Mr. Goldenson. The pair drove to Stockton, by way of Pleasanton, where by coincidence they met Mr. Goldenson, and he then called his motel manager and told him to arrange for the giving of such information about the motel as Mrs. Ross should want. On getting to Stockton, they went to the motel, met the manager, talked to him and his wife, stayed there about an hour and then proceeded back to San Mateo. While at the motel, there was a general conversation with the manager about business; Mrs. Ross and the wife looked at the yard proper, the backyard of the premises and the general living conditions. While in the office, the manager brought in what books he had, which covered only the last four months, and handed them to her. Apparently, she still wasn't feeling very well for she then said "Well, I don't want to take the time right now," but nevertheless she did glance at them. Much information, such as concerns taxes, monthly payments, wages and other items of expense, that one reasonably would expect a prudent buyer would want to see on such a large transaction were not included in the books that were presented. However, neither Mr. Miller nor Mrs. Ross asked for such information, possibly because it was apparent such information was not at that time and place available. Mr. Miller, at her request, made rough notes mainly about monthly totals.

On the way home, Mrs. Ross wanted to locate a man who was supposed to be interested in her property, but they were unable to find him so they went to Mrs. Ross' home where there was further discussion about the deal. The trip, just referred to, was the second Mrs. Ross had made to the motel; and it also appears from the evidence that Mr. Goldenson had on a previous occasion refused an offer from her for the place. Mrs. Ross is not a person totally unfamiliar with real property transactions, having had limited experience in that field before.

About seven in the evening of the same day they made the Stockton trip, Mr. Miller and appellant at her home discussed the situation as it had developed up to that time. He testified she said everything appeared to be in good order so that he replied "If everything is in order, then we can go ahead with the deal." He then submitted the offer she had already signed for initialing. She put her initials opposite the clause which concerned itself with the right of inspection of books and properties of the parties. In this regard, she testified that Mr. Miller told her when she asked him if such initialing was binding on her that it was not; that the reason he wanted the initials placed on the offer was only to show his boss that he really had made a business trip to Stockton. Mr. Miller denied having made any such statement, testifying that he told her that the initialing meant that she had inspected the books and the property. This only results in a conflict of evidence, of no assistance to appellant for the trial court accepted Mr. Mil-

ler's version, not hers, of what took place; and in so doing was not unreasonable.

After leaving Mrs. Ross, the salesman hurried over to Danville to see Mr. Goldenson, and he did see him about nine o'clock of the same evening. Mr. Goldenson, having during the day made an inspection of the properties he was to get in the exchange, signed the acceptance of the offer and put his initials upon the written offer right near where Mrs. Ross had placed hers.

[1] If the condition as to both parties was then met, and no fraud or mistake having been pleaded or proved, there was right then a binding contract of exchange between Mr. Goldenson and Mrs. Ross. In such an event, the real estate agent had performed his agreement and his commission was thereupon due. It would make no difference if the exchange was never thereafter consummated. Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173. The commission would still be due even if thereafter one of the parties, as Mrs. Ross indicated was her desire, wanted or tried to back out of the agreement.

[2] There can be no doubt that each of the parties to the exchange agreement had a right to inspection of the books and properties; that until this condition was satisfied there would be no binding contract and the broker would not yet be entitled to his commission. Williams v. Belling, 76 Cal. App. 610, 245 P. 455. There could scarcely be any stronger proof of performance of the condition precedent than the statement of the party to be charged that he or she was satisfied that everything was in order, and then initialing the contract right where the condition appeared. If it were not for the initials, and the evidence of Mrs. Ross' understanding of their placement near the condition, it could well be argued that there was actually no inspection of the books or property because so little time was involved and the inspections were so cursory in nature. However, if the parties are satisfied with less than would otherwise have been a reasonable inspection, that is their right, and it isn't for a court to make a contrary finding on the subject.

The crux of the case appears to be whether or not the condition was performed. There is no direct affirmative finding on this essential factual element of the case as there should have been. The affirmative finding of the court "[t]hat by execution of said written exchange agreement, defendant Maude E. Ross agreed to pay plaintiffs" would probably not be a sufficient finding on the vital issue of the performance or nonperformance of the condition. The evidence on the subject being quite conflicting, an appellate court could not, as it sometimes has power to do (Code Civ. Proc. § 956a), supply the missing finding of fact.

"The failure to find upon this issue [a material fact] requires a reversal of the judgment unless it can be said as a matter of law that if a finding had been made it would necessarily have been adverse to the defendant." Chacon v. Austin, 110 Cal. App.2d 145, at page 147, 241 P.2d 1037, at page 1039.

[3] However, in support of the judgment, it can be determined with reasonable certainty that the court made a finding on the material fact here discussed even though it be expressed in a negative sort of way. First, the court finds that appellant agreed to pay the $3,500 commission by the execution of the exchange agreement, which must necessarily mean the completed contract with all conditions performed, if a later finding is considered in connection therewith. This later finding is to the effect that "each and all of the denials and allegations set forth in defendant's Answer to plaintiffs' complaint herein, inconsistent with the Findings of Fact herein, are untrue." The answer, among other things, "denies that the condition in said alleged agreement, 'subject to inspection of books and properties by parties', was ever met." The court, having found this denial to be untrue, by necessary implication, finds the

opposite to be true and that is: the condition in said agreement has been met.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

Hearing denied; CARTER J., not participating.



159 Cal.App.2d 247

Marcia Jeanne ALLEN, a minor, by and through W. C. Allen, her guardian ad litem, Plaintiff and Respondent,

v.

PARADISE GRANGE NO. 490, Inc., a corporation, Defendant and Appellant.

Civ. 9343.

District Court of Appeal, Third District, California.

April 8, 1958.

Rehearing Denied May 2, 1958.

Hearing Denied June 4, 1958.

Action for personal injuries sustained by 10 year old plaintiff when she fell off a porch of defendant's hall which had been leased to a dance group to which plaintiff's parents belonged. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that where club to which plaintiff's parents belonged rented defendant's premises without a porch railing, it did not have any right to complain that there should have been a guard rail on the porch, and plaintiff who had accompanied her parents to the premises was, at most, an invitee, and as such had only the rights which the club or its respective members had in event of injury due to lack of the guard rail, and therefore, landlord, who had leased hall in question for a private rather than a public or semi-public purpose, could not be held liable for its alleged negligence in failing to provide a guard rail.

Judgment reversed with directions.

Landlord and Tenant ⇐167(8)

Where club to which infant plaintiff's parents belonged rented premises without a porch railing, plaintiff who had accompanied her parents to the premises was, at most, an invitee, and as such had only the rights which the club or its respective members had in event of injury due to lack of guard rail, and therefore landlord, who had leased hall in question for a private rather than a public or semi-public purpose, could not be held liable for its alleged negligence in failing to provide a guard rail.

Edward A. Friend, San Francisco, for appellant.

Goldstein, Barceloux & Goldstein, Chico, for respondent.

WARNE, Justice pro tem.

The defendant appeals from a judgment entered against it on a jury verdict in favor of plaintiff, a minor, for personal injuries suffered by said minor and from an order denying defendant's motion for judgment notwithstanding the verdict.

Defendant is the owner of a one-story building which it rents to various organizations for meetings and social gatherings. Plaintiff's parents were members of a dance club, an unincorporated association, called the "Heavenly Steppers", which rented defendant's hall on Wednesday evenings. No admission was charged to the club's meetings, which were attended solely by the members and their guests. The public was not invited. The cost of renting the hall was defrayed by dues paid by the members of the club. The entire premises were turned over to the Heavenly Steppers and a member of the club was given a key to the hall. There was no retention of control and no official representative of defendant was present. The members occasionally brought their children along. On the night of the accident, plaintiff, a ten year old child, had gone to defendant's hall with her parents who were attending the dance. The club had

no organized activities of any kind for the children of the members while attending the dances. At the time arrangements were made for the rental of the hall between the representative of the group and the defendant nothing was said about children and the defendant had no knowledge that any children had ever attended the meetings.

On the night of the accident, plaintiff and several other children were playing a game of "tag" on the front porch of the building while their parents were dancing and while so engaged one of the children bumped or pushed plaintiff and she fell off the porch, so that her knee struck the bumper of a parked automobile, causing substantial injury. The porch had no guard railing of any kind nor did it have a railing at the time the club rented the hall. The porch was three feet off the ground at the site of the accident.

Appellant contends that the rental of the hall was not for a public or semi-public purpose, but was for a limited ascertained group for its own purposes and that under such circumstances defendant is not liable. We feel that there is merit in this contention. The evidence shows that the rental arrangements were informal. There is no written lease and a member of the club was given a key to the building and no representative of defendant was present on the nights that the club used the hall. The Heavenly Steppers was a definite, ascertained, group of limited membership and the dance meetings were held exclusively for the instruction and enjoyment of the members, except that an occasional guest was invited by a member. But the meetings were, as noted, not open to the public nor was the public invited to them. We feel that, under the facts and circumstances, it may not be said that the meetings were either public or semi-public nor that the tenancy was for a public purpose.

What was said in De Motte v. Arkell, 77 Cal.App. 610, 247 P. 254, a case in which it was held that defendant's motion for a nonsuit should have been granted is applicable to the facts of this case. There a member of an unincorporated lodge which leased the second floor of a building owned by the defendant was killed when a defective guard rail on a porch or platform gave way. The court said, 77 Cal.App. at page 619, 247 P. at page 257:

> "* * * The premises were leased to the Odd Fellows' Lodge, of which the deceased was a member, which renders all members of the Odd Fellows' Lodge leasing the premises tenants * * *. The lessee in this case was a private fraternal organization composed of a limited, known, and accepted membership, each one having equal rights and liabilities, and the hall was not a place and was not at the time used as a place for the assembling of the general public. This is not a case of the visiting by a patron of a public amusement place, but is a case of use thereof, which was for the private convenience of the tenants for a limited purpose."

In the instant case the plaintiff stood in no better position than that of any member of the club. Her parents were members of the club and she had accompanied them to the meeting. She, at most, was an invitee and as such she had only the rights which the club or its respective members had in event of any injury from the same cause. The club, having rented the premises without a porch railing, would not have any right to complain that there should have been a guard rail on the porch. De Motte v. Arkell, supra, 77 Cal.App. at page 620, 247 P. at page 258.

In Stanford v. Bailey Incorporated, 132 Cal.App.2d 725, 729–730, 282 P.2d 992, 995, the court said:

> "It is the rule under the general law that a lessor is not liable for injuries to the invitees of a lessee caused by defects in the leased premises. The rule is subject to the exception that if there is some hidden defect in or danger on the premises, which is known to the lessor at the time of executing the lease but which

is not apparent to the prospective lessee, the lessor is obligated to inform the lessee thereof; and failing to do so, the lessor renders himself liable for injuries sustained by the lessee resulting from such hidden defects. And in such case the lessor is liable to invitees of the lessee to the same extent that he would have been had the lessee been injured. Stated differently, the lessor's liability in such a case is no greater to the invitee of the lessee than it would be to the tenant himself. Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 610, 195 P.2d 501."

We feel that the rules of law stated in the above cases are applicable to the facts of this case and that under such rule it was error for the trial court not to grant the motion for judgment notwithstanding the verdict.

King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559, relied upon by respondent, is inapplicable to the facts of this case. That case was distinguished in De Motte v. Arkell, supra, on the ground that the Woman's City Club of Long Beach was separate and apart from its members since it was a corporation, and therefore a legal entity in the eyes of the law. In the case at bar the club was an unincorporated association. The King case may further be distinguished from the De Motte case since it appears that there the club's activities were civic and semi-public in nature. It used the rented premises for such purposes. Each member was entitled to three guest cards per year and non-members were admitted to the club meetings upon the payment of twenty-five cents. Gentlemen were welcome without charge at all regular meetings and, as noted, it was a civic club. The club meetings being open to gentlemen free and to any woman for the price of twenty-five cents would make it at least a semi-public organization.

In the instant case, the public was not invited or admitted nor was there any admission charged. It was strictly a private dance club of ascertained membership and it functioned as such. Since we have concluded that the judgment and the order denying defendant's motion for judgment notwithstanding the verdict must be reversed on the ground that the motion should have been granted, it is not necessary for us to discuss the complaint made by appellant concerning the giving of certain jury instructions nor any other issue presented.

The order denying defendant's motion for judgment notwithstanding the verdict and the judgment are reversed and the trial court is ordered to enter judgment for the defendant with costs.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.



159 Cal.App.2d 171

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wilmont McCord WILLS, Defendant and Appellant.

Cr. 2780.

District Court of Appeal, Third District, California.

April 3, 1958.

Appeal by defendant from adverse judgment of the Superior Court, Butte County, J. F. Good, J. The District Court of Appeal, Peek, J., held that judgment of conviction entered pursuant to plea of guilty made by defendant's attorney and not by defendant himself, was invalid.

Judgment reversed.

Criminal Law ⇐980(1)

Judgment of conviction entered pursuant to plea of guilty made by defend-

ant's attorney and not by defendant himself was invalid. West's Ann.Pen.Code, § 1018.

William P. Smith, Jr., Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

PEEK, Justice.

Since it appears without contradiction that the judgment of conviction from which defendant appeals was entered pursuant to a plea of guilty made by defendant's attorney and not by defendant as required by section 1018 of the Penal Code, it follows that the judgment was invalid and must be reversed. In re Brain, 70 Cal.App. 334, 233 P. 390.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



Joseph STEPHENS, Petitioner,

v.

Thomas A. TOOMEY, as Registrar of Voters of the City and County of San Francisco, State of California, Respondent.*

Civ. 18037.

District Court of Appeal, First District, Division 1, California.

April 1, 1958.

Hearing Granted May 27, 1958.

Proceeding for a writ of mandate to compel the respondent to register the petitioner as an elector. The District Court of Appeal, Peters, P. J., held that one who had been found guilty of robbery in the first degree, a felony, and who was sentenced to prison but the execution of which was suspended and the person placed on probation has not been "convicted" within the constitutional provision that no person convicted of any infamous crime shall ever exercise the privilege of an elector.

Peremptory writ issued.

1. Constitutional Law ⇐32

The constitutional provision that no person convicted of any infamous crime shall exercise the privileges of an elector is self-operating. West's Ann.Const. art. 2, § 1.

2. Elections ⇐90

Once a person has been convicted of an infamous crime he loses his right to vote and the Legislature cannot restore such right to him. West's Ann.Const. art. 2, § 1.

3. Elections ⇐90

All felonies are "infamous crimes" within the constitutional provision that no person convicted of any infamous crime shall exercise the privilege of an elector. West's Ann.Const. art. 2, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Infamous Crimes".

4. Elections ⇐90

One who had been found guilty of robbery in the first degree, a felony, and who was sentenced to prison but the execution of which was suspended and the person placed on probation has not been "convicted" within constitutional provision that no person convicted of any infamous crime shall ever exercise the privilege of an elector. West's Ann.Pen.Code, §§ 1203.1, 1203.4; West's Ann.Const. art. 2, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Convicted".

5. Elections ⇐90

The constitutional provision that no person convicted of any infamous crime shall ever exercise the privilege of an elector means the final "conviction" and when the judgment is subject to being set

* Opinion vacated 338 P.2d 182.

aside it is not final. West's Ann.Pen.Code, § 1203.4; West's Ann.Const. art. 2, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Conviction".

Kenneth C. Zwerin, San Francisco, for petitioner.

Dion R. Holm, City Atty. of the City and County of San Francisco, Lawrence S. Mana, Chief Deputy City Atty., William J. Braun, Deputy City Atty., San Francisco, for respondent.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., amici curiae in support of respondent.

PETERS, Presiding Justice.

[1–3] Petitioner seeks a writ of mandate to compel the respondent, the Registrar of Voters of San Francisco, to register him as an elector. The respondent refused on the sole ground that petitioner had been convicted of an infamous crime and was therefore deprived of the right to vote under Article II, Section 1, of the California Constitution. That section contains the qualifications of electors and also states certain disqualifications. Among other things, it provides that "no person convicted of any infamous crime * * * shall ever exercise the privileges of an elector in this State." This section is, of course, self-operating. Once a person has been "convicted" of an infamous crime he loses the right to vote and the Legislature is powerless to restore such right to him. All felonies are "infamous crimes." Truchon v. Toomey, 116 Cal.App.2d 736, 254 P.2d 638, 36 A.L.R.2d 1230; Matter of the Application of Westenberg, 167 Cal. 309, 139 P. 674. Thus, the question presented is whether petitioner has been "convicted" of a felony within the meaning of that term as used in Article II, Section 1, supra.

The facts are as follows: On August 6, 1954, petitioner was found guilty of robbery in the first degree, a felony. The following judgment was announced:

"It is therefore ordered, adjudged and decreed that the defendant, Joseph Stephens, be punished by imprisonment in the State Prison at San Quentin, California, for the term prescribed by law." Immediately after this pronouncement the court ordered the execution of the sentence suspended upon condition that petitioner remain on probation for a period of five years. The probation thus ordered is still in full force and effect. Petitioner has complied with all terms of the probation. On November 4, 1957, petitioner attempted to register as an elector. The registrar refused to register him for the reason stated. Thus, the precise question is whether or not one who has been found guilty and is sentenced to prison but the execution of the sentence has been suspended and the person placed on probation, has been "convicted" within the meaning of Article II, Section 1, above quoted.

[4] We do not think that this is an open question in this state. It was necessarily decided in favor of petitioner in the case of Truchon v. Toomey, 116 Cal.App.2d 736, 254 P.2d 638, decided by this court in 1953, and in which a hearing by the Supreme Court was denied without a dissenting vote. In that case Truchon pleaded guilty to the charge of assault with intent to commit rape. He was admitted to probation conditioned upon serving 90 days in the county jail. He successfully completed his probation and then, under the provisions of section 1203.4 of the Penal Code, withdrew his plea of guilty and entered a plea of not guilty. The cause was dismissed and the record expunged. He then applied to register to vote and was refused. This court issued a writ of mandate compelling the registrar to accept his registration. The opinion discusses the applicable principles at some length. The precise holding of the case was that admission to probation and the subsequent dismissal of the prosecution under section 1203.4 of the Penal Code was not a "conviction" within the meaning of the con-

stitutional provision under consideration. It is there pointed out that the term "conviction" has several meanings, and must be construed in its context and in the light of the purpose intended. Running through the opinion is the thought that the term as used in Article II, Section 1, means a "final" conviction. For example, the opinion refers to, quotes from, and relies upon In re Riccardi, 182 Cal. 675, 189 P. 694, in which it was held that an attorney could not be disbarred on account of a "conviction" from which an appeal had been taken and which was pending, because "conviction" as used in the statute referring to disbarment required that the "conviction" be final. Finality is the key to the Truchon case. When a person is on probation, the judgment of conviction is not final because it is subject to dismissal under Penal Code section 1203.4. The Truchon case, although involving a situation where the probationary period had been completed, necessarily stands for the proposition that while Truchon was on probation, and satisfactorily complying with its terms, he would have been entitled to vote had he applied for that privilege. This is so because it is the Constitution itself that operates to deny the franchise to those "convicted" of a felony. If Truchon were to be considered so convicted during his period of probation, the Legislature would be without authority, by section 1203.4 of the Penal Code, or by any other statute, to restore the right to vote. The holding that Truchon was entitled to vote after probation had been completed necessarily constituted a holding that those on probation are entitled to vote. This was clearly recognized by the Attorney General and he so argued in his briefs. In disposing of this point, this court stated (116 Cal.App.2d at page 744, 254 P.2d at page 643):

> "The attorney general suggests that our interpretation would result in the situation that a person on probation would continue to be entitled to vote and that neither the People nor the Legislature intended this result. Fundamentally, there does not appear anything wrong in not taking away the franchise of a person on probation who is behaving in such manner that on the termination of his probation by proceedings under section 1203.4 he would be entitled to continue to vote. If he fails to fulfill the terms of his probation it can be revoked and then because of sentence, the Constitutional inhibition would apply."

Thus, the contention that a defendant on probation after being found guilty of a felony cannot vote was passed on in the Truchon case. That case necessarily stands for the proposition that one on probation may vote. (For a discussion of the general problem see notes 27 So.Cal.L.Rev. 327; 22 So.Cal.L.Rev. 476; 2 Stan.L.Rev. 221.)

The Attorney General argues that the instant case differs from the Truchon case in that in the Truchon case no sentence was imposed, the trial court granting probation following the plea of guilty and prior to imposing sentence. This does not clearly appear in the Truchon opinion but it is claimed that the record shows that this was the fact. We will assume that this is so. In the instant case after the verdict of guilty the trial judge pronounced sentence, immediately suspended the execution thereof, and then granted probation. The Attorney General argues that whatever the rule may be where a sentence is not imposed, where it is imposed, although suspended, the person has been "convicted" within the meaning of Article II, Section 1. It is urged that even under the broadest interpretation of "conviction," all that is required is verdict plus judgment, and that once "judgment" is pronounced the constitutional penalty must be imposed.

The Penal Code confers on trial judges the right to grant probation in either of the two ways mentioned, and makes no distinction between the two methods. Section 1203.1 provides that the court "may suspend the imposing, or the execution of the sentence * * * upon such terms and conditions as it shall determine." No statutory criteria is provided for determining

when it is proper to suspend the imposing of sentence and admit to probation, and when it is proper to suspend the execution of the sentence and admit to probation. The determination of what method shall be used is left to the discretion of the trial judge. While there are some differences between the two methods, particularly in the procedure to be followed in case of a violation of probation, it would not seem that a fundamental right such as the right to vote should depend upon the chance of which method is used. Fortunately, such a result is not required.

[5] The argument that, because sentence was here imposed and then suspended, the petitioner was "convicted" and so deprived of the right to vote, completely disregards the basic holding of the Truchon case. That case, as already pointed out, is predicated on the theory that the term "conviction" means final conviction, and that when the judgment is subject to being set aside under section 1203.4 of the Penal Code, it is not final. Of course, that section applies whatever method of probation is adopted by the trial court.

The argument also disregards the obvious and fundamental purpose of Article II, Section 1. Quite clearly the people inserted that provision in the Constitution because it was felt that those "convicted" of a felony constituted a socially undesirable class that should be prohibited from voting. As already pointed out, and as is held in the Truchon case, when probation is granted, a person is not considered to be in that socially undesirable class. In fact, by the granting of probation, whichever method is used, the trial judge has indicated that the person involved is worthy of being given a chance to maintain his place in society. Certainly, Truchon cannot be held to belong to a more socially acceptable class than Stephens simply because in one case probation was granted before sentence and in the other after sentence was imposed. Truchon was required to spend time in the county jail as a condition of his probation, and yet, as already held, he was entitled to vote while on probation. Stephens was not required to serve time in the county jail. From any realistic standard the severe penalty of the deprivation of the right to vote should no more be imposed in one case than in the other. The people in adopting the constitutional provision could not have intended such a result. Obviously, they intended that only those sent to the state prison were to be placed in the excluded class.

Except for the claimed disability it is conceded that petitioner possesses all of the qualifications of an elector. Let a peremptory writ of mandate issue directing the respondent to register petitioner as an elector of the City and County of San Francisco.

BRAY and FRED B. WOOD, JJ., concur.



158 Cal.App.2d 630

In the Matter of the ESTATE OF Edna J. NESBITT, Deceased.

GOOD SHEPHERD FOUNDATION,
Contestant and Appellant,
v.
FIRST WESTERN BANK & TRUST CO.,
Petitioner and Respondent.

Civ. 22654.

District Court of Appeal, Second District, Division 2, California.

March 24, 1958.

Proceeding respecting final accounting and order of distribution of estate of testratrix whose will provided that the executor should pay out of her general estate, all just debts and funeral expenses and all federal and state and inheritance taxes. From a judgment of the Superior Court of Los Angeles County, John Gee Clark, J., charitable beneficiary of will appealed. The District Court of Appeal, Fox, P. J., held that where there was no

residuary estate and funds in estate were inadequate to meet all bequests, general bequest to charitable beneficiary took precedence over provision for payment of inheritance tax of individual beneficiary.

Reversed with directions.

1. Taxation ⇐856
Wills ⇐736

An inheritance tax is upon the right of succession, but this does not prevent a testator from making an appropriate provision in will by which intended bequest passes to beneficiary undiminished by inheritance tax.

2. Wills ⇐811

A general or specific bequest takes priority over any gift to be paid from residuary estate. West's Ann.Prob.Code, § 161.

3. Internal Revenue ⇐1746
Wills ⇐736, 812

Where testatrix by her will bequeathed money to charity and also bequeathed certain personal property to another beneficiary, and provided that the executor, out of her general estate, should pay all just debts and funeral expenses and all federal and state inheritance taxes, but there was no residuary estate and funds in the estate were inadequate to meet all bequests, general bequest to charity took priority over provision for payment of inheritance tax due on bequest to individual who would be required to bear burden of tax just as though provision in will for payment thereof had never existed. West's Ann.Prob.Code, § 161.

Robert Einstein, Los Angeles, for appellant.

Mabel Clausen, Pasadena, for respondent.

FOX, Presiding Justice.

This is an appeal by the contestant from the judgment approving the final accounting and order of distribution in the estate of Edna J. Nesbitt.

It is appellant's position that the executor erred in paying a portion of the inheritance tax out of the decedent's general estate. It contends that such tax should have been paid by the beneficiary.

The testatrix left a will and four codicils. In her will she provided: "I hereby direct my executor * * * to pay, out of my general estate, all my just debts and funeral expenses, and all Federal and State estate and inheritance taxes." By the second codicil testatrix devised to Marguerite Belle Johnson certain real property; by the third codicil she bequeathed $1,000 to the Good Shepherd Foundation, the contestant and appellant herein; by the fourth codicil she bequeathed her household furniture and furnishings to Miss Johnson. The gifts to Miss Johnson were conditioned upon her being continuously in the employ of the testatrix from the date of the two codicils to the death of testatrix. Miss Johnson fulfilled the condition.

The inheritance tax against Miss Johnson's share was $1,397.23. There was only $220.72 left in the estate after the specific devises and bequests and the payment of the expenses of administration. If the estate was to pay the inheritance tax on Miss Johnson's inheritance it needed $1,176.51 additional funds. To meet this need Miss Johnson advanced the estate $1,500. This was $323.49 ($1,500–$1,176.51) more than the amount required to fully pay the inheritance tax. The court found that the sum of $323.49 cash advanced to the estate by Miss Johnson did not constitute an asset of the estate and ordered it returned to her. It is thus apparent that the executor used the balance of the funds on hand in the estate to apply on the inheritance tax on Miss Johnson's inheritance. As a result there was no money left in the estate, hence the Good Shepherd Foundation received nothing. It contends that Miss Johnson should have been required to pay the inheritance tax on her inheritance. On that basis the Foundation would have been entitled to receive the $220.72 remaining in the estate.

[1] An inheritance tax is upon the right of succession. In re Estate of Kennedy, 157 Cal. 517, 523, 108 P. 280, 29 L.R.A.,N.S., 428. "The tax is not one of expenses of administration or a charge upon the general estate of the decedent; it is collectible out of each specific share of interest to which the beneficiary succeeds, and not from the general property of the estate." Cohn v. Cohn, 20 Cal.2d 65, 68, 123 P.2d 833, 834; Kelso v. Sargent, 11 Cal.App.2d 170, 177, 54 P.2d 26. This principle, however, does not prevent a testator from making an appropriate provision in his will by which the intended bequest passes to the beneficiary undiminished by inheritance tax. In re Estate of Irwin, 196 Cal. 366, 237 P. 1074, 1077, relied upon by respondent, illustrates the technique by which this result may be accomplished. See, also, Annotations: 51 A.L.R. 454 and 37 A.L.R.2d 7. In the Irwin case, the fifth paragraph of the will reads:

"5. I give and bequeath to my son-in-law, Charles Templeton Crocker, the sum of one hundred thousand dollars ($100,000) in United States Gold Coin, free and clear of all inheritance taxes, which I direct to be paid from the residue of my estate." In interpreting this paragraph the court stated (196 Cal. at pages 375–376, 237 P. at page 1077):

"In the absence of such a provision as that contained in paragraph 5 of the will that the bequest of $100,000 shall be free and clear of all inheritance taxes and directing the payment of the taxes out of the residue of the estate, it is apparent that the bequest of $100,000 would itself be liable for the payment of the inheritance tax thereon. The actual value of the property therefore transferred to Charles Templeton Crocker by paragraph 5 of the will was not the sum of $100,000 but the sum of $100,000 plus an amount sufficient to permit him to take the $100,000 free from all liability for the inheritance tax * * *. That is to say, the amount bequeathed to him by the will was such an amount as would net $100,000 after the payment of the inheritance tax thereon. In short, by making the payment of the tax payable out of the residue of the estate, the legatee was bequeathed an additional amount sufficient to pay the tax and the tax upon the tax *ad infinitum.*

"The amount which the residuary legatee actually received was the residuum after the payment of the inheritance tax upon the bequest of $100,000."

While the principle in the Irwin case is applicable in theory to the case at bar, it does not, as a practical matter, solve the problem before the court because of the inadequacy of the funds in the estate. It is true that the provision for payment of estate and inheritance taxes constitutes an attempt to give Miss Johnson an additional legacy. However, this additional legacy was to be paid from the "general estate" of the testatrix. By the term "general estate" the testatrix undoubtedly meant the residue of her estate which remained after the devise and the specific and general bequests. Several cases have held that in a will provision directing that estate and inheritance taxes be paid from the "general estate," the term "general estate" meant the residuary estate. (In re Mills' Will, 272 App.Div. 229, 70 N.Y.S.2d 746, 749, affirmed 297 N.Y. 1012, 80 N.E.2d 535; In re Chambers' Estate, Sur., 54 N.Y.S.2d 88, 90; In re Reid's Will, 193 Misc. 154, 79 N.Y.S.2d 248, 250; In re Bayne's Will, Sur., 102 N.Y.S.2d 525, 528; In re Becher's Estate, 204 Misc. 523, 123 N.Y.S.2d 589, 601; In re Whitman's Estate, Sur., 125 N.Y.S.2d 165, 167. The difficulty in the instant case arose because there was no residuary estate; in fact, the funds in the estate were inadequate to meet all the bequests. Since there was no residuary estate out of which the inheritance tax could be paid, the question for determination is whether the provision for the payment of Miss Johnson's inheritance tax takes precedence over the general bequest to appellant.

[2, 3] We have concluded that the bequest to appellant takes priority. "A residuary legacy embraces only that which remains after all the bequests of the will are discharged." Probate Code, sec. 161; In

re Estate of Hall, 183 Cal. 61, 64, 190 P. 364; In re Estate of Marinos, 39 Cal.App.2d 1, 9, 102 P.2d 443. It is obvious from this definition that a general or specific bequest takes priority over any gift to be paid from the residuary estate. This being so, it follows that the general bequest to appellant should have been satisified before resorting to any property in the estate to pay Miss Johnson's inheritance tax. Since only $220.72 remained, this money should have been paid to appellant in partial satisfaction of its $1,000 legacy. There being nothing left in the estate from which the inheritance tax could be paid, it is clear that Miss Johnson must bear the burden of that tax, just as if the provision in the will for payment thereof never existed.

The judgment is reversed with directions to enter a new judgment and order of distribution consistent with the views expressed herein.

HERNDON, J., and KINCAID, J. pro tem., concur.



William A. DRENNAN, Plaintiff and Respondent,

v.

STAR PAVING COMPANY et al., Defendant and Appellant.*

Civ. 5642.

District Court of Appeal, Fourth District, California.

April 3, 1958.

Hearing Granted May 27, 1958.

Action by general contractor against paving company, which allegedly bid to perform paving work on a public works construction job, for damages for refusal to perform paving work. The Superior Court of Kern County, W. L. Bradshaw, J., entered judgment for general contractor and paving company appealed. The District Court of Appeal, Mussell, J., held where paving company knew that general contractor was going to bid on a school construction job on a particular evening and, late in afternoon of that day, paving company, through representative, made a bid for the paving work, and general contractor secured construction job using pavings company's bid, paving company had made a promise which would reasonably induce action or forbearance of a definite and substantial character on part of general contractor and since it did induce such action, paving company was liable to general contractor.

Judgment affirmed.

1. Estoppel ⇐118

In action by general contractor against paving company which allegedly bid to perform asphaltic paving work for a public works construction job, evidence established that paving company made a definite and specific offer or bid to perform asphaltic paving portion of construction job and that in reliance upon bid, general contractor computed his final figures for job specifically naming paving company as subcontractor selected by him to perform asphaltic paving work.

2. Appeal and Error ⇐1010(1)

Findings supported by evidence would not be disturbed on appeal.

3. Estoppel ⇐85

Where paving company knew that general contractor was going to bid on a school construction job on a particular evening, and, late in the afternoon of that day, paving company, through representative, made a bid for paving work, and contractor secured construction job using paving company's bid, but paving company did not perform, paving company had made a promise which would reasonably induce action or forbearance of a definite and substantial character on part of general contractor and, since it did induce such action paving company was liable,

* Opinion vacated 333 P.2d 757.

under doctrine of promissory estoppel, to general contractor for refusal to perform.

Obegi & High, Van Nuys, for appellant.

S. B. Gill, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action for damages alleged to have been caused by the refusal of defendant corporation to perform the asphaltic paving work according to its bid submitted to plaintiff as general contractor. The trial court rendered judgment in favor of plaintiff and against the defendant, Star Paving Company, a corporation, for the sum of $3,817 and costs. The defendant corporation appeals from the judgment, claiming that the evidence was insufficient to sustain the judgment and that the judgment is against the law.

On July 28, 1955, plaintiff William A. Drennan was a licensed general contractor engaged in bidding for a public works construction job known as the "Monte Vista School Job" in the Lancaster school district. The bids of the general contractors for the complete construction job were required by the board of trustees of the school district to be submitted before 8:00 p. m. on July 28, 1955, in the office of the district superintendent of the district. In the afternoon of that day plaintiff's secretary and clerk, Lorraine Johnson, was receiving all subcontractors' bids for the various portions of the school job, recording them in writing on mimeographed forms, and transmitting them to plaintiff, who then posted each sub-bid to his master cost sheet which contained the names and amounts of the bids of all subcontractors bidding on the school job. During the day Mrs. Johnson received approximately seventy-five sub-bids by telephone and recorded them in the manner stated and according to the custom of the business.

Late in the afternoon, between 4:00 and 7:00 o'clock, a telephone conversation was had between Mrs. Johnson and Kenneth R. Hoon, an estimator of bids for the defendant Star Paving Company. Hoon stated his name and 'phone number and stated that he was bidding the paving work on the Monte Vista school, according to the plans and specifications, for $7,131.60, and that he was a representative of the Star Paving Company. Mrs. Johnson asked him to repeat the amount, which he did. Plaintiff listened to this conversation on an extension 'phone and, after receiving the record of it from Mrs. Johnson, he posted the bid to his master cost sheet. Since the bid of the Star Paving Company was the lowest bid received for the asphaltic paving portion of the job, he used it in making his final bid as general contractor and relied on the amount of the bid submitted by Hoon. Plaintiff's bid for the school job was accepted on the night of July 28, 1955. The general contract was awarded to him and thereafter he completed the job.

On the morning of July 29, 1955, plaintiff, while en route to Los Angeles stopped at the office of the defendant company to talk to its representatives and the first person with whom he talked was Mr. Oppenheimer, a construction engineer employed by the defendant company. Plaintiff testified in this connection:

> "I introduced myself and he immediately told me they had made a mistake in their bid to me the night before, they couldn't do it for the price they had bid, and I told him I would expect him to carry through with their original bid because I had used it in compiling my bid and the job was being awarded them. And I would have to go and do the job according to my bid and I would expect them to do the same."

The defendant corporation refused to perform the asphaltic paving work for any sum less than $15,000. Plaintiff then employed the L and H Paving Company to perform said work and was required to pay them the sum of $10,948.60 therefor.

[1, 2] The trial court found, inter alia, that the Star Paving Company, through

its agent K. R. Hoon, made a definite and specific offer or bid to perform the asphaltic paving portion of the Monte Vista job according to the official plans and specifications therefor for the sum of $7,131.60; that in reliance upon defendant corporation's bid, plaintiff computed his final figures for said school job and submitted his bid in writing on the evening of July 28, 1955, specifically naming the defendant corporation as the subcontractor selected by him to perform said asphaltic paving work. These findings are supported by substantial evidence and cannot be here disturbed.

[3] Appellant contends that there never was a firm bid given to plaintiff and that the factual situation raises the same problem the court faced in Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal.App. 2d 226, 296 P.2d 368, namely, did a contract exist? However, in that case the trial court found that no contract existed and there was substantial evidence that the subcontractor stated that he could not give the general contractor an exact quotation or bid; that he told the general contractor that he would give him some kind of an idea to use as a bid on the job and that he did not intend to make a firm bid. In the instant case the evidence supports the trial court's finding that the defendant made a definite and specific bid. The representatives of defendant corporation knew that plaintiff as general contractor was going to bid on the school job on the evening of July 28, 1955, and that plaintiff would rely on the bid of defendant corporation in submitting his final bid to the school authorities.

In Wade v. Markwell & Co., 118 Cal. App.2d 410, 420, 258 P.2d 497, 502, 37 A.L.R.2d 1363, the court said, quoting from Carpy v. Dowdell, 115 Cal. 677, 687, 47 P. 695: "'* * * he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such change of position is sternly forbidden.'" And in Hunter v. Sparling, 87 Cal.App.2d 711, 725, 197 P.2d 807, 816, the doctrine of promissory estoppel is defined as "'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" This doctrine is applicable under the facts and circumstances shown by the record herein.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



159 Cal.App.2d 252

Albert I. SILVER, Plaintiff and Respondent,

v.

SECURITY JEWELRY & LOAN COMPANY, a copartnership, Neil B. Blumenthal, Carole R. Shostak and Harry B. Blumenthal, Defendants and Appellants.

Civ. 17624.

District Court of Appeal, First District, Division 1, California.

April 9, 1958.

Action to recover amount claimed by plaintiff to be due on a contract for sale of his business to defendant. From adverse judgment of the Superior Court, City and County of San Francisco, Edward Moklenbuhr, J., the defendants appealed. The District Court of Appeal, Bray, J., held that where contract to purchase plaintiff's jewelry, loan and pawnbroker business, stated that subject matter being sold was sole possession of and all equities of seller in pledges of said business, save and except those pledges specifically set forth in separate agreement and schedule attached

thereto, and two schedules were made but neither was attached to contract, contract was ambiguous and uncertain permitting admission of parol evidence to explain it.

Judgment affirmed.

1. Evidence ⇐450(8)

Where contract to purchase plaintiff's jewelry, loan and pawnbroker business stated that subject matter being sold was sole possession of and all equities of seller in pledges of said business, save and except those pledges specifically set forth in separate agreement and schedule attached thereto, and two schedules were made but neither was attached to contract, contract was ambiguous and uncertain permitting admission of parol evidence to explain it.

2. Appeal and Error ⇐1011(1)

Where evidence is conflicting, finding of trial court is binding on reviewing court.

3. Appeal and Error ⇐842(1)

Whether contract is ambiguous or uncertain so as to permit extrinsic evidence to show its terms is a question of law for trial court to determine in first instance and its determination is binding on reviewing court, but where contract is ambiguous or uncertain and parol evidence is introduced in aid of interpretation, then question of meaning is one of fact, particularly when evidence on subject is conflicting.

4. Appeal and Error ⇐1011(1)

Where evidence on subject is conflicting, province of reviewing court is merely to determine if there is substantial evidence to support trial court's determination.

5. Evidence ⇐448

If there is any reasonable room for doubt as to what contract means or as to what exact words thereof apply to, parol evidence is admissible.

6. Contracts ⇐169

In discovering elements of intent of parties to contract, trial court may look to circumstances surrounding making of agreement, including object, nature, and subject matter of writing, and preliminary negotiations between parties, and thus place itself in same situation in which parties found themselves at time of contract.

Morris Oppenheim, San Francisco, for appellants.

Truman S. Waterman, Raymond H. Levy, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from a judgment awarding plaintiff $11,270 balance due on a contract of sale.

Question Presented.

[1] Was the contract ambiguous, thereby permitting the admission of parol evidence to explain it?

Evidence.

The controversy is over the question of whether or not one of two separate inventories of pledged goods was included in the contract price of $15,000. On August 9, 1954, plaintiff and defendants Neil Blumenthal and Carole R. Shostak[1] signed a contract under which plaintiff agreed to sell and said defendants agreed to buy plaintiff's jewelry, loan and pawnbroker business "together with all of the fixtures, furniture, furnishings, safes, and all other personal property, apparatus and paraphernalia * * *." As drawn, the contract included "stock in trade of watches and jewelry." Before signing this clause was stricken out. The contract as drawn also stated that being sold was "the sole possession of and all equities of the seller in the pledges of said business." Before signing, however, the following was added after the word "business": "save and except those pledges specifically set forth in

1. The court found that these two defendants were acting for themselves and as trustee for defendant Harry Blumenthal whom it included in the judgment. This finding is not challenged.

separate agreement and schedule attached hereto." The contract further provided that the parties would "jointly take an inventory of all pledges existing and in effect as of August 31." It was agreed that the seller would continue to conduct the business until August 31 when the buyer would take over. Plaintiff executed a bill of sale dated August 31 which included in the property transferred "all equities of the seller in the pledges of said business." This was delivered at the time of the delivery of the three checks hereafter mentioned. The purchase price was $15,000, of which $5,000 was to be paid upon execution of the contract, the balance to be evidenced by a promissory note, payable in monthly installments of $250 commencing October 1. The note was never executed.

No inventory of pledges was attached to the contract. However, on the closing date, August 31, two inventories were prepared. Defendant Neil signed one copy of each and gave them to plaintiff. Plaintiff signed one copy of each, giving them to Neil. One was for pledges made prior to February 24, 1954, totalling $1,051.50. These pledges had expired technically but the interest thereon was being paid and had been pledged by special customers. The inventory stated that receipt of the listed pledges was acknowledged by the buyers and that they agreed to keep these pledges subject to redemption by the pledgors for at least one year. It also acknowledged receipt by the seller of $1,051.50 in consideration of which the seller assigned to buyer all his interest in said pledges or the equities therein. The second inventory was of the other pledges of the business. These totalled $7,055.50 and the inventory contained a receipt of the listed pledges "as per terms of that certain Agreement," the contract above mentioned. It further contained acknowledgment of payment of $7,055.50 "in full for and in consideration of the transfer and sale of all the equities in and to the hereinabove itemized and listed pledges." On the same day as the inventories were signed defendant Neil gave plaintiff three checks, one for $4,500 dated August 30 (admittedly this was the initial payment which the parties had agreed should be less than that provided in the contract), a second, dated August 31, for $7,055.50; on the back was typed "All Equities in pledges"; a third, dated the same day, for $1,051.50; on its back was typed "In full for pledges set forth in separate agreement." January 12, 1955, defendant Neil tendered plaintiff a check for $3,444.50, contending that to be the balance due under the contract and for the pledges listed in the first inventory above mentioned, claiming credit against the $15,000 contract price for the total of the three checks.[2] Plaintiff refused to accept the tender, claiming that the only payment on the contract price was the $4,500 and that the other sums were paid for the pledges which plaintiff claimed were excluded from the contract.

The court found that the contract was ambiguous as to whether or not the understanding of the parties was that the pledges in the second inventory above mentioned were included in the contract price, and permitted oral evidence of the circumstances attendant upon the execution of the contract and the inventories.

[2] Without detailing the evidence, plaintiff's evidence showed that all pledges were left out of the contract and not included in the contract price for the reason that it was not possible at the time of execution of the contract to know the amount of pledges there would be on August 31. A pledgor might redeem any time before the closing date and also plaintiff, as he was continuing the business until that date, might make additional pledge loans. Defendants' evidence was to the effect that only the pledges in the first inventory (pledges made prior to February 24, 1954) were excluded from the contract price, and that all other pledges were to be paid for by the $15,000. This conflict was resolved by the trial court and as the evidence was

2. The excess over $15,000 was for alleged accrued interest.

contradictory we are bound by the court's determination.

[3, 4] Defendants contend that the contract is not ambiguous. Under the law, whether a contract is ambiguous or uncertain so as to permit extrinsic evidence to show its terms is a question of law for the trial court to determine in the first instance. Its determination is not binding on this court. Brant v. California Dairies, Inc., 1935, 4 Cal.2d 128, 133, 48 P.2d 13; Barlow v. Frink, 1915, 171 Cal. 165, 172, 152 P. 290. However, where it is ambiguous or uncertain and parol evidence is introduced in aid of interpretation, then the question of the meaning is one of fact. Particularly is this so when the evidence on the subject is conflicting. Then our province is merely to determine if there is substantial evidence to support the trial court's determination. Gibson v. De La Salle Institute, 1944, 66 Cal.App.2d 609, 621, 152 P.2d 774. We agree with the trial court that the contract is ambiguous and uncertain. It provides that "those pledges specifically set forth in separate agreement and schedule attached hereto" are excepted. What does this mean when two agreements and schedules were made, neither of which was attached to the contract? Defendants concede that the pledges listed in the first schedule are excepted from the agreement. A part of the first schedule is a receipt acknowledging that $1,051.50 was received in full payment of the pledges therein listed, and a part of the second schedule is a receipt for the pledges listed therein "as per terms" of the contract, and for $7,055.50 in full payment for those pledges. Thus, this schedule in effect says that the pledges listed on it are those which are excepted in the contract, and therefore are not to be paid for by the $15,000.

[5, 6] Taking the language of the contract to the effect that there was being sold "the sole possession of and all equities of the seller in the pledges of said business, save and except those pledges specifically set forth in separate agreement and schedule attached hereto," coupled with the fact that two schedules were made, neither attached to the contract, and that attached to the schedules were receipts of $1,051.50 in one, and $7,055.50 in the other in payment for the pledges listed in the particular schedule, it is obvious that there was an uncertainty as to what the agreement meant. As said in Pacific Indemnity Co. v. California Electric Works, 29 Cal. App.2d 260, 273, 84 P.2d 313, 320: "* * * if there is any reasonable room for doubt as to what the contract means or as to what the exact words thereof apply to, then parol evidence is properly admitted." Defendants contend on the one hand that the agreement is clear and unambiguous and on the other hand that the evidence as to what was meant by the insertion of the "save and except" clause was admissible. They then contend that the trial court should have accepted the version given by their attorney who testified as to the circumstances under which the clause was inserted and what it meant, whereas the court accepted the version of plaintiff's attorney as to these. Needless to say, the resolving of this conflict was within the province of the trial court. After determining that the contract was ambiguous the trial court determined the true intent of the parties, using the method laid down in Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665, 671: "As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement [citations], including the object, nature and subject matter of the writing [citations], and the preliminary negotiations between the parties [citations], and thus place itself in the same situation in which the parties found themselves at the time of contracting." See also Berverdor, Inc., v. Salyer Farms, 97 Cal.App.2d 459, 462–463, 218 P.2d 138.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

159 Cal.App.2d 206

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles Fred BRASHER and Raymond Owen Edwards, Defendants,

Raymond Owen Edwards, Appellant.

Cr. 2816.

District Court of Appeal, Third District, California.

April 7, 1958.

Two defendants were convicted of burglary in the second degree and from a judgment of the Superior Court, Stanislaus County, Frank C. Damrell, J., one of the defendants appealed. The District Court of Appeal, Schottky, J., held that evidence including showing that accused was found inside market after closing hours, that door had been forced to gain access, that safe was not locked, that there were indications that someone had attempted to pry open the inner door and that meat was found on floor of meat locker, indicating that someone had moved it, was sufficient to sustain conviction of burglary in the second degree.

Affirmed.

1. Burglary ⇐29

The intent to commit a theft could reasonably be inferred from fact that meat had been moved from its place of storage in market.

2. Burglary ⇐41(1)

Evidence including showing that accused was found inside market after closing hours, that door had been forced to gain access, that safe was not locked, that there were indications that someone had attempted to pry open the inner door and that meat was found on floor of meat locker, indicating that someone had moved it, was sufficient to sustain conviction of burglary in the second degree.

Patrick R. Murphy, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SCHOTTKY, Justice.

Charles Fred Brasher and Raymond Owen Edwards were found guilty by a jury of the crime of burglary in the second degree. Judgment was entered on the verdict and Edwards has appealed from the judgment.

At appellant's request this court appointed Patrick R. Murphy, a member of the Sacramento Bar, to represent appellant upon this appeal. Mr. Murphy has informed this court by letter that after a careful review of the record he has reached the conclusion there is no meritorious ground of appeal and that he will file no brief. He also has informed us that he visited appellant, Edwards, and explained his views to appellant and that appellant has stated to him that he agrees that there is no legal merit to the appeal and that he (appellant) will file no brief in support of his appeal.

We have, however, examined the record and will briefly summarize the evidence. Two law enforcement officers located a 1951 Chevrolet station wagon parked in the rear of Azevedo's Market in the city of Patterson about 2:30 a. m. of June 24, 1957. No one was in the vehicle, but one officer who inspected the vehicle saw ropes, a tool box, and a dolly in it. The officers then proceeded to check the building. One of them found a door with some fresh pry marks near the lock area. By the door were two metal bars which were described as wrecking bars. One of the officers grasped the door knob in order to enter the building, and a knife which had been lodged in the inside of the door fell to the floor and the door was opened. Two other knives were found outside the door. The officers entered the market and found appellant and Charles Brasher standing near the corner of a walk-in ice box with their gloved hands in the air. Appellant, in response to a question, said that he found the door open and walked in. The meat storage compartment was found open and meat was lying on the floor. A sledge

and a hatchet were found underneath a sink in the locker room. A safe which was located in the market was found to have been opened. The door was closed when the safe was observed but the handle was not in the locked position. The inner door of the safe appeared to have been sprung by prying—there were pry marks in the left hand upper corner of the safe. The cash register had also been tampered with.

Mrs. Azevedo testified that she had closed the market about 6:00 p. m. the previous evening. She locked the storerooms, back door and the front door. The back door was locked by wedging three knives in it. She removed the day's receipts from the cash register and placed them in the safe and locked both the inside and outside of the safe. No meat was on the floor of the walk-in box when she locked up the store. She had never seen the tools which were found beneath the sink.

Brasher, Edwards' accomplice, testified that he and Edwards had left San Francisco in Edwards' Chevrolet station wagon about 8:45 p. m. on June 23, 1957. While driving, Edwards said he knew "where we could make some easy money." He later pointed out the market and said the money should be in there. Later they drove behind the market where Edwards got out to go to a restroom, and after five or ten minutes he called Brasher over to the restroom and they then entered the store. Brasher testified that the door was open when they entered. After they were in the store a few minutes Brasher saw the police who entered shortly thereafter.

Edwards claimed that he entered the store, which he thought was a motel office, to obtain a room for the night. There were some cabins in the rear which could be rented. He denied any intent to commit any crime.

[1, 2] It is clear that the jury could infer that an entry had been made in the market for the purpose of committing a larceny, even without the testimony of the accomplice. Edwards was found inside a market after closing hours. There was evidence that a door had been forced to gain access. The safe was not locked and there were indications that someone had attempted to pry open the inner door. Meat was found on the floor of the meat locker, indicating that someone had moved it. The intent to commit a theft could reasonably be inferred from the fact that the meat had been moved from its place of storage. People v. Fitch, 73 Cal.App.2d 825, 167 P.2d 211. Indeed, it could be inferred from the evidence of unlawful and forcible entry alone.

We are satisfied that the appellant received a fair trial, that the jury was fully and correctly instructed, and that the evidence supports the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



159 Cal.App.2d 208

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond Owen EDWARDS, Defendant and Appellant.

Cr. 2820.

District Court of Appeal, Third District, California.

April 7, 1958.

Defendant was convicted of feloniously taking a trailer without consent of the owner and from a judgment of the Superior Court, Stanislaus County, H. L. Chamberlain, J., defendant appealed. The District Court of Appeal, Schottky, J., held, inter alia, that where theory of prosecution was that theft of trailer was part of a larger scheme to burglarize a market and take safe therefrom in event accused could not

open it, and that scheme was interrupted by apprehension of perpetrators in the market, evidence showing commission of burglary of the market including attempted opening of safe and possession of tools, was properly admitted as tending to prove motive for taking of trailer, and that the error in admitting evidence of a prior burglary did not require reversal where evidence was such that the error did not result in a miscarriage of justice.

Affirmed.

1. Criminal Law ⇐371(12)

If proof fairly and logically establishes a motive for crime charged, it is admissible though it also proves another crime by defendant.

2. Criminal Law ⇐371(12)

In prosecution for feloniously taking a trailer without consent of owner, wherein theory of prosecution was that theft of trailer was part of larger scheme to burglarize a market and take safe therefrom in event accused could not open it, and that scheme was interrupted by apprehension of perpetrators in the market, evidence showing commission of burglary of the market including attempted opening of safe and possession of tools, was properly admitted as tending to prove that motive for taking of trailer was its use in transporting safe in event it could not be opened inside the market.

3. Criminal Law ⇐369(2)

In prosecution for feloniously taking a trailer without consent of owner, wherein theory of prosecution was that theft of trailer was part of larger scheme to burglarize a market and take safe therefrom in event accused could not open it, evidence of burglary of the market was relevant as corroborating testimony of possible accomplice in the offense.

4. Criminal Law ⇐511(1)

In corroboration of accomplice's testimony, entire conduct of parties, the relationship, acts, and conduct during and after the crime, may be taken into consideration by jury in determining sufficiency of the corroboration.

5. Criminal Law ⇐374

While evidence of other similar crimes is admissible to show common plan or system of operation, evidence of defendant's guilt of such other crimes must be established by evidence which clearly connects defendant therewith.

6. Criminal Law ⇐369(2)

Defendant cannot be required to defend himself against any other crime than the one with which he is charged, but such rule does not exclude evidence of other crimes when it is relevant to establish defendant's guilt of crime for which he is being tried, notwithstanding fact that it tends to connect defendant with offense not included in the charge.

7. Criminal Law ⇐374

Evidence of other crimes should not be received unless defendant is clearly connected therewith.

8. Larceny ⇐64(1)

Possession of stolen goods is not of itself sufficient to justify conviction of larceny, although it is a circumstance to be considered in connection with other proven facts.

9. Criminal Law ⇐371(12), 372(5)

In prosecution for feloniously taking a trailer without consent of owner, wherein theory of prosecution was that theft of trailer was part of larger scheme to burglarize a market and take safe therefrom in event accused could not open it, evidence that accused's trailer had been found in another municipality with a safe in it on certain date following a burglary and prior to date of alleged crime charged, for purpose of showing a common scheme and plan and motives was inadmissible and error in admitting it was accentuated by instruction that evidence tending to show commission of other crimes was received for limited purpose of indicating whether defendant was innocent or guilty of crime charged.

10. Criminal Law ⇐1186(4)

Under constitutional provision providing for reversal where error results in "miscarriage of justice," "miscarriage of justice" should be declared only when the court, after examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appealing party would have been reached in absence of the error. West's Ann.Const. art. 6, § 4½.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

11. Criminal Law ⇐1186(4)

In prosecution for feloniously taking a trailer without consent of owner, wherein theory of prosecution was that theft of trailer was part of larger scheme to burglarize a market and take safe therefrom in event accused could not open it, error in admission of evidence of a prior burglary wherein accused's trailer with a safe in it had been found, did not require reversal of judgment of conviction where evidence properly introduced was such that the error in admission of the evidence did not result in miscarriage of justice. West's Ann. Const. art. 6, § 4½.

Patrick R. Murphy, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SCHOTTKY, Justice.

Raymond Owen Edwards was found guilty by a jury of violating section 503 of the Vehicle Code. The information charged him with feloniously driving and taking a trailer belonging to Town and Country Rentals without the consent of the owner. He has appealed from the judgment entered upon the verdict.

Appellant does not question the sufficiency of the evidence to support the judgment, but urges as grounds for reversal that the court committed prejudicial error in the admission of certain testimony and that the District Attorney was guilty of prejudicial misconduct. Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

The evidence produced at the trial disclosed that a Selma trailer, the property of Town and Country Rentals, disappeared from King's Service Station, the Modesto agent of the trailer company, between the evening of June 23, 1957, and the morning of June 24, 1957. No one at the service station authorized anyone to take the trailer; no rental contract was made.

Appellant and one Charles Fred Brasher drove to Modesto late in the evening of June 23, 1957, in appellant's 1950 Chevrolet station wagon, arriving there about midnight. In passing through Patterson, a nearby town to Modesto, the appellant pointed out the Azevedo Market as a place where they could get easy money. In Modesto they stopped in front of a bar which Brasher entered to go to a restroom. When Brasher returned a few minutes later there was, for the first time that evening, a trailer attached to the automobile. The trailer was identified as the one which disappeared from the service station. The two men then drove to Patterson, detached the trailer from the station wagon, drove for a while and then drove behind the Azevedo Market and entered the market where they were apprehended. Brasher testified that the trailer was to be used to haul groceries or a safe.

Various tools, including crowbars, a sledge hammer and a hatchet, were found in the market by the officers. None of these tools belong to the owners of the store or were in the store when it closed the day before. The crowbars had previously been in appellant's station wagon. A dolly, some blankets, webbing and a large amount of rope, and a bolt cutter were found in the rear of appellant's station wagon. Appellant admitted that these tools belonged to him.

A member of the Patterson Police Department testified that about 1:30 a. m. he noticed a Chevrolet station wagon in which

two men were riding, one of whom was wearing a cowboy hat (Brasher was wearing such a hat), and that the station wagon had a Town and Country trailer attached. Later, the trailer was found parked about one-half mile from the market. A tire imprint 2½ feet from the trailer matched the tread of the left rear tire of the Chevrolet station wagon. Appellant admitted that the station wagon was his automobile.

Appellant testified on his own behalf. On direct examination he denied taking the trailer and denied ever having it attached to his car. In rebuttal the district attorney was allowed to prove various details of the burglary of the market in Patterson and a burglary which had occurred on May 14, 1957, in Modesto. In the Modesto burglary a safe was found in a trailer which belonged to appellant, in the rear of the burglarized establishment.

Appellant's first contention is that the court erred in admitting testimony of the details of the burglary in the market at Patterson on June 24, 1957. The evidence of the burglary in Patterson came in by way of rebuttal. On direct examination appellant denied that he ever had the trailer attached to his car, testified that he never saw it before, and that his car was in Patterson and Modesto the evening in question. On cross-examination he testified that he was in Modesto about 12:45 a. m. for the purpose of getting a job in the fields; that he had to return to San Francisco about 8:00 a. m.; that he went to Patterson to seek a location for a flower shop. The district attorney then asked the following questions, among others:

"Isn't it true you went to Patterson to more or less look over the Azevedo Market for the purpose of burglarizing it?

"In fact, you were found inside the market, weren't you?

"What were you doing inside the grocery store?

"Did you attempt to open the safe?

"Was it your intention to remove the safe if you could not open it?

"You are certain you didn't intend to use this trailer, you and Mr. Brasher, to haul away the safe out of Azevedo's Market?

Appellant's objections to these questions were overruled, and appellant denied any intent or attempt to burglarize the Azevedo Market, and stated that he entered it thinking that it was a motel. The prosecution then was permitted, over the objection of appellant, to introduce evidence of the details of the burglary of the market.

Appellant contends that all of the evidence relating to the burglary of the Azevedo Market in Patterson was inadmissible and highly prejudicial and was introduced solely to show appellant's criminal inclination and to prejudice and inflame the jury against him.

Appellant cites from 18 Cal.Jur.2d, page 583, as follows:

"Subject to certain exceptions, evidence of the commission of other independent offenses by the accused, having no tendency to prove a material fact in connection with the particular crime charged, cannot be given by the prosecution, unless it is a part of the res gestae."

Appellant argues that there is no direct relationship in the instant case between the commission of a burglary and the theft of a motor vehicle, the crime with which appellant was charged.

Respondent in reply contends that evidence of the Patterson burglary was admissible as part of the res gestae and to show motive and establish intent. Respondent states that it was the theory of the prosecution that the theft of the trailer, the crime with which the appellant is charged, was part of a larger scheme to burglarize the Azevedo Market and take the safe from the premises in the event the appellant could not open it; that the scheme was interrupted by the apprehension of the perpetrators in the market so that

the taking and use of the stolen vehicle was never completed; and that since the res gestae of the theft of the trailer included breaking into the market, the attempted taking of the safe and the intent to load the safe on the trailer, the proof of these acts became relevant to the principal offense.

[1, 2] We think that there was no error in the admission of evidence showing the commission of the burglary of the Azevedo Market on June 24, 1957. It is well settled that if the proof fairly and logically establishes a motive for the crime charged, it is admissible though it also proves another crime by the defendant. People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. O'Brand, 92 Cal.App.2d 752, 207 P.2d 1083. The jury was properly instructed that this was one of the purposes for which they could consider the evidence. It is apparent that the evidence showing the breaking and entering of the market, the attempted opening of the safe and the possession of tools such as a bolt cutter, dolly, webbing and rope tended to prove that the motive for the taking of the trailer was its use in transporting the safe in the event it could not be opened inside the market. Since the evidence was relevant and therefore admissible, the trial judge properly overruled the objection of counsel.

[3, 4] The evidence of the burglary on June 24, 1957, was also relevant as corroborating the testimony of Brasher, a possible accomplice in the offense. The jury was correctly instructed as to the definition of an accomplice and the need of corroborating such testimony by other evidence as shall tend to connect the defendant with the commission of the offense. In corroboration of such testimony the entire conduct of the parties, their relationship, acts, and conduct during and after the crime, may be taken into consideration by the jury in determining the sufficiency of the corroboration. People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519.

Appellant next contends that the court committed prejudicial error in admitting over appellant's objection evidence of the crime of burglary committed in the city of Modesto, at the Modesto Livestock Company, on May 14, 1957, with the use of appellant's trailer.

At the trial, in rebuttal, Mr. Jack Avila testified that he had gone to the Modesto Livestock Company on old Crows landing Highway at 5:00 a. m. on May 14, 1957, and observed two men loading something on a trailer; that the car pulling the trailer was a "Chevvie" or Ford station wagon and was a light color; that after going to the office behind the sales yard he returned and saw the trailer, but the station wagon was gone; that there was a safe in the trailer.

Edward Bates, a criminal investigator for the county of Stanislaus, testified that he investigated a burglary early in the morning of May 14, 1957, at the Modesto Livestock Auction Yard and that a safe was found in the trailer identified in the testimony of Jack Avila. Appellant Edwards admitted that the trailer found in the yard of the Modesto Livestock Company on May 14, 1957, was his trailer. An investigation made by the sheriff's office of the county of Stanislaus showed that the trailer belonged to Edwards.

There was no evidence that appellant was in Modesto on May 14, 1957, and the only evidence tending to connect appellant with that burglary was evidence that appellant's trailer was found with the safe in it. The appellant on cross-examination testified that his trailer had been stolen from his home in San Francisco, and denied any connection with the Modesto burglary. It does not appear that appellant was ever charged with the May 14th burglary.

Respondent argues that evidence of the May 14th Modesto burglary was properly admissible to show "the identity in this very trial before the court, to show the modus operandi, to show a common scheme and plan." Respondent points out that the jury was instructed that evidence of such other offenses was not offered to prove distinct offenses or continual criminality

and that they could only consider such evidence for the purpose of showing "First, the identity of the person who committed the alleged crime in question in this case, if it was committed; or, second, that the defendant had a motive for the commission of the offense charged against him in this action; or, third, that there existed in the mind of the defendant, a plan, scheme, system or design, into which fitted the commission of the offense for which he is now on trial."

[5–7] While it is true that evidence of other similar crimes is admissible to show a common plan or system of operation, it is also true that the evidence of defendant's guilt of such other crimes must be established by evidence which clearly connects defendant therewith. It is of course fundamental that a defendant in a criminal case cannot be required to defend himself against any other crime than the one with which he is charged. This rule does not exclude evidence of other crimes when it is relevant to establish a defendant's guilt of the crime for which he is being tried, notwithstanding the fact that it tends to connect the accused with an offense not included in the charge. Likewise, if the proof fairly and logically establishes a motive for the crime charged, it is admissible even though it proves another crime by defendant. People v. Peete, supra; People v. O'Brand, supra. But evidence of such other crimes should not be received unless the defendant is clearly connected therewith.

[8] Respondent apparently recognizes this, for throughout its argument respondent makes such statements as: "The evidence that appellant committed the May 14th burglary tended to show that there existed in the mind of the appellant a plan, scheme or design, into which fitted the commission of the offense for which he was on trial." "From the facts connecting the appellant with the events occurring on May 14th, it could be inferred * * *." "The fact that the appellant had used a trailer on May 14th to attempt to haul away a safe in the burglary of an establishment in the Modesto area again tended to show the motive for the theft of the trailer on June 24th." However, the weakness of respondent's position is that merely because the safe was found in a trailer belonging to appellant it cannot be assumed, as respondent assumes, that it has been established that appellant committed the Modesto burglary of May 14, 1957. The well established rule is that possession of stolen goods is not of itself sufficient to justify a conviction of larceny, although it is a circumstance to be considered in connection with other proven facts.

[9] We believe that the evidence of the Modesto burglary should not have been admitted. This error was accentuated by the following instruction given by the court:

> "Evidence was offered in this case tending to show that the defendant committed other crimes than the one of which he is accused and for which he is on trial in this action.
>
> "Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for the bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in this action in the information."

[10] Having concluded that it was error to admit the evidence of the Modesto burglary we must next determine whether such error requires a reversal of the judgment. By the mandate of section 4½ of Article VI of the Constitution of California we may not reverse a judgment "on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." As stated

in People v. Watson, 46 Cal.2d 818, at page 836, 299 P.2d 243, at page 254:

"Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

[11] We have carefully examined the entire record and are satisfied that the evidence properly introduced was of such strength that the hereinbefore mentioned error in the admission of evidence did not result in a miscarriage of justice. Under such circumstances we would not be justified in reversing the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



158 Cal.App.2d 19

ESTATE of Mary ROHDE, Deceased.
Nellie Fust RUCKES, Contestant and Respondent,
v.
Howard MAGEE, as Executor and Legatee, Respondent and Appellant.
No. 17548.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1958.

Hearing Denied April 23, 1958.

Proceedings to set aside probate of will in which beneficiary was testatrix's attorney. The Superior Court, City & County of San Francisco, Edward Molkenbuhr, J., entered judgment revoking probate on ground of undue influence and proponent appealed. The District Court of Appeal, McMurray, J. pro tem., held that where trial judge searched for credible evidence and sufficient credible evidence to sustain verdict and where he considered proper weight to be accorded evidence, mere fact that trial judge expressed his dissatisfaction with rule that presumptions continue as evidence throughout case in California did not justify grant of new trial on theory that trial judge did not consider evidence which was introduced to overcome presumption of undue influence which arose from attorney-client relationship.

Affirmed.

1. New Trial ⇐72

The trial judge should not disregard a verdict or determine what result he would have reached if case had been tried before him, without a jury; instead, he should consider proper weight to be accorded to evidence and then decide whether there is sufficient credible evidence to support verdict in determining motion for new trial.

2. Evidence ⇐87

In California, a presumption is evidence to be weighed against adverse evidence.

3. New Trial ⇐157

Where trial judge searched for credible evidence and sufficient credible evidence to sustain verdict and where he considered proper weight to be accorded evidence, mere fact that trial judge expressed his dissatisfaction with rule that presumptions continue as evidence throughout case did not mean that trial judge did not perform his duty or did not consider evidence which was introduced to overcome presumption of undue influence which arose from an attorney-client relationship in denying motion for new trial.

4. Appeal and Error ⇐717

The opinion of the trial court, while of great assistance to an appellate court,

is no part of record and decrees and orders are matters for consideration by an appellate court, not reasons for judicial decision.

5. Trial ⇐296(2)

In proceedings to set aside probate of will, where there was some direct evidence concerning undue influence, error in instruction to effect that direct evidence as to undue influence is rarely obtainable and hence jury must determine issue of undue influence by inferences drawn from all facts and circumstances was not prejudicial in view of further instructions.

6. Trial ⇐235(4)

In proceedings to set aside probate of will in which attorney was beneficiary, instruction to effect that jury could consider both direct and circumstantial evidence and that both were admissible and any fact in the case could be proved by either direct or circumstantial evidence or both was proper.

7. Trial ⇐252(18), 296(2)

In proceedings to set aside probate of a will, where there was no evidence of fraud, instruction to effect that although undue influence and fraud are not the same thing and one may exist without the other, yet undue influence may be exerted by means of fraud, was error; however in view of numerous instructions which were correctly given regarding jury's duty and law in case, error was not prejudicial.

8. Wills ⇐155(4)

Although kindness and attention alone would not constitute undue influence, they might, when combined with other factors, amount to such influence.

9. Trial ⇐260(5)

In proceedings to set aside probate of a will, failure to give requested instruction to effect that any degree of influence resulting from kindness and attention to testatrix could not constitute undue influence, did not amount to reversible error, where there were many and adequate instructions given on subject of undue influence and it was properly defined for jury.

Charles Reagh and Bert W. Hirschberg, San Francisco, for appellant.

Jacobsen & Tobin, San Francisco, for respondent.

McMURRAY, Justice pro tem.

The will of Mary Rohde was admitted to probate after her death in November, 1952; within the six months' period allowed for contest, the respondent instituted proceedings to set aside the will. The trial resulted in a jury verdict in favor of the contestant, based on two grounds:

(1) That the testatrix was mentally incompetent, and

(2) That the will was the product of undue influence.

A motion for judgment notwithstanding the verdict was denied as to undue influence. The trial judge, however, held that the evidence as to mental incompetency was insufficient to support the verdict. A motion for a new trial was denied. This appeal is from the judgment revoking probate of the will.

Mary Rohde was 82 years old on October 16, 1951, when she executed the will, which is here concerned. She had no children, no relatives in the United States, and her husband had predeceased her by two years. There is much testimony in the record as to Mrs. Rohde's mental condition. This, however, is not involved in this appeal, and will not be here considered.

Several days before making the will, Mrs. Rohde called a friend and told her that she had made an appointment by phone with Mr. Magee. The friend had never before met Mr. Magee. Mrs. Rohde asked this friend to take her to Mr. Magee's office; this the friend did and upon arriving there Mrs. Rohde recognized Mr. Magee and introduced him to her friend. Mr. Magee then took Mrs. Rohde into his private office.

There is conflict in the testimony as to the purpose of Mrs. Rohde's visit at this time. Some of contestant's witnesses claim she went to the office for the purpose of obtaining legal assistance in cancelling the

sale of her home. Mr. Magee stated that he knew nothing about the proposed sale of the home on the day the decedent visited his office. The real estate salesman, who had negotiated the sale, testified that Mr. Magee had telephoned him the morning the will was made, and stated that Mrs. Rohde was in his office, and that he read portions of the sale agreement to the real estate salesman. The salesman further testified that Mr. Magee told him that Mrs. Rohde came down to consult him about the selling of the property. Mr. Magee testified that Mrs. Rohde came to his office to prepare her will. After Mrs. Rohde went into Mr. Magee's office, his secretary came out to the car to see the friend, who had driven her down there, and stated that Mr. Magee wished to see her. Mr. Magee met her in an outer office, and told her that Mrs. Rohde was making a will, and decided to include her as a beneficiary, and he wished to get the proper spelling of her name.

Mrs. Rohde was alone with Mr. Magee for approximately fifteen minutes, according to the testimony of the proponent of the will. During that time the will was discussed and notes were taken, from which the will was prepared by Mr. Magee's secretary. The secretary was given these notes and proceeded to type a short will. It was estimated that this took from ten to twenty minutes. During that time Mrs. Rohde was alone with Mr. Magee. After the will was typed, Mr. Magee went next door to Mr. Devlin's office (Mr. Devlin is an attorney with offices located next to Mr. Magee's) and Mr. Devlin was asked to witness the will, but when told that Magee was the chief beneficiary requested that he be left alone in the office with Mrs. Rohde.

Mr. Devlin had never met Mrs. Rohde before this time. Mr. Magee told him that the will had been prepared in accordance with Mrs. Rohde's wishes. After Mr. Magee had left the room at Devlin's request, Devlin read the will word for word to Mrs. Rohde, asking her at the end of each clause if that was her will. To each clause she answered affirmatively that it was her will. Thereafter, Mr. Devlin called Mr. Magee back into the private office, and he and Mr. Magee's secretary attested the document. Mr. Magee was not present when it was executed. Thereafter, Mr. Devlin went back to his office, obtained two paper backs for the wills, and affixed them to the will. The will, therefore, appears to have been prepared by Mr. Devlin at his address, rather than by Mr. Magee at his address next door.

When Mrs. Rohde left Mr. Magee's office, he helped her into the automobile, in which her friend was, and handed the friend a five-dollar bill, remarking, "Mrs. Rohde wants you to have this $5." From this friend's testimony it appears that the entire transaction at Mr. Magee's office did not take more than an hour and possibly even less time. Mr. Magee's secretary, who was an attesting witness to the will, testified that she typed the will from a work sheet given her by Mr. Magee, that she had typed many wills during the ten years she had worked for Mr. Magee and knew how to type them from notes. The residuary clause of the will reads, "my good friend and attorney, Howard Magee." The secretary stated this wording was not on the work sheet given her by Mr. Magee, that she was not sure whether he had verbally told her to word it in that manner or whether she did so automatically. The secretary testified that after she witnessed the will she did not see Mrs. Rohde again except when she passed through the reception room on her way out.

Mr. Magee, the executor and chief beneficiary of this will, had never visited Mrs. Rohde at her house prior to October 16, 1951, the date of the making of the will, but had seen her at meetings of the Nelson A. Miles Auxiliary, U.S.W.V., where his mother and Mrs. Rohde were members.

Before drawing the will, Mr. Magee had acted as Mrs. Rohde's attorney on one prior occasion. After the death of her husband, Mrs. Rohde consulted him for assistance in filling out a claim form to receive a pension, as the widow of a

Spanish-American War veteran. This was in April of 1949. Upon the death of her husband, she did not seek Mr. Magee's assistance in the transfer of bank accounts, the recording of the deed on the home or any other matters. The will made no mention of the contestant, who was the niece of Mrs. Rohde's predeceased husband, nor did the will make any mention of her closest friends.

The trial judge filed a memorandum opinion, denying the motion for new trial, which reads as follows: "Memo on Order Denying New Trial.

[1] "It is my opinion that a trial Judge should not disregard a verdict or determine what result he would have reached if the case had been tried before him, without a jury; instead, he should consider the proper weight to be accorded to the evidence and then decide whether there is sufficient credible evidence to support it.

"In this case we have the presumption, which is evidence, running through the entire case; it is substantial and credible and cannot be disbelieved (if such an act is possible). This shows the effect of the irrational rule in California that a presumption is evidence and is not dispelled by rebutting evidence. How then could I conscientiously say, if I were to grant a new trial on the ground of insufficient evidence, that there was insufficient credible evidence to sustain the verdict of the jury? A trial Judge does not act as a thirteenth juror. It is the duty of the trial Judge to see that the jury intelligently and justly performs its duty and in the exercise of proper legal discretion to determine whether there is sufficient credible evidence to sustain the verdict.

"Motion for new trial is hereby denied."

[2, 3] The appellant argues that by the language of this memorandum it appears affirmatively that the trial judge did not properly perform his duty, since from the language it appears that the court did not consider the evidence which was introduced to overcome the presumption of undue influence, which arose from the attorney-client relationship here involved. The first paragraph of the memorandum of opinion is certainly a proper statement of the trial judge's duty in passing upon a motion for a new trial. It is in the second paragraph, where he expresses some displeasure with the California rule regarding presumptions, which gives rise to the question of his performance of his duties. However, despite the fact that the trial judge expressed dissatisfaction with the California rule, it does not appear that he did not properly perform his duty. There is no affirmative showing that he did not weigh the evidence contrary to the presumption and find that the presumption was the better evidence. His expression of dissatisfaction may well be taken to be more academic and philosophical than actual. Furthermore, the language relative to the duty of the trial judge, "to see that the jury intelligently and justly performs its duty * * *," shows that the trial judge did in fact consider the justice of the verdict and properly so. In the case of People v. Robarge, 41 Cal.2d 628, 634, 262 P.2d 14, 17, it appears affirmatively that the trial judge did not perform his duty, as he stated: "* * * that it was mindful of 'the rule that the jury are the sole judges of the credibility of the witness. It adheres to that rule to the extent that even though the Court disbelieves what the witnesses may have said, if there is sufficient evidence upon which the jury may base their decision, even though the Court sits as a thirteenth juror, it is not in a position to upset the verdict of the jury.'" There is no such affirmative showing in the language used here. It should not be assumed that a trial judge, who shows the awareness of his duties evidenced by the memorandum here written, which in fact contains verbatim many of the phrases contained in People v. Robarge, supra, would be so well acquainted with his duty and then ignore that duty. The passage in the memorandum opinion here under consideration relative to the rule on presumptions as continuing evidence throughout the case is no doubt a reference to the rule in California that a pre-

sumption is evidence to be weighed against adverse evidence. The trial judge's dissatisfaction with this rule is not unique. It has been expressed many places. However it is the law of this state, and when it is considered that this same trial judge fully and correctly instructed the jury as to the role of presumptions in relation to other evidence in California, it should not be assumed that, upon the motion for a new trial, he neglected to apply these same rules.

[4] It has often been said that the opinion of the trial court, while of great assistance to an appellate court, is really no part of a record and that the decrees and orders are the matters for consideration by an appellate court, not the reasons for the judicial decision. In re Estate of Finkler, 7 Cal.2d 97, 103, 59 P.2d 801; Broadfoot v. Leather Supply Co., 69 Cal.App.2d 729, 735, 160 P.2d 59; Fechtner v. Costa, 16 Cal. App.2d 691, 697, 61 P.2d 473. Appellant urges strongly that the trial judge's memorandum shows conclusively that he merely looked to see if there was any evidence to support the jury's finding. A reading of that opinion shows by its very language that the trial judge searched for credible evidence and sufficient credible evidence to sustain the verdict, and that he considered the proper weight to be accorded to the evidence. He nowhere says that he did not consider appellant's evidence.

[5, 6] The appellant urges that the trial court committed error in giving and refusing certain instructions.

The jury was correctly instructed that it could consider both direct and circumstantial evidence and that both are admissible and any fact in the case may be proven by either direct or circumstantial evidence or both. Appellant argues that they were then incorrectly told as follows: "You are instructed that direct evidence as to undue influence is rarely obtainable and hence you *must* determine the issue of undue influence by inferences drawn from all the facts and circumstances. Circumstantial evidence may be sufficient to support a finding of undue influence. Taken singly the facts or circumstances may be of little weight, but taken collectively they acquire their proper weight." [Italics added.] Appellant argues that this instruction told the jury to disregard certain direct testimony, that of Mr. Devlin, where he testified that he went over Mrs. Rohde's will with her phrase by phrase, asking her if those were her wishes and that she had replied affirmatively as to each phrase. Assuredly, this first instruction complained of by using the word "must," which is here emphasized in the first quoted instruction, was an incorrect statement of the law in conjunction with the evidence before the jury in this case. However, by reading the very numerous instructions, which were given to the jury, it becomes evident that by placing undue emphasis on this one word an incorrect interpretation of the instructions as a whole would result. The jury was also instructed: "You are instructed that the presumption of undue influence may be explained and rebutted by testimony of persons present at the time the instrument was executed, by proof that the testatrix gave instructions for the preparation of the instrument, and by evidence that the testatrix subsequently affirmed or expressed approval of its provisions. Whether it has been rebutted is a question of fact for you as jurors to determine." The proper approach in viewing such an inconsistency between instructions is stated in Soda v. Marriott, 118 Cal.App. 635, at pages 642–643, 5 P.2d 675, at page 678, where, it is stated: "It is true that some of the incorrect principles announced in the foregoing challenged instructions were elsewhere correctly stated to the jury in other instructions which were given. It is also true that the instructions which were given must be construed as a whole, in determining whether they contain reversible error. If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury

materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury." The instruction complained of is general in nature. Another general instruction told the jury they could consider both direct and circumstantial evidence on all issues involved and a specific instruction, in effect, told them they could consider the testimony of Mr. Devlin. The error in the instruction relative to the circumstantial evidence was not prejudicial in view of the other instructions here given.

[7] The second instruction complained of is as follows: "You are instructed that although undue influence and fraud are not the same thing, and one may exist without the other, yet *undue influence may be exerted by means of fraud.* Confidence or influence may be used to obtain an unfair advantage over another party in a variety of ways." [Italics added.] Appellants argue that this instruction is error, in that there was no evidence of the existence of fraud and that by the mention of fraud the jury was lead to believe that the judge believed that fraud might have entered into the case. This instruction was under the facts of this case error. However, the passage heretofore quoted from in Soda v. Marriott, supra, 118 Cal.App. 635, 5 P.2d 675, would again seem to be controlling, and in view of the numerous instructions regarding the jury's duty and the law in the case, which were correctly given, it does not appear to have been prejudicial particularly when it is remembered that no evidence of fraud appears in the record. As is said in Erickson v. Water Land Truck Lines, 119 Cal.App.2d 210, 212, 259 P.2d 484, 486, "It would credit jurors with less than average understanding to assume that they were confused or misled by the challenged instruction. The instructions as a whole were clear, correct and comprehensive, although it is true that some part of the particular instruction might have been modified.

" 'It is elementary that a judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context, when such charge in its entirety fairly and correctly states the law.' "

[8, 9] The trial court also refused to give a requested instruction, which was submitted by appellant, which read as follows: "Any decree of influence resulting from kindness and attention to the testatrix can never constitute undue influence within the meaning of the law. Mere acts of kindness and solicitude performed with honest motives without regard for monetary gain should not be regarded by you as undue influence." The instruction might well have been given, but would have required modification, since the first sentence of the requested instruction is not a true statement of the law as it is too broad, since although kindness and attention alone would not constitute undue influence, they might, when combined with other factors, amount to such influence. There were many and adequate instructions given on the subject of undue influence, and it was properly defined for the jury. The fact that they were not given the requested instruction would not, in our opinion, amount to reversible error when the facts of this case are considered.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

159 Cal.App.2d 281

BETA SIGMA TAU, Plaintiff and Respondent,

v.

SHRINE CIVIC AUDITORIUM, Defendant and Appellant.

Civ. 22864.

District Court of Appeal, Second District, Division 1, California.

April 9, 1958.

Rehearing Denied April 30, 1958.

Action to recover for breach of a contract. Judgment for plaintiff by the Superior Court of Los Angeles County, Stanley Mosk, J., and the defendant appealed. The District Court of Appeal, White, P. J., held that where in conversations allegedly constituting an oral agreement for lease of an auditorium, it was understood that it was necessary to sign a written lease, and at the same time to pay $200 to apply on the rental and it did not appear that lessee ever agreed to pay the balance at any certain time or at all and no consideration passed from the lessee to the lessor, no valid agreeement was entered into.

Judgment reversed.

1. Contracts ⇐32

Where the parties have agreed upon all essential facts, there is a binding contract notwithstanding that a more formal contract is to be prepared and signed later.

2. Landlord and Tenant ⇐22(1)

Where in conversations allegedly constituting an oral agreement for lease of an auditorium, it was understood that it was necessary to sign a written lease and at same time to pay $200 to apply on rental and it did not appear that lessee ever agreed to pay balance at any certain time or at all, and no consideration passed from lessee to lessor, no valid agreement was entered into and alleged lessor was not liable for losses sustained by alleged lessee. West's Ann.Civ.Code, §§ 1586, 1622.

3. Appeal and Error ⇐1010(1)
Contracts ⇐14

Whether an oral contract is made depends upon intention of the parties and is determined by the surrounding circumstances and is a question to be determined by the trial court and if there is any substantial evidence in support of its decision an appellate court cannot reweigh the evidence.

A. G. Ritter, Los Angeles, for appellant.

Herbert W. Simmons, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant Shrine Civic Auditorium appeals from the judgment in favor of the plaintiff, Beta Sigma Tau, a college fraternity and non-profit corporation, for $2,695 and costs, in plaintiff's action for damages for breach of contract.

Appellant urges that the judgment should be reversed for the following reasons: (1) that there is no evidence to sustain the finding that a contract was made; (2) that there is no evidence of any breach of contract by defendant; and (3) that there is no evidence to sustain the finding that plaintiff was damaged by any act of defendant.

The following is a fair summary of the evidence tending to support the finding that a contract was made. We have ignored all denials and conflicts, as we must.

Benjamin W. Alston, a student at the University of California at Los Angeles, was on July 15, 1954, the president of the undergraduate chapter and chairman of the board of directors of the plaintiff. He was authorized by plaintiff to secure the rental of an auditorium in which to stage a jazz concert for the benefit of the "Mark Rashmir" fund. On or about July 15, 1954, he called the Shrine Auditorium on the telephone and talked with someone who said he was Mr. McMeekin, the manager. He requested and received information as to the availability of the auditorium for certain tentative dates and asked Mr. McMeekin if he would "place a hold on his books for the date of August 20th". Mr. McMeekin "said that this could be done" and for the witness to come in and talk to

him about it as soon as he had his arrangements made. "At the first contact", he "did not enter into a complete arrangement with them"; he "entered into a tentative arrangement with them". The witness believes he talked with Mr. McMeekin a second time on the telephone before he saw him. In that second telephone conversation Mr. McMeekin said "he would change the hold from the 20th to the 27th", and "when it was convenient to come in and we could iron out the details".

About July 29, 1954, Mr. Alston went to the Shrine Auditorium to talk about the matter and Mr. McMeekin "made the oral contract". That was the first time he had been "in the Shrine Auditorium to talk about this matter". At that time, he "had already made arrangements or commitments" for some of the performers, for tickets and publicity. He made those commitments before he had any conversation with Mr. McMeekin in person about leasing the auditorium, but after he "had Mr. McMeekin's assurance over the telephone that the auditorium would be held" for him on August 27th. He had been told by Mr. McMeekin over the telephone the amount of rental for the auditorium was $800 "which was agreeable" to him and to their purposes, and he had Mr. McMeekin's assurance that he would hold it for them until they came in to make the arrangements, and Mr. McMeekin had told him to come in at the earliest possible opportunity to get the details ironed out. Mr. McMeekin told him that at the time the written lease was executed there would be a deposit of $200, one-fourth of the rental fee, "which could have been any time up to the 27th of August". Mr. Alston further testified as follows:

"Q. Well, why did you enter into these contracts with these other agencies when you knew that a written contract was necessary with the Shrine before this lease would be— A. Because Mr. McMeekin had assured me that I would have the auditorium available to me on that night. I took his word as a business man—as an honest business man.

"Q. You knew, did you not, that it was necessary to enter into some kind of a lease agreement? A. I considered this nothing more than a formality."

* * * * * *

"Q. And he told you that all those things would have to be straightened out and also the payment made before there would be any agreement with you, didn't he, and the lease signed? A. No, sir, he told us we could be assured that the house would be ours on the evening of August 27th and therefore I took the writing or the executing of the lease to be nothing more than a formality".

Also, referring to the conversation of July 29, 1954, Mr. Alston testified as follows:

"Q. By Mr. Simmons (Plaintiff's Attorney): Will you relate to the Court at this time just what was said during the course of this conversation? A. Well, I informed Mr. McMeekin I had secured some *tentative* arrangements with some performers for the date of the 27th, and inquired if that date were open, if the auditorium would be available at that time.

"He informed me it would be available. I then discussed with him what the terms were of renting the auditorium, all of the necessary details to make arrangements to rent the auditorium for that date.

"Q. What did he say and what did you say in respect to the exact rental of the auditorium at that time? A. He told me the total rental fee would be $800.00. That he would reserve the auditorium for us for that evening, and that he would request a down payment of one fourth of that amount at the time we signed the written agreement.

"He told me that this price would include everything with the exception, I believe, of the use of the spotlights and an operator for the spotlights. The fee would include a stage manager, as I recall. It would not include the services of the ushers or guards, that is, we would have to provide these for ourselves or secure the services of these for ourselves.

"That we could either pay cash right then or we could pay it, as I say, later on at such time as we went into a written agreement. The only occasion he would call on us for the cash would be if someone else came in with cash in his pocket and was interested in that date; but otherwise the auditorium was ours—and in this event we would be given the opportunity of putting our cash first down.

"Q. Was there any discussion about reserving the auditorium? A. Yes, he definitely said it was reserved to us for that date.

"Q. What date was that? A. August 27th.

"Q. You testified to the fact that there was no request for cash at that time, is that right? A. No, there was not.

"Q. Did you have any discussion about your making arrangements and contracts with the artists to perform? A. I told him the reason I wanted the date is that I had tentative arrangements with some of the performers for that date.

"Q. What was said, if anything, about your going ahead and making actual contracts? A. I told him if I could be assured of the date, I could take up the options I had received with these groups to perform on that night.

"Q. What was his statement as to that? A. He said, 'You're all set', or something of that nature."

Mr. Alston next heard from Mr. McMeekin on or about the 7th or 9th day of August, at which time Mr. McMeekin telephoned and told him "I'm sorry but the arrangements are off"—"the arrangements for the leasing of the auditorium for that evening had been cancelled". Mr. Alston went to the auditorium to see Mr. McMeekin and was again told that the "arrangements were discontinued—that the auditorium was no longer available". Later, on the 11th or 14th of August, he "offered to pay Mr. McMeekin the entire $800.00 to complete the contract". Mr. McMeekin said: "Sorry, it was too late—".

All contracts may be oral, except such as are especially required by statute to be in writing. Civil Code, sec. 1622. There is no claim in the instant action that a contract for the leasing of the auditorium was required to be in writing.

[1] In respondent's brief, the decision in Toms v. Hellman, 115 Cal.App. 74, 78, 1 P.2d 31, 33, is cited, and the following language quoted therefrom: "* * * (W)here the parties have agreed upon all essential facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later". In Toms v. Hellman, supra, an objection was sustained on the ground that the complaint did not state a cause of action and judgment of dismissal was entered. That judgment was affirmed on appeal for the reason that (115 Cal.App. at page 83, 1 P. 2d at page 35) "the acceptance of the offer failed to make a contract, because the offer by its terms clearly contemplated that the complete contract should be embodied in a written contract to be subsequently executed."

Respondent continues, in its brief, with the following statements: "A contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed." Citing Kreling v. Walsh, 77 Cal.App.2d 821, 176 P.2d 965, and Church v. Wade, 80 Cal.App.2d 412, 182 P.2d 212.

In Kreling v. Walsh, supra, this court affirmed judgments for defendants upon their affirmative defense that prior to the trial said actions had been settled and compromised by oral agreement entered into in the court corridor while awaiting trial, the general terms of which had been stated by the respective counsel to the court in which the matter was put over for four or five days to allow the preparation of the stipulation to release moneys under attachment. Appellant's argument that the oral agreement was purely tentative and prelim-

inary and should not be enforced was disposed of by the statement, 77 Cal.App.2d at page 832, 176 P.2d at page 972, that "There was substantial evidence to support the court's finding that not only did appellant enter into an oral agreement of compromise and settlement, but that he later signed a contract embodying the terms of such oral agreement. Furthermore, the agreement was performed in full by appellant and respondents, save and except that the former did not withdraw his own money * * *."

In Church v. Wade, supra, judgment for defendants in an action to set aside a conveyance which had been made to them in consideration of their oral agreement to give the grantor a home, support and medical care for life was affirmed by this court. After quoting, 80 Cal.App.2d at page 419, 182 P.2d at page 217, a portion of the Kreling decision, this court said:

"The evidence sustains the view of the trial court that there existed an oral agreement between decedent and defendants which was fully performed by both parties thereto. There is no evidence to support a finding that decedent and defendants contemplated a reduction to writing of their agreement before it was to be considered as complete. The full performance by both parties to the oral agreement negatives any such finding."

[2] In the instant action, all witnesses agree that in each of the conversations found to constitute the oral agreement it was expressed and understood that it was necessary to sign a written lease and at the same time to pay $200 to apply upon the rental. In the entire record there is no evidence as to when, if ever, the remainder of the $800 rental was to be paid. Nor does it appear that respondent ever agreed to pay the $800 at any certain time, or at all. No consideration of any kind passed from respondent to appellant.

[3] The Toms, Kreling and Church cases, supra, are not authority for the decision in the instant action that an oral agreement was made. Whether such contract was made depends upon the intention of the parties and is to be determined by the surrounding facts and circumstances in the particular case. It is a question to be determined by the trial court, and if there is any substantial evidence in support of the decision an appellate court is not authorized to reweigh the evidence. Johnston v. Twentieth Century-Fox Film Corp., 82 Cal.App.2d 796, 820–821, 187 P.2d 474; Thompson v. Schurman, 65 Cal.App.2d 432, 440, 150 P.2d 509.

Considering the evidence in the instant action, with all inferences favorable to respondents, we have been able to find only an offer or proposal by appellant that a written agreement be signed and deposit paid for the leasing of its auditorium on August 27th. An offer can be accepted only in accordance with its terms. A proposal may be revoked at any time before its acceptance is communicated to the proposer. Civil Code, sec. 1586. According to Alston's own testimony, he made no offer to sign a lease and his only offer to pay any money was at least two days after appellant's withdrawal of its offer.

This court is sympathetic with respondent in its losses, but finds no basis in the record for the judgment against appellant. There being no oral agreement, there could be no breach thereof, and no liability on the part of appellant for respondent's losses. Respondent's losses were caused by its erroneous assumption that it could, without binding itself to pay the rental or perform the other obligations of the lessee, secure all the benefits which could have been obtained by the signing of the lease and payment of the rental.

The judgment is reversed.

FOURT and LILLIE, JJ., concur.

159 Cal.App.2d 136

Ruby Cloma Richards McELHATTEN, Plaintiff and Appellant,

v.

James Albert McELHATTEN, Defendant and Respondent.

Civ. 22391.

District Court of Appeal, Second District, Division 3, California.

April 3, 1958.

Action for annulment of marriage. The Superior Court of Los Angeles County, Arnold Praeger, J., denied annulment and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that husband's testimony that he "attempted" to get a divorce from first wife in Mexico, being there only two days without intention of living there, did not warrant refusal to annul second marriage in absence of other evidence of Mexican divorce from first wife.

Reversed with directions.

Parker Wood, J., dissented.

1. Marriage ⇐60(7)

Husband's testimony that he "attempted" to get a divorce from first wife in Mexico, being there only two days without intention of living there, did not warrant refusal to annul second marriage in absence of other evidence of Mexican divorce from first wife.

2. Marriage ⇐60(7)

In action to annul second marriage, whether defendant's first wife had remarried after attempted Mexican divorce from defendant was irrelevant.

Lawrence R. Horton, Van Nuys, for appellant.

No appearance for respondent.

SHINN, Presiding Justice.

Plaintiff appeals from an adverse judgment in her action for annulment of her marriage to defendant, James Albert McElhatten. She alleged in her complaint that she participated in a ceremony of marriage with defendant on December 4, 1951 in Tijuana, Mexico, a year later in another ceremony of marriage in Glendale, California, and at the times of said purported marriages and each of them defendant had another wife living by virtue of a marriage which was then and continued to remain in full force and effect. Defendant having been duly served with process and having defaulted, plaintiff submitted her evidence, following which the court entered a judgment which recited "The Court finds that the allegations of the complaint are not true, and that plaintiff is not entitled to an annulment of marriage from defendant"; whereupon it was decreed that an annulment of the marriage was denied. Although the finding negatives each and every allegation of the complaint, such could not have been the intention of the court. If given literal effect, the finding would be contrary to the established facts as to the ceremonies of marriages in which defendant participated.

Defendant was called as a witness on behalf of plaintiff and testified that he married Barbara June Gamble August 15, 1947. He also testified that on or about December 4, 1952, he participated in a marriage ceremony with plaintiff Ruby Cloma Johnson McElhatten. Certified copies of the certificates of each marriage were received in evidence. Plaintiff testified further that at all times subsequent to August 15, 1947, he had lived and been continuously employed in California; also that Barbara June Gamble McElhatten is living and a resident of California. He further testified that he had never instituted an action for divorce in the United States and had never been served with process in an action for divorce brought by Barbara; that he "attempted" to get a divorce in Mexico "December 4 1951"; he was in Mexico but two days; he had no intention of living in Mexico or in any place other than California, and he immediately returned to California. This evidence was received November 15, 1956 and the cause was submitted.

There were further proceedings December 12, 1956. Apparently, due to press of other business, some of the facts developed had escaped the minds of the court and counsel. It was stated: "The Court is denying the decree of annulment on the ground that the plaintiff in this action is not in a position to collaterally attack the Mexican decree of divorce which it was testified the defendant obtained in Tijuana on December 2, 1951; that the other party to the marriage which resulted in the Mexican divorce is a party interested in the matter and is not a party to this action.

"If I remember correctly, the evidence showed that Barbara June Gamble had remarried; is that correct?

"Mr. Horton: I believe that was the testimony, your Honor.

"The Court: There is no showing that the jurisdiction of the Mexican Court was not contested in the Mexican divorce proceeding. Therefore the decree of annulment is denied."

[1, 2] There was no evidence that defendant had procured a divorce in Mexico December 2, 1951, or at any other time. Neither was there any evidence that Barbara June Gamble had remarried, although that question was irrelevant to any issue in the case.

The only tenable conclusion from the evidence was that defendant's marriage to Barbara was in force at the time of his purported marriage to plaintiff. The clear inference from defendant's testimony was that he did not obtain even a purported decree of divorce during the two days he was in Tijuana or at any other time, and there was no evidence that he ever brought suit. Moreover, a resident of California cannot step across the international boundary into Mexico as a casual visitor and bring back a signed paper which is entitled to any consideration as a decree of divorce. The mere assertion that a marriage can be dissolved in that manner deserves from a California court nothing but ridicule and reproach. The evidence which was elicited from defendant that he and his former wife were residents of California, that he had never sued for divorce there nor been sued, dispelled any presumption that their marriage had ever been dissolved in any jurisdiction. The record discloses no ground upon which a decree of annulment could be properly refused.

The judgment is reversed with directions to enter a decree in accordance with the prayer of the complaint.

VALLÉE, J., concurs.

PARKER WOOD, Justice.

I dissent. The burden of proving that defendant's marriage to Barbara (his first wife) had not been dissolved by judicial decree was upon plaintiff. Whether plaintiff met that burden was a question of fact to be decided by the trial judge. The defendant was the only witness. The questions as to the weight and credibility of his testimony were exclusively for the trial judge to decide. The trial judge was not required to decide that, as a matter of law, the marriage of plaintiff and defendant was invalid. There is a presumption that the marriage of plaintiff and defendant was valid. The basis for this presumption is that it is presumed that defendant is innocent of crime and he did not commit bigamy when he married plaintiff. That presumption is evidence. If, in the opinion of the trial judge, that presumption was not rebutted or overcome by other evidence, the trial judge was required to deny a decree of annulment.

At the hearing upon the default herein, plaintiff called defendant as a witness under the provisions of section 2055 of the Code of Civil Procedure. Defendant testified that he married Barbara June Gamble on August 15, 1947, and that thereafter he lived continuously in California (the certificate of that marriage was received in evidence); he had not instituted an action for divorce in the United States against Barbara, and he had never been served in a divorce action commenced by her; on December 4, 1951, he attempted to get a divorce in Mexico; he went to Mexico on

December 1 or 2, 1951, for the purpose of attempting to get a divorce; he was in Mexico two days; at the time he went to Mexico he did not have any intention of living in Mexico or any place other than California; he returned to California and has lived in California since that time; on December 4, 1952, he participated in a marriage ceremony with the plaintiff herein, Ruby Cloma Johnson McElhatten (the certificate of that marriage was received in evidence); after December 4, 1952, he has seen Barbara June Gamble McElhatten alive, and she is a resident of California at this time. (Time of the trial was November 15, 1956.)

The testimony of defendant with respect to attempting to get a decree in Mexico was as follows:

"Q. [by attorney for plaintiff] Did you ever attempt to get a divorce elsewhere? A. Yes.

"Q. Where was that? A. Mexico.

"Q. When was that? A. December the 4th.

"The Court: Louder, please.

"The Witness: December 4th, '51.

"Q. By Mr. Horton [attorney for plaintiff]: When did you go to Mexico? Did you go to Mexico for that purpose? A. Yes."

No copy or purported copy of a Mexico decree of divorce was offered or received in evidence. It thus appears that there was no evidence that there was a Mexico decree of divorce. Also, there was no evidence that there was not a Mexico decree of divorce.

"It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage." In re Estate of Smith, 33 Cal.2d 279, 281, 201 P.2d 539, 540. In Hamrick v. Hamrick, 119 Cal.App.2d 839, at page 848, 260 P.2d 188, at page 193, it was said (in quoting from another case): "'* * * the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage.'"

In the present case there was testimony by defendant that his first wife was living at the time of his second marriage. As above stated, whether plaintiff met the burden of proving that the first marriage had not been dissolved by judicial decree was a question of fact to be decided by the trial judge. As above stated, there was no evidence that there was not a Mexico decree of divorce as to the first marriage. The only evidence with respect to the nonexistence of a divorce decree in the United States (as to the first marriage) was that defendant testified that he had not instituted an action for divorce in the United States against his first wife (Barbara), and he had never been *served* in a divorce action commenced by her. His testimony that he had not been served in a divorce action by his first wife was a legal conclusion. The trial judge was not required to infer or conclude from such testimony (regarding nonservice) that defendant's first wife had not obtained a divorce. In Re Estate of Borneman, 35 Cal.App.2d 455, 96 P.2d 182, Mrs. Borneman, who sought to prove that her marriage had not been dissolved by judicial decree, testified that she had not commenced a divorce action and had never been served with papers in a divorce action commenced by her husband. She also introduced evidence that there was no record of such action in San Francisco (where her husband had resided in 1912). There was no evidence therein showing the husband's place of residence from 1912 to 1938, the date of his death. The court said at page 460 of 35 Cal.App.2d, at page 184 of 96 P.2d: "That proof was insufficient to rebut the presumption of innocence. [Citations.] The burden rested on Mrs. Borneman to introduce such evidence as would convince the mind of the trial court that the first

marriage had not been dissolved. [Citation.] This apparently she did not do. The most she did was to create a conflict in the evidence but a mere conflict in the evidence will not warrant a reversal." It thus appears that it has been held that testimony that a spouse had not been served with process is not adequate proof that the other spouse had not obtained a divorce. In Re Estate of Smith, supra, 33 Cal.2d 279, at page 283, 201 P.2d 539, at page 541, it was said: "In order to show that no divorce or annulment had been obtained it is not necessary to prove that an examination was made of the public records of jurisdictions other than those in which the parties to the marriage were domiciled." In the present case there was testimony by defendant that his first wife was a resident of California "at this time." The reporter's transcript shows as follows: "Q. Is she [Barbara, first wife] a resident of California at this time? A. Yes." There was no evidence as to the domicile of the first wife from 1947, when she married defendant, to the time of trial (on November 15, 1956). Defendant testified that he had lived in California since the marriage in 1947. There was no evidence as to when he and his first wife (Barbara) separated. Even if it be assumed that her domicile was in Los Angeles County, there was no evidence that an examination was made of the public records of Los Angeles County to ascertain whether the first wife had obtained a decree of divorce.

In Maslow v. Maslow, 117 Cal.App.2d 237, at page 243, 255 P.2d 65, at page 69, which was an action for annulment of marriage, the court said: "Where the evidence will support different inferences, the choice of inferences is for the trial court; and its finding, based on the inferences drawn, cannot be disturbed on appeal. [Citation.] The trier of fact is the *exclusive* judge of the credibility of the witnesses. [Citations.] The trial court is free to disbelieve and reject the testimony of witnesses even though they are uncontradicted and unimpeached. [Citations.] These rules apply with particular emphasis to an action for annulment since the the state is a silent but active third party to every action to dissolve a marriage. The state is interested in seeing to it that no marriage is declared void as a result of fraud or collusion, and that the statutory grounds on which the annulment is sought actually do exist. [Citation.]"

The court found that the allegations of the complaint are not true. One of those allegations was in substance that (at the times of the two marriage ceremonies with plaintiff) the marriage of defendant to Barbara June Gamble (the first wife) was and still is in force. The effect of that finding is that plaintiff did not overcome the presumption of validity of her marriage to defendant, and did not meet the burden of proving that the marriage of defendant to Barbara (the first wife) had not been dissolved by judicial decree.

Under the evidence here the trial judge was not required to conclude that appellant had met the burden of proving that the first marriage had not been dissolved by judicial decree when the second marriage occurred.

The trial judge stated, at the time of submitting the matter for decision, that under the decision in Mumma v. Mumma, 86 Cal.App.2d 133, 194 P.2d 24, he did not believe that the plaintiff could attack the Mexican decree collaterally, and that plaintiff was not injuriously affected by that decree at the time of its rendition. The judge also stated, about a month later when he rendered his oral decision in open court, that an annulment was denied on the ground that plaintiff herein was not in a position to collaterally attack the Mexican decree of divorce which it was testified the defendant obtained in Tijuana on December 2 (4), 1951, and that the other party to the marriage which resulted in the Mexican divorce is a party interested in the matter and is not a party to this action. The judge said further: "If I remember correctly, the evidence showed that Barbara June Gamble [McElhatten] had remarried; is that correct?" The attorney for plaintiff herein replied: "I believe that was the

testimony, your Honor." The judge said: "There is no showing that the jurisdiction of the Mexican Court was not contested in the Mexican divorce proceeding. Therefore the decree of annulment is denied." It is apparent that the judge was of the belief that there was evidence that a decree of divorce had been rendered in Mexico. According to the reporter's transcript, however, defendant did not testify that he obtained a decree in Mexico. His testimony was that he attempted to get a divorce in Mexico. The reporter's transcript does not show that there was testimony with reference to the remarriage of the first wife. The reference, however, to such purported testimony indicates the importance of requiring adequate proof herein of nonexistence of a judicial decree dissolving the first marriage.

In my opinion the judgment should be affirmed.



Brookee KUBON, Plaintiff and Appellant,

v.

Walter KUBON, Defendant and Respondent.*

Civ. 17727.

District Court of Appeal, First District, Division 2, California.

March 27, 1958.

Hearing Granted May 21, 1958.

Former wife's action to recover on Nevada money judgment against former husband based on his delinquency in support payments ordered in divorce decree previously entered by Nevada court. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment denying recovery and former wife appealed. The District Court of Appeal, Brazil, J., pro tem., held that where Nevada court had jurisdiction over the parties in divorce proceedings in which it ordered support payments, Nevada court had jurisdiction over husband, a resident of California, to enter judgment for delinquent payments upon notice served on him by registered mail with return receipt requested.

Reversed with directions.

* Opinion vacated 331 P.2d 636.

1. Appeal and Error ⇐544(2)

Where appeal is on the judgment roll together with certain exhibits of documentary nature which were requested in the notice of appeal, scope of appellate court's inquiry could not be widened by an attempt to supplement record through reference in the briefs to the evidence. West's Ann. Rules on Appeal, rule 5(a).

2. Appeal and Error ⇐907(3)

Where appeal is on judgment roll together with certain exhibits of documentary nature which were requested in notice of appeal, appellate court must presume that in the oral proceedings there was substantial evidence to support the findings. West's Ann.Rules on Appeal, rule 5(a).

3. Appeal and Error ⇐544(2)

Where appeal was on the judgment roll together with certain exhibits of documentary nature which were requested in notice of appeal, evidence was not before appellate court which was confined to a determination of questions as to whether complaint stated a cause of action, whether findings were within the issue, whether judgment was supported by finding, and whether reversible error appeared upon the face of the record.

4. Guardian and Ward ⇐8

Infants ⇐18

Where Nevada court, having jurisdiction of the parties entered divorce decree giving custody of children to wife, a Nevada resident, and subsequently decree was modified so as to give husband, a California resident, custody of children during summer, and while children were in California during summer and in husband's physical custody husband filed verified petition for guardianship of their person, he was legally authorized to do so since

the children were at that time temporarily domiciled with him in the county, and upon filing of petition, courts of California and Nevada had concurrent jurisdiction over custody of children. West's Ann.Probate Code, §§ 1440, 1442.

5. Judgment ⇐822(1)

If Nevada court had jurisdiction to enter money judgment against defendant, a California resident, judgment of the Nevada court was entitled to full faith and credit, and was res judicata of the rights of the parties as of the date of the judgment, and California court could not go behind the Nevada decree.

6. Divorce ⇐311

Where Nevada court had jurisdiction over the parties in divorce proceedings in which it ordered husband to make certain support payments, Nevada court had jurisdiction over husband, a resident of California, to enter money judgment for delinquent support payments upon notice served on husband by registered mail with return receipt requested.

7. Divorce ⇐403(8)

Where Nevada court having jurisdiction over the parties in divorce proceeding ordered support payments by husband, a California resident, and wife brought action in Nevada court to reduce delinquency to a money judgment and service was had upon husband by registered mail but he never personally appeared, and Nevada court then entered money judgment against him for the amount of delinquency, even if it were a defense to Nevada action that wife had failed to comply with decree respecting husband's visitation rights, such defense was not available to husband in wife's action in California court to recover on money judgment which was res judicata. Laws Nev.1954–1955, c. 128.

8. Judgment ⇐713(2)

If matter was within scope of action, related to subject matter and relevant to the issues so that it could have been raised judgment is conclusive despite fact that it was not in fact expressly pleaded or otherwise urged, since a prior judgment is res judicata on matters which were raised or could have been raised on matters litigated or litigable.

9. Contempt ⇐80

Where wife brought action in California court to recover on money judgment entered in Nevada court against husband and based upon delinquencies in support payments ordered by Nevada court in divorce decree, fact that wife was in contempt of California court on another matter, had no probative value in determining who was entitled to a judgment after husband had submitted to a complete trial involving all the issues presented by the pleadings, without any attempt to preclude matter from being heard on ground that wife was in contempt.

Robert W. Corlett, San Rafael, for appellant.

Bruce B. Bales, San Rafael, for respondent.

BRAZIL, Justice pro tem.

[1–3] The plaintiff wife appeals from a judgment denying her recovery on a Nevada money judgment which was based on orders in a divorce decree requiring defendant husband to pay support for two minor children. The appeal is on the judgment roll and certain exhibits of a documentary nature which were requested in the notice of appeal as is provided in Rule 5a, Rules on Appeal. The respondent, and the appellant to a lesser degree, attempt to supplement the record by reference in their briefs to the evidence. The scope of inquiry by this court cannot be widened by such a method. Hunt v. Plavsa, 103 Cal.App.2d 222, 229 P.2d 482. On an appeal such as we have here, we must presume that in the oral proceedings there was substantial evidence to support the findings.

" 'The evidence is not before this court, we are confined to a determination of the questions as to whether the complaint states a cause of action; [or the affirmative defenses in the answer constitute a defense],

whether the findings are within the issues; whether the judgment is supported by the findings and whether reversible error appears upon the face of the record' ". In re Estate of Larson, 92 Cal.App.2d 267, 268, 206 P.2d 852, 853.

From the reviewable record that is before this court, the following facts are ascertainable. On March 27, 1952, the parties were divorced in the District Court of Clark County, Nevada, which court, all agree, had personal jurisdiction of the parties. In conformity with an agreement between them, the property rights were settled, legal custody of the two minor children was given to both, the physical custody was awarded to the mother and the father was ordered to pay $100 per month for their support. The court specifically reserved "jurisdiction to make such other and further orders with respect to the care, custody, support and maintenance of the said minor children * * * as * * * may be proper."

Appellant and respondent again appeared in the Nevada court on a motion to change custody, and on August 27, 1953, the order for physical custody was modified in respondent's favor to allow him the physical custody of the children during the summer vacations. The next time both parties appeared personally in the Nevada court was in October 1954, when in a contested hearing on a motion, the decree and previous order modifying it were modified to take away the respondent's summer time custody, and award full custody of the children to the mother, with right of reasonable visitation in Nevada to the father. The order for monthly support was continued in the last order of modification in the same amount per month.

Support payments for September 1954 to June 1955, both inclusive, admittedly were not paid. Pursuant to Chapter 128 of the Statutes of Nevada, appellant thereafter made a motion to reduce the delinquent support payments to a formal judgment. The court ordered service of that notice of motion on respondent by registered mail, return receipt requested. On this last motion, respondent made no personal appearance; and judgment was entered against him for $1,000, $250 attorney's fees and $10 costs.

On September 18, 1955, appellant filed her complaint in Marin County to establish the Nevada judgment as a judgment of this state. Respondent filed an answer in which he admitted submitting himself to the jurisdiction of the Nevada court in all proceedings except the last one, vis., the motion for judgment. He admitted the nonpayment of, and his ability to pay, the support during the ten month period involved in the judgment. He then sets up three affirmative defenses, each of which was the subject of a motion to strike, the motions being denied.

The affirmative defenses in substance are: (1) the Nevada court had no jurisdiction to enter the judgment sued upon because respondent was not given notice in accordance with the court's order directing that the notice of motion for judgment and accompanying papers be served upon him "by registered mail, return receipt requested," (2) that appellant denied respondent the right of reasonable visitation, and (3) it is against public policy to enforce this judgment in California because appellant does not come into court with "clean hands," she being in contempt of the very court whose aid she seeks, in that she violated a temporary custody order and a restraining order issued in a guardianship proceeding pending in Marin County.

[4] While the children were in Marin County during summer vacation and in respondent's physical custody, in accordance with the provisions of the Nevada decree then in effect, the respondent filed a verified petition for guardianship of their persons. This he was legally authorized to do by Section 1440 of the Probate Code, as the children at that time were temporarily domiciled with him in Marin County. Upon the filing of that petition, the courts of California and Nevada had concurrent jurisdiction over the custody of the chil-

dren. Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739. The hearing on the petition for guardianship was set for August 30, 1954, notice thereof being given to appellant by registered mail directed to her at her address in Las Vegas. Concurrently, with the filing of the petition, petitioner obtained an ex parte order, upon the authority of Probate Code section 1442, giving him exclusive temporary physical custody of the children pending the hearing on the petition. The order also restrained appellant from taking the children from respondent's custody before hearing of the petition.

The trial court found that in "willful violation, defiance and contempt of said restraining order, plaintiff kidnapped said children from their San Rafael home on August 20, 1954, carried them across the California border and until the Nevada court hearing of October 20, 1954 * * * concealed said children * * *" In finding the allegations of paragraph III of the complaint to be true, the court found that after the abduction on August 20, 1954, and on or about October 21, 1954, in a hearing in which the Nevada court had jurisdiction of the parties, the respondent was deprived of his summer vacation physical custody and he was required to pay $100 a month child support.

It may be helpful to determine what this case does not involve, in view of the extensive discussions in the briefs on related matters which cannot affect this appeal. The action is not to establish the Nevada divorce decree as a continuing judgment in California, nor an action to modify a decree of another state, nor an action for future support payments, nor is it an action involving custody of minor children and it is not a proceeding to punish the appellant for contempt of court because she took the children out of California in violation of a restraining order. It is only an action on a final judgment of a sister state based upon a support order which that court had jurisdiction to make. We are in no way concerned with retroactively modifiable support orders because here there is a final judgment not subject to modification.

[5] The first thing to determine is whether or not the Nevada court had jurisdiction of the respondent to enter the judgment. If it had jurisdiction, the judgment of the Nevada court is entitled to full faith and credit and is res judicata of the rights of the parties as of the date of the judgment. The court cannot go behind the Nevada decree. That decree is just as binding on this court as if it had been rendered by a court in this state. In re Bauman, 82 Cal.App.2d 359, 361, 186 P.2d 154. The trial court made this finding: "That on April 15, 1955, the Nevada District Court in which plaintiff secured the alleged judgment marked 'Exhibit A' and made a part of said complaint made and entered an order directing that plaintiff's Notice of Motion for Judgment, together with the motion, affidavit and court order, be served upon this defendant Walter J. Kubon 'by registered mail, returned receipt requested;' that said prescribed manner of service was not followed prior to the rendition of judgment or at all; that no return receipt bearing defendant's signature has ever been presented to or filed with said Nevada District Court; and because of the foregoing said court never acquired jurisdiction to render said judgment."

[6] The recitation that "said court never acquired jurisdiction" is but a conclusion of law, not supported by the findings of fact contained in the same paragraph. It is apparent that the conclusion referred to is based upon the finding that "no return receipt bearing defendant's signature has ever been presented." However, the order fixing the kind of notice to be given did not require a return receipt signed by the addressee only. The registered return receipt has been included in the record on appeal and it shows that it was signed in this manner—"Walter J. Kubon by Charlotte G. Kubon." The defendant having personally appeared in the Nevada divorce action, and having by that decree been ordered to support his children, that court had

jurisdiction over him to enter a judgment for delinquent payments upon a notice served upon him in the manner directed by the court.

[7] Assuming, without deciding, that it is a defense in Nevada in an action to collect child support, to establish the wife's failure to comply with the decree permitting the husband reasonable visitation, such a defense is not now available to the husband because it is res judicata. Issues already tried and determined may not be relitigated in a second action.

[8] "If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this rule is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 655, 101 P.2d 497.

The third affirmative defense is based on the rule that "a party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes." MacPherson v. MacPherson, 13 Cal.2d 271, 277, 89 P.2d 382, 385. The rule as stated is the basis for the refusal of a court to act on an application for relief from one who stands in an attitude of contempt in the following cases cited by the respondent: Weiner v. Weiner, Sup., 149 N.Y.S.2d 474; White v. White, 71 Cal.App.2d 390, 163 P.2d 89; Knoob v. Knoob, 192 Cal. 95, 218 P. 568; Weeks v. Superior Court, 187 Cal. 620, 203 P. 93; Williams v. Williams, 103 Cal.App. 2d 276, 229 P.2d 830 and Pearson v. Superior Court, 32 Cal.App.2d 87, 89 P.2d 162. Three later cases, not cited, which use the same rule as a basis for dismissal of an appeal are: Kottemann v. Kottemann, 150 Cal.App.2d 483, 310 P.2d 49; In re Estate of Scott, 150 Cal.App.2d 590, 310 P.2d 46; and Rude v. Rude, 153 Cal. App.2d 243, 247, 314 P.2d 226, 229.

In all the foregoing cases, except In re Estate of Scott, the contempt was in the very proceeding in which the party in contempt sought relief. The rule so often stated, if literally applied, is wide enough to justify a court in refusing to act on behalf of the person who is in contempt in a separate proceeding. However, research discloses only the In re Estate of Scott as applying the rule to authorize a dismissal of an appeal by one who was in contempt of court in an unrelated proceeding. In the Scott case, the appeal from an order appointing a trustee of the estate of a missing person was dismissed on respondent's motion, where it was shown that L. Ewing Scott, the appellant, was a fugitive from justice, and was in contempt of court in a criminal action. He stood charged in the criminal case with unlawful activities involving his missing wife's property. No petition for hearing in the Supreme Court was filed.

[9] We need not here decide whether the rule of the MacPherson case would or would not justify a trial court in refusing to hear an application for relief by one who admittedly stands in an attitude of contempt in another proceeding, for reflection reveals that such a situation is not involved. There was no attempt by the respondent in either the trial court or appellate court, by motion or application for writ or otherwise to preclude the matter from being heard. There was an actual trial, evidence was introduced, rulings were made, the case was argued, trial briefs were filed, and in all respects there was a trial on the merits. The finding of fact that appellant was in contempt of court before the trial started, while it might have justified the trial court in not hearing the case at all until plaintiff was purged of contempt, does not have a probative value in determining who is entitled to a judgment after a complete trial involving all issues presented by the pleadings. The plaintiff's motion to strike from

the answer the last discussed affirmative defense should have been granted.

Judgment reversed with directions to enter judgment consistent with this opinion.

DOOLING, Acting P. J., and DRAPER, J., concur.



159 Cal.App.2d 257

OAKLAND BANK OF COMMERCE, a California Banking Corporation, Executor of the Last Will and Testament of John James Moffett, Deceased, Plaintiff and Appellant,

v.

Eleanor Jane HAYES, formerly known as Eleanor Jane Moffett, Defendant and Respondent.

Civ. 17640.

District Court of Appeal, First District, Division 1, California.

April 9, 1958.

As Corrected on Denial of Rehearing May 9, 1958.

Action to quiet title and to declare certain deeds void for nondelivery. The Superior Court, County of Alameda, S. Victor Wagler, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to sustain findings that there was a valid delivery of recorded deed from husband and wife, owners of land in joint tenancy, to husband, wife and daughter as grantees, but there was no valid delivery of the simultaneously executed and unrecorded three deeds of gift by which each one of the grantees conveyed the same land to the other two.

Affirmed.

1. Deeds ⇐56(2)

A lack of manual delivery is not fatal to delivery of deed, and delivery is sufficient and complete if from any or all of the circumstances the grantor has irrevocably made known his intention to part with his dominion and control over instrument to end that it may presently vest title in another.

2. Deeds ⇐208(1, 4)

In action to quiet title to land and to cancel four deeds on ground that they were invalid because of lack of delivery, evidence sustained findings that there was valid delivery of recorded deed from husband and wife, owners of land in joint tenancy, to husband, wife and daughter as grantees, but there was no valid delivery as to the simultaneously executed and unrecorded three deeds of gift by which each of the grantees conveyed land to the other two.

3. Deeds ⇐56(2)

To constitute a valid effective delivery of a deed, it must be shown that grantor intended to divest himself of title by a deed that should become presently operative as such and should presently pass title.

4. Appeal and Error ⇐171(1)

Plaintiff on appeal may not reverse position he took in his complaint and throughout trial in lower court.

Wallace B. Colthurst, Oakland, Orlando J. Bowman, Oakland, for appellant.

Hagar, Crosby & Rosson, Paul L. May, Oakland, for respondent.

BRAY, Justice.

Plaintiff appeals from an adverse judgment in an action brought (1) to quiet title; (2) to declare void for non-delivery the four deeds hereafter mentioned.

Questions Presented.

1. Was there evidence of delivery of the joint tenancy deed?

2. Are the findings sufficient?

Evidence.[1]

Plaintiff and his wife Mary Eleanor Moffett (the wife died subsequently to the signing of the deeds and prior to the institution of this action), at the time of the making of the deeds hereafter mentioned, held certain Oakland property in joint tenancy.

The four deeds in question are: 1. Joint tenancy deed dated October 12, 1950, acknowledged the same date before a notary public, and recorded October 13, in which plaintiff and his wife are grantors, and plaintiff, his wife and defendant daughter are grantees. It was "Recorded at Request of Grantee" and was to be returned to Mr. and Mrs. John J. Moffett. 2. Deed of gift dated and acknowledged October 14, wherein plaintiff is grantor and his wife and defendant are grantees. 3. Deed of gift dated and acknowledged October 14, wherein defendant is grantor and plaintiff and his wife are grantees. 4. Deed of gift dated and acknowledged October 14, wherein Mrs. Moffett is grantor and plaintiff and defendant are grantees. All deeds are of the property which plaintiff and wife held in joint tenancy. None of the three deeds of gift was recorded in Mrs. Moffett's lifetime, but two days after her death plaintiff recorded deed No. 4 (Mrs. Moffett as grantor, plaintiff and defendant as grantees) with directions that it be returned to him.

Plaintiff testified that at 6:30 p. m. on October 12, 1950, at their home, his wife told him that she had consulted an attorney about their property and had been advised that the three members of the family should make deeds of gift to each other to save making wills. He stated that as the property was already in joint tenancy the survivor would get it. The wife replied that under her plan, if he and she died at the same time, the defendant would get the property without having to go to court; that she had had the papers drawn and that after signing they would be kept in the safe deposit box, being of no value until recorded. His wife presented two deeds to him and requested that he sign. The deed of gift from him to his wife and the defendant was on top. After signing it, his wife twisted it up and he signed another deed which he thought was also a deed of gift. He did not see or read the joint tenancy deed until after his wife's death. At no time did he authorize his wife to record the joint tenancy deed. His only intention was to convey title if he and his wife died at the same time. He understood that title would not pass unless the deed was recorded.

The day after his wife's death he found in their joint tenancy safe deposit box an envelope. On the face of it was written in his wife's handwriting "Deeds of Gift from us, to be recorded in the event of the death of either of us. Record the Deed of Gift of the decedent only." In the envelope were the four deeds above mentioned. He took the deed of gift from his wife to him and defendant, and recorded it. At no time after the joint tenancy deed was signed until after Mrs. Moffett's death did defendant claim any ownership in the property, nor pay any of its taxes, insurance or improvements. He first discovered that the property was in defendant's name when an attorney told him so in the presence of defendant. Plaintiff stated that was ridiculous and requested defendant to make a deed of gift to him. She said nothing but the attorney refused for her. Plaintiff found in his wife's personal records after her death a $10 check to the notary public[2] dated October 13, 1950, and a receipt from the recorder of the same date.

Defendant testified that the subject of the property was discussed at dinner time

1. Subsequent to judgment plaintiff John James Moffett died, and the Oakland Bank of Commerce as executor was substituted for him. Plaintiff, as used herein, refers to Moffett.

2. Plaintiff testified that he never saw the notary public who acknowledged the deeds. Defendant testified that she could not recall having seen him.

on October 12, 1950. Her mother, in the father's presence, said that the three of them were to be on the deed so that if anything happened to one the interest would be vested in the others. Her mother told defendant that she would have to make out a deed and that the parents were also making out deeds. The property was to be put in the three names and the deeds of gift would be put into the safe deposit box. After dinner her father called to her and requested her to sign the deed as he wanted to go bowling. She had intended to sign it later. She went into her parents' bedroom and signed the deed of gift on the dresser. Both parents were present. On the dresser the other three deeds were laid out so as to allow the ink to dry. Hers was the last one signed. She did not see her father sign and does not know when he did. At that time there was no discussion other than that her father told her to sign the deed of gift, so that her mother could record the joint tenancy deed the next day and put the other three in the safe deposit box. The understanding was that only the joint tenancy deed was to be recorded. Plaintiff denied defendant's version of the evening's happenings. Defendant could not remember any specific other time wherein she discussed the title with her father but discussed it with her mother on other occasions. One was when her mother said that she had put some stock in the three names and that the real property was in the three names. Defendant testified that when the attorney told plaintiff that she and he owned the property plaintiff did not express any surprise.

Plaintiff's sister-in-law, Irene Moffett, testified that in January, 1954, defendant told her that she had not known that the property was in her name and that she was going to make it tough for plaintiff since he recorded the gift deed. Defendant denied this. Also in 1952 defendant asked Irene's husband's advice as to whether she should loan money to her parents for the purchase of a new home. Upon being told that it was not a good idea, defendant stated that she had everything fixed so that she would be taken care of and that her parents would not be able to do anything without her knowledge.

Plaintiff's brother, William, testified that he requested defendant to return the property to her father and that she said she would after she got everything belonging to her out of the house. In another conversation defendant said she knew the property belonged to her father, that she never put anything in to it, and would give it back when she got everything she wanted out of it. At that time defendant had some personal property in the home.

Defendant admitted that she told William that she was going to give the property to her father when she got her things out of it, and that she had paid nothing into the property, but she testified that she had further stated that her name was on the deed. As to the conversation in regard to loaning money to her parents, she explained that she meant that if her name was on the present house and would be on the next one, she would like to contribute some money if it were needed for the new house.

The court found that Mrs. Moffett did not make the representations which plaintiff claimed that she made and further found that by reason of said joint tenancy deed plaintiff, his wife and defendant became and are the owners of the real property involved; that there was a valid delivery of the joint tenancy deed and no valid delivery of any of the three deeds of gift and that each of said three deeds are null and void. It then quieted title by virtue of the joint tenancy deed in plaintiff, his wife and defendant.

1. The Joint Tenancy Deed Was Delivered.

[1] There is a direct conflict between the testimony of plaintiff and that of defendant as to the circumstances under which plaintiff signed the deeds. This conflict the trial court resolved in favor of defendant. Defendant's testimony, if believed (and it was believed by the trial court), amply

supports the finding of delivery. Her testimony shows that the three parties understood, at the time of the signing of the deeds, that the joint tenancy deed was to be recorded by the mother, for the purpose of getting title in all three in joint tenancy. There is no evidence of manual delivery, in the strict sense of the grantors' handing the deed to themselves and defendant as grantees. A lack of such manual delivery is not fatal to a delivery. It was said in Moore v. Trott, 1912, 162 Cal. 268, 274, 122 P. 462, 465: "It has long, if not always, been the rule that the delivery of an instrument is a question of intent, and that to a complete delivery no precise form of words and no particular character of act is necessary. The delivery is sufficient and complete if from any of all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another. 'The delivery,' says Touchstone, 'is either actual, i.e., by doing something and saying nothing; or else, verbal, i.e., by saying something and doing nothing, or it may be both; and either of these may make a good delivery and a perfect deed.'"

[2] The evidence shows a clear distinction between the intent of the parties as to the passing of title under the joint tenancy deed and under the three deeds of gift. The latter were only to take effect upon death of one of the parties. Plaintiff contends that it was the intention that the deed of gift from defendant to plaintiff and wife was to pass immediate title to the grantees. However, his own testimony, as well as that of defendant, refutes such contention. Nor does the fact that the joint tenancy deed after recordation was returned to plaintiff and his wife and kept thereafter in their safe deposit box necessarily refute an intention to pass title under that deed immediately. Plaintiff and his wife as well as defendant were grantees therein. The fact that they were also grantors does not negative the inference of delivery. The deed was recorded at the request of "grantees" and a logical place for the deed to be kept was in the safe deposit box which was in the names of the father and mother.

Marshall v. Marshall, 140 Cal.App.2d 475, 295 P.2d 131, cited by plaintiff, answers some of plaintiff's contentions. There a grandmother signed a grant deed conveying property to her five granddaughters, reserving a life estate in herself. She instructed her attorney to record it but did not tell the grantees of its execution. After recordation the deed was returned to her attorney, who, later, at the grandmother's request, returned it to her. She stated to her attorney and her son that she wanted the grandchildren to have the property and wanted to avoid the trouble and expense of probate. Two of the grandchildren "learned of the execution and recordation of the deed but neither rejected the grant made to them by it." (140 Cal. App.2d at page 477, 295 P.2d at page 132.) The court held that the foregoing circumstances substantially supported the finding of delivery, saying that "the plaintiff had by words manifested her intent to vest title in the grantees and had directed the recording of the instrument. * * *" (140 Cal.App. 2d at page 479, 295 P.2d at page 133) and that "At least two of the grantees learned of the grant prior to the time plaintiff sought to revoke it and did not reject the gift made by it. This constituted acceptance by them, and as the grant was beneficial to all the grantees, the acceptance by the other three may be presumed." (140 Cal.App.2d at page 479, 295 P.2d at page 133.)

[3] Plaintiff cites a number of cases in which it was held that under the particular circumstances of the respective case no delivery of a deed took place. For extmple, Stone v. Walsworth, 1953, 115 Cal.App.2d 369, 252 P.2d 39, deed from parents to daughter. They all uphold the principle that to constitute a valid, effective delivery, it must be shown that the grantor intended to divest himself of title, that the deed should become presently operative as such, and should presently pass title. The difference between those cases and the instant one is that there the evidence failed to show the requisite intention of the particular

grantor while here it showed the intention of the grantors that title presently pass under the joint tenancy deed.

[4] Plaintiff contends that as all the deeds were signed the same day, they must be construed together. The evidence shows that the joint tenancy deed was delivered unconditionally, the other three conditionally. Plaintiff takes a rather inconsistent position. In his complaint he alleged that all three deeds were void for nondelivery and requested that they be cancelled. At the trial he contended that they were void for the same reason. The court so found. He now contends that the deed from defendant to himself and wife was a valid one conveying presently any interest defendant might have received from the joint tenancy deed. If this were so, then the deed from himself and wife to defendant and the one from the wife to defendant and plaintiff were valid ones and likewise conveyed present titles. However, plaintiff on appeal may not reverse the position he took in his complaint and throughout the trial in the lower court. See 4 Cal.Jur.2d 420, and cases cited.

2. Findings.

Plaintiff contends that finding IX is inconsistent with finding I. The latter relates to the means by which plaintiff and his wife originally acquired the property in joint tenancy. Finding IX, following findings concerning the execution of the joint tenancy deed from plaintiff and wife to plaintiff, his wife and defendant, finds that by said last mentioned deed all three became the owners in joint tenancy of the property. There is no inconsistency in these findings.

Plaintiff contends that the finding in finding IV that the joint tenancy deed was executed and delivered to the grantees named in it is a mere conclusion of law and does not find that the grantors intended to convey a present interest. Taking the findings as a whole, including the finding that the present ownership of the property is evidenced by the joint tenancy deed, that the gift deeds are null and void, that the recorded gift deed should be expunged from the record, and that plaintiff is not entitled to a decree quieting his sole title to the property or adjudging that defendant has no interest therein, the finding of delivery is that of the ultimate fact which includes delivery with intent to vest present title.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



159 Cal.App.2d 242

Ted MARKOWITZ, Individually, doing business under the firm name and style of Artem Trust & Investment Co., Plaintiff, Cross-Defendant and Respondent,

v.

Ed I. IKEMOTO, Defendant, Cross-Complainant and Appellant.

Civ. 9338.

District Court of Appeal, Third District, California.

April 8, 1958.

Action by landlord against tenant to recover rent and damages for breach of covenant to keep premises in good repair. Tenant cross-complained for cancellation of lease and a promissory note. The Superior Court, Sacramento County, Malcolm Glenn, J., ordered lease and note be cancelled, but awarded landlord damages for breach of covenant and tenant appealed. The Third District Court of Appeal, Schottky, J., held that evidence was sufficient to support conclusion that damage which was found when premises were surrendered, such as broken windows, was not result of nomal wear and tear and that tenant breached provision of lease requiring him to keep premises and improvements in good repair.

Judgment affirmed.

1. Trial ⇐404(1)

All of trial court's findings must be read together and any uncertainty or ambiguity in findings must, if possible, be construed in support of judgment.

2. Landlord and Tenant ⇐154(3)

Under covenant to keep premises in good repair, landlord had burden of proving claimed damages by reason of breach of covenant.

3. Landlord and Tenant ⇐160(4)

In order for landlord to recover for breach of a covenant to surrender premises in good repair, condition of premises at beginning and termination of lease must be shown and if he does not so show, landlord may not recover; however, where premises have been surrendered in damaged condition, landlord has proved a prima facie case, and it is then incumbent upon tenant, if he would avoid liability, to prove damage was due to an excepted cause.

4. Landlord and Tenant ⇐154(3), 160(4)

In action by landlord against tenant to recover damages for breach of covenant to keep premises in good repair, and to surrender premises in as good condition as reasonable wear would permit, evidence was sufficient to support conclusion that damage which was found when premises was surrendered, such as broken windows, was not result of normal wear and tear and that tenant breached provision of lease.

Colley & Sakuna, Sacramento, for appellant.

Seymour Berger, Sacramento, for respondent.

SCHOTTKY, Justice.

In 1951, appellant purchased the leasehold interest in certain premises known as the Alaska Hotel in the city of Sacramento. A new lease was executed between appellant and respondent which provided, in part:

> "The *lessee* shall personally occupy said demised premises and shall keep the same in good repair, including all improvements which may hereafter be added, damage by the elements excepted, and shall not make alterations thereon without the written consent of the *lessor* and shall not commit or suffer to be permitted any waste on said premises.
>
> * * * * * *
>
> "At the expiration of said term or the sooner determination thereof, the *lessee* shall peacefully quit and surrender possession of said premises in as good condition as reasonable use and wear thereof will permit."

In 1955, appellant moved out of the premises and delivered a notice of rescission to respondent. Respondent thereafter commenced an action against appellant, seeking to recover rent, attorney's fees and damages for breach of the covenant to repair. Appellant filed a cross-complaint seeking a cancellation of the lease and a promissory note executed contemporaneously therewith. The trial court held that appellant had surrendered up possession of the leased premises and that respondent had accepted possession, and ordered that the lease and note be cancelled. The court, however, awarded respondent damages in the sum of $1,376.30 for breach of the covenant to repair. Appellant has appealed from the part of the judgment awarding damages against him.

[1] Appellant's major contention is that the judgment must be reversed because of a finding of the trial court that "during the trial it became necessary to determine the condition of the premises when defendant went into possession, and the Court finds that no one was able to do so." However, the rule is well settled that all of the findings must be read together and that any uncertainty or ambiguity in the findings must, if possible, be construed in support of the judgment. 28 Cal.Jur.2d, page 729. The court made the further finding that "during the course of the trial it became necessary to take an accounting of the necessary items of repairs, material and work done, furnished and performed in order to

arrive at the amount of damages suffered by the plaintiff by reason of the failure of the defendant to perform the conditions imposed upon the defendant during his occupancy thereof." The court then proceeded in its findings to detail the various items of repair made to the premises by respondent, amounting to $3,120, and segregated the items and amounts that the court determined were shown by the evidence to have been made necessary by appellant's breach of the covenant to repair. Specifically the court allowed damages in the amount of $440.32 for plumbing supplies and repairs, $506.71 for plaster and paint paid to the plumbing contractor, $158.20 for new locks; $9.36 for new light bulbs, $40 for new electric sockets, and $221.71 for new window glass and replacement of glass in a skylight plus repairs to the skylight. These items totaled $1,376.30. Judgment was rendered in the amount of $1,376.30.

Appellant argues that since respondent had the burden of proving damages and since he could not show the condition of the leased premises at the beginning of the lease, he was not entitled to damages. However, the question that we must determine is whether or not there is evidence in the record upon which the court could base its finding of damages against appellant. It is true that respondent could not state the exact condition of the premises at the beginning of the lease, but we are satisfied that there was ample evidence that it was in fairly good condition at that time. Mr. Markowitz testified that in 1946 he remodeled and repaired the whole building, with complete new wiring, plumbing, painting and other repairs; that in 1948 he inspected the premises and found them in excellent condition, and during the years 1949, 1950, and in 1951 prior to appellant's taking possession he visited the premises, and while he made no inspection of the premises, so far as he could observe they were in good condition. Appellant applied for a permit to occupy the leased premises, and the inspector reported to the health officer that he had made a careful inspection of the premises and recommended that the permit be issued. It is hardly likely that the inspector would have made such a recommendation if the premises were in anything remotely approaching the condition that the evidence showed they were in when appellant vacated the premises. Appellant's own testimony was that he had owned, leased and operated hotels for years and that he examined the premises carefully prior to purchasing the leasehold interest and personal property for $9,000 and agreeing to pay a rental of $350 per month. As stated by the trial judge in his memorandum opinion:

> "The defendant had been in possession approximately four years. It stands to reason that he would not have taken possession of the premises, and to have agreed to keep them in good repair, if the premises had been in such a condition as they were in when he moved out."

Mr. Markowitz testified to what he found as the condition of the premises in August, 1955, after lessee vacated the premises, and Mr. Quillici, an inspector for the Sacramento Health Department, testified to what condition the premises were in after lessee vacated the premises.

Markowitz, whose testimony was corroborated by Quillici, testified that the premises were in very poor condition. He stated:

> "Well, they were in very poor condition. All the plumbing throughout, there were sinks and basins throughout where the bottom of the basin was broken, taped together, handles tore off the basins and sinks were dripping and in very poor condition as though not so much from just normal wear and tear but from real abuse. In one particular, that is, there was one sink completely missing, gone right off the wall. The bannisters and rails coming up the stairs, they were loose and torn away in a couple of places. Lathes and plaster was out. There were various rooms had holes in the walls that had been done just sort of pushed or

kicked or cut. The paper was all torn and the floor coverings were all broken and there was broken windows. The windows, no shades or curtains, no light globes in the place. It was just pretty much of a mess. * * * All the windows, many of the glasses were completely broken out and there was glass on the floors and none of the windows would work. None were in working condition. There wasn't a shade in the place, occasionally a curtain."

He also testified in detail to other damage.

Appellant offered the testimony of himself, his daughter, and several other persons who testified that the premises were improved by appellant during his occupancy. This testimony merely created a conflict in the evidence, and evidently failed to impress the trial judge who stated in his memorandum opinion: "The testimony of Ikemoto and daughter was not clear or satisfactory."

[2, 3] While it is true that the burden of proving damages by reason of appellant's breach of the covenant to keep the premises in good repair was upon respondent, we believe that the evidence supports the court's findings that respondent was damaged to the extent of $1,376.30. Appellant relies upon the contention that since respondent could not testify positively and minutely as to the exact condition of the premises at the time of the commencement of the term of the lease, no damages can be awarded. It is true that the rule has been enunciated that in order for a lessor to recover for breach of a covenant to repair, the condition of the premises at the beginning and termination of the lease must be shown and if he does not do so he may not recover. Goodyear Fabric Corporation v. Hirss, 1 Cir., 169 F.2d 115; Zoslow v. National Savings & Trust Co., 91 U.S.App.D.C. 391, 201 F.2d 208. However, it has also been held that where the premises have been surrendered in a damaged condition the plaintiff has proved a prima facie case, and it is incumbent on the lessee, if he would avoid liability, to prove the damage was due to the excepted cause. Rustad v. Lampert, 149 Minn. 363, 183 N.W. 843.

[4] In the instant case we believe the evidence hereinbefore set forth was sufficient to support the conclusion that the damage which was found when the premises were surrendered, such as broken windows, damaged plumbing fixtures, and other items hereinbefore mentioned, was not the result of normal wear and tear and that appellant breached the provision of the lease requiring him to keep the premises and improvements in good repair. The memorandum opinion and the detailed findings show that the trial court weighed the evidence carefully and segregated from the total expenditure of $3,120 by respondent in the repair of the premises the items totaling the sum of $1,376.30 as the amount of damages suffered by respondent because of appellant's breach of the covenant to repair.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

CALIFORNIA BEVERAGE & SUPPLY CO., a corporation, Plaintiff, Respondent and Cross-Appellant,

v.

DISTILLERS DISTRIBUTING CORPORATION, a corporation, Defendant, Appellant and Cross-Respondent.

Civ. 22419.

District Court of Appeal, Second District, Division 2, California.

March 27, 1958.

Rehearing Denied April 21, 1958.

Hearing Denied May 21, 1958.

Action by wholesaler against liquor manufacturer. The Superior Court of Los Angeles County, Frederick F. Houser, J., rendered judgment on directed verdict in defendant's favor, and the plaintiff appealed from that portion of the judgment. The plaintiff cross-appealed. The District Court of Appeal, Fox, P. J., held that evidence raised question for jury as to whether manufacturer, through its employees, was guilty of unlawful interference with wholesaler's business relationships by diverting retailers' purchases from wholesaler during the last month of the one year period during which wholesaler, by contract, could distribute manufacturer's products.

Reversed and remanded with directions.

1. Contracts ⇐217

Contract permitting wholesaler to distribute liquor manufacturer's products for one year and requiring wholesaler, if it wished to renew, to apply for renewal not less than 30 days before the expiration of the year did not give wholesaler an option to renew the contract and manufacturer could refuse to renew it if he so desired.

2. Contracts ⇐215(1)

Where contract for distribution by wholesaler of liquor manufacturer's products for one year required wholesaler, if it wished to renew, to apply for renewal not less than 30 days before the expiration of the year, and wholesaler's notice of desire to renew was sent less than 30 days before the expiration of the year, the contract was not renewed and by its terms expired at the end of the year.

3. Contracts ⇐202(1)

Contract appointing wholesaler "as a distributor" of liquor manufacturer's products contained no implied provision that manufacturer would not appoint another distributor.

4. Contracts ⇐247

In wholesaler's action against liquor manufacturer for breach of contract permitting wholesaler to distribute manufacturer's products, evidence failed to establish executed oral amendment prohibiting an additional distributor of manufacturer's products.

5. Contracts ⇐323(1)

In wholesaler's action against liquor manufacturer for breach of one year distributorship contract permitting wholesaler to have a 45-day inventory on hand at end of year and allowing wholesaler to sell manufacturer's products for 30 days after end of year, evidence raised question for jury as to whether manufacturer breached contract by refusing to fill orders placed by wholesaler during last month of year.

6. Damages ⇐120(7)

If liquor manufacturer breached distributorship contract with wholesaler by failing to deliver liquor ordered by wholesaler during last month of the year at the end of which the contract terminated, the measure of wholesaler's damages was the net profit, if any, which wholesaler reasonably could have anticipated; the wholesaler could not recover damage for loss of good will in connection with the liquor which the manufacturer may have failed to deliver. West's Ann.Bus. & Prof.Code, § 14100.

7. Contracts ⇐215(1)

Where liquor manufacturer's one-year distributorship contract with wholesaler permitted wholesaler to have a 45-day inventory on hand at end of year and allowed wholesaler to sell manufacturer's products for 30 days after the end of the year, manufacturer was not required to fill wholesaler's orders for delivery in months sub-

sequent to the end of the year, even though such orders were placed prior to the end of the year.

8. Monopolies ⇐17(2.5)

Liquor manufacturer's refusal to renew distributorship contract with wholesaler because wholesaler was taking on the products of one of the manufacturer's principal competitors was not a violation of the anti-trust laws.

9. Monopolies ⇐28(1.4)

In the absence of injury to a plaintiff, a violation of the anti-trust statute is not actionable by a private party.

10. Torts ⇐28

In wholesaler's action against liquor manufacturer, evidence raised question for jury as to whether manufacturer, through its employees, was guilty of unlawful interference with wholesaler's business relationships by diverting retailers' purchases from wholesaler during last month of the one-year period during which wholesaler, by contract, could distribute manufacturer's products.

11. Torts ⇐10(1), 12

The unjustifiable inducement of a third person not to enter into or continue a business relationship with another, or the wrongful interference with the formation of a contract, is an actionable tort in California.

12. Torts ⇐10(3)

Where wholesaler's distributorship of liquor manufacturer's products expired on February 28, manufacturer could thereafter encourage retailers to purchase their supplies of manufacturer's products from its then distributors, and such conduct would not be tortious conduct on part of manufacturer, even though wholesaler still had a quantity of manufacturer's products on hand.

Lawler, Felix & Hall, John M. Hall, Los Angeles, for appellant and cross-respondent.

J. Albert Hutchinson, San Francisco, for respondent and cross-appellant.

FOX, Presiding Justice.

This litigation grows out of a contractual relationship between plaintiff and defendant concerning the distribution of Calvert distilled spirits. Plaintiff was awarded damages for two asserted breaches of the contract. As to these issues defendant has appealed. Plaintiff also sought damages for other alleged breaches of contract and for certain tortious conduct, including unfair competition, conspiracy and restraint of trade. The trial court directed a verdict in defendant's favor upon all these issues. Plaintiff has appealed from this portion of the judgment.

This case is the companion of A.B.C. Distributing Co. v. Distillers Distributing Corp., 154 Cal.App.2d 175, 316 P.2d 71, recently decided by this court. The issues in the two cases are substantially the same,[1] and that decision is controlling on many of the issues raised herein.

1. Plaintiff's initial brief in this case, filed prior to the A.B.C. opinion, stated that "plaintiff's appeal herein presents the same issues as are now pending before the Court in the [A.B.C. case], in which the defendants are identical, the plaintiffs are similarly situated and counsel are common to both cases." The brief states further: "Since no material differences in the issues, proof and disposition of the withheld issues exist as between the two cases, plaintiff deems it inappropriate to repeat at length the outline of the facts, applicable statutes and rules of decision set forth in the briefs on file in the A.B.C. case and takes the liberty of referring the Court to the presentation in the latter as equally applicable to the same points of discussion in this appeal in behalf of the plaintiff.

"Plaintiff shall, in consequence, note only the distinctions between the two cases, and, unless otherwise indicated, the Court may assume that the arguments, statements of position and of the facts of this case are materially identical to those set forth in the A.B.C. written submission.

"The relationship of the parties and the contractual instruments asserted in the two cases, the industry background and merchandising and distribution practices, and controlling statutes are identical."

Plaintiff is a wholesale distributor of alcoholic beverages. It purchases from manufacturers and other distributors and resells to retail dealers. Defendant is, by virtue of successive mergers, the successor to Calvert Distillers Corporation. It manufactures Calvert products and sells them to distributors. Prior to June, 1951, plaintiff had been a distributor of Calvert products in Los Angeles and Orange counties pursuant to a verbal agreement with Calvert. There were also several other Calvert distributors active in those areas over the years, but by 1951 only three were active: plaintiff, Simon Levi, and A.B.C. During the period prior to June, 1951, each of the three distributors had been at liberty to sell Calvert products in competition with the others to any retail liquor licensee anywhere within those areas. After June, 1951, Calvert restricted Simon Levi, A.B.C. and plaintiff each to an assigned territory. Since the territory assigned to each of the distributors was different, the result was that each distributor had an exclusive area for the sale of Calvert products. As of March 1, 1952, plaintiff and the other two distributors contracted in writing with Calvert. Each of the contracts covered a period of one year. At the termination of the first contract plaintiff entered into a second written contract with Calvert, effective March 1, 1953. This is the contract involved in the present litigation. The contract appointed plaintiff "as a distributor" of Calvert products. The territorial restrictions were essentially the same as before.

In June, 1953, the distributors were notified by Calvert that there would be an "opening up" of the territory—i.e., the distributors would no longer be confined to assigned territories; instead, each would be permitted to sell anywhere in the entire territory. The distributors were happy about the new arrangement and readily agreed to its adoption. In effect the written contracts were modified by an executed oral agreement concerning territorial restrictions.

In October, 1953, Calvert appointed the Don W. Snyder Company as a Calvert distributor for a territory which included Los Angeles and Orange counties. Plaintiff protested this appointment but continued its dealings with Calvert just as before.

On February 2, 1954, Mr. Froelich, a representative of Calvert, called on the president of plaintiff, Mr. Hillinger, and asked him if it was true that plaintiff was planning to "take on" a competing line of distilled spirits. Mr. Hillinger indicated that plaintiff was considering the matter but had made no definite decision. The next day Mr. Froelich told Mr. Hillinger over the telephone that plaintiff's contract would not be renewed. A letter dated February 1, 1954, from Hillinger to Calvert stated: "Please be advised that we are desirous of renewing our contract at the expiration of our agreement." Mr. Froelich replied by letter on February 4, stating: "As I advised you previously * * * we do not intend to renew your contract."

Thereafter, plaintiff commenced distributing the competing line. It continued to order Calvert products in March, 1954, but these orders were not filled. Plaintiff commenced this action on November 1, 1954.

[1, 2] Before discussing the points raised by defendant's appeal, we must consider the question of the renewal of the written contract between plaintiff and Calvert. The contract in this respect is exactly the same as the one before this court in the A.B.C. case, and we there held that the provision in question did not give the distributor an option to renew and that Calvert could refuse to renew the contract if it so desired. 154 Cal.App.2d at pages 183, 184, 316 P.2d at pages 76–77. Furthermore, the contract states that a distributor wishing to renew must "apply for renewal not less than 30 days before March 1, 1954." Plaintiff's notice of desire to renew the contract was sent less than 30 days before March 1, 1954. It is therefore clear that the contract between plaintiff and Calvert was not renewed in

1954. By its terms this contract expired at the end of February, 1954.

Defendant's appeal concerns the two asserted breaches of contract found by the trial court. The trial court ruled as a matter of law that the appointment of Snyder as an additional Calvert distributor was a breach of contract. The court also ruled as a matter of law that Calvert breached the contract by failing to deliver 162 cases of liquor during February 1954. The court submitted to the jury only the question of damages arising from these two breaches of contract.

[3] Defendant contends that the court erred in ruling as a matter of law that the appointment of the Snyder Company as an additional distributor in the fall of 1953 was a breach of an implied provision in the contract. Defendant's contention is correct. The trial court should have ruled as a matter of law that there was no such implied provision in the contract. The situation in the instant case is substantially the same as in the A.B.C. case, and we there held that as a matter of law there was no such implied provision and hence no breach of contract (154 Cal.App.2d at page 187, 316 P.2d at pages 78–79). Our opinion in the A.B.C. case fully discusses the law on this subject, so it need not be repeated here. It is there pointed out that the law is clearly against plaintiff's proposition that the contract impliedly prohibited the appointment of Snyder as an additional distributor.

[4] Nor may the trial court's ruling be sustained on the basis of an "executed oral amendment" to the 1953 contract. Plaintiff seeks to fortify its position on this point by certain testimony of Mr. Hecht, who was president of the A.B.C. Distributing Company, to the effect that when the matter of opening up the restricted territory was discussed with him in the latter part of May, 1953, Mr. Taub, who represented Calvert, stated that each of the distributors (California Beverage & Supply Company, Simon Levi and A.B.C.) would service the whole territory and nothing was said about Calvert considering the addition of a new distributor. This evidence does not establish any oral agreement prohibiting an additional distributor. Moreover, it must be borne in mind that this conversation was not had with a representative of plaintiff and is not the conversation upon which plaintiff must rely as the basis for an oral amendment prohibiting the addition of another Calvert distributor. The only conversation upon which plaintiff may rely took place in June between Mr. Hillinger, plaintiff's president, and Mr. Taub, representing defendant. Mr. Hillinger testified that during that conversation "nothing was mentioned" about the addition of any new or different distributors in the territory. There was no other reference to that subject matter. It is thus apparent that there is no substantial basis for finding "an executed oral amendment" between plaintiff and Calvert to the effect that no additional distributor would be appointed for the territory. The only purpose of the conversations mentioned above was to inform the respective distributors that the territorial restrictions of each distributor were being removed and that each distributor would be free to service the entire territory. The judgment must therefore be reversed as to the Snyder issue.

[5] Defendant's next contention is that the trial court erred in ruling as a matter of law that Calvert failed to deliver 162 cases of liquor in February, 1954, thus causing a breach of the contract. The evidence sustains this contention. The trial court construed paragraph 12 [2] of the contract as allowing plaintiff 30 days after March 1, 1954, to sell Calvert's products, even though the contract terminated on February 28. The court then construed

2. Paragraph 12 reads as follows:
"In the event that this contract is not renewed, Distributor agrees that within 30 days after March 1, 1954, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory."

paragraph 5 [3] as permitting plaintiff to have at least a 45-day inventory (if Calvert had supplies available to fill plaintiff's orders) on hand at the end of February, 1954. The court concluded that the difference between the amount of this 45-day inventory (1,584 cases) and the amount which plaintiff actually had on hand at the beginning of March (1,422 cases) represented the number of cases which Calvert should have delivered to plaintiff to avoid being in breach of the contract. Although we agree with the court's interpretation of the two paragraphs in question, we cannot accept the court's directing a verdict for plaintiff. It seems perfectly clear that under the contract defendant was under no obligation to deliver to plaintiff during February, 1954, more cases of Calvert products than plaintiff ordered. Plaintiff was entitled to make such orders during the month of February, 1954, as would enable it to maintain a 45-day inventory; but defendant may not be penalized for plaintiff's failure to order the maximum during that month. In deciding that Calvert failed to deliver 162 cases of liquor, the trial court apparently assumed that such cases were ordered and the order was not filled. This was a question of fact which should have been submitted to the jury if there was a substantial conflict in the evidence. United Air Services, Ltd. v. Sampson, 30 Cal.App.2d 135, 86 P.2d 366. There was evidence in the record of sufficient substantiality to entitle the jury to conclude that Calvert filled all the orders which paintiff placed during February, 1954. The exhibits and testimony of plaintiff's own witnesses showed that plaintiff placed written orders during February for 1,440 cases, and that such orders were all filled by Calvert. In prior years plaintiff ordered only 500 or 600 cases in February. Plaintiff's final February order, placed on Friday, February 26, 1954, was accompanied by a letter in which the following statement appeared: "We are enclosing an order for 320 cases of Calvert which is needed to complete the orders that we have now on hand." The only evidence which would support the conclusion that plaintiff placed orders during February which Calvert failed to fill is testimony by Mr. Hillinger. He testified that plaintiff placed certain orders by telephone which Calvert refused to ship. These orders were not confirmed in writing. Nor was there substantial evidence as to the total amount of such orders. But this testimony, if believed by the jury, would tend to establish a breach of contract by Calvert in this regard. It is thus clear that the evidence was conflicting and that the jury should have been permitted to decide how many, if any, cases of Calvert products were ordered by plaintiff and not delivered by Calvert. The judgment must be reversed and the cause remanded for a new trial on this issue. It should be noted that the maximum for which Calvert may be held liable is the net profit on 162 cases of Calvert. The reason for this is that paragraph 5 of the contract gave Calvert the right to refuse to fill orders when it would result in plaintiff's having more than a 45-day inventory on hand; and the difference between that 45-day inventory and the number of cases actually on hand at the beginning of March, 1954, was 162 cases.

[6] Since there must be a new trial on the question of breach of contract for failure to deliver liquor ordered for February delivery, it is appropriate for us to comment on the issue of good will. The

3. Paragraph 5 reads as follows:
"Calvert agrees to supply its products to Distributor to the best of Calvert's ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract."

trial court permitted the jury to award plaintiff damages for loss of good will in connection with the 162 cases which Calvert allegedly failed to deliver. This was error. The only question involved was breach of contract; good will had nothing to do with it. "Good will" is defined as the expectation of continued public patronage. Business and Professions Code, sec. 14100. It is obvious that plaintiff could have no expectation of continued public patronage in connection with Calvert products since it would no longer be a distributor of Calvert commencing March 1, 1954. The only damage which plaintiff could suffer by reason of Calvert's failure to deliver liquor which it had ordered is the net profit which it would derive from the sale of such products. Therefore, if Calvert is found to have been in breach of contract upon retrial, the measure of plaintiff's damages is the net profit, if any, which plaintiff reasonably could have anticipated.

[7] In connection with the question of the February orders we should also consider plaintiff's contention that Calvert's failure to deliver 2,500 cases of liquor, which were ordered on January 25, 1954, was a breach of contract. The 2,500 cases represent two separate orders, one for 1,500 cases and the other for 1,000. The former order called for delivery after March 1, 1954, and the latter order scheduled delivery during the week of March 29, 1954. Defendant contends that Calvert was not required to fill these orders since they called for delivery subsequent to the termination of the contract. The trial court ruled in defendant's favor as a matter of law, and we are convinced that the court's conclusion was correct. While it is clear that plaintiff was entitled to maintain a 45-day inventory during the period the contract was in effect, it is implicit in the agreement that plaintiff was not entitled to maintain such 45-day inventory once the contract terminated. Paragraph 12 of the contract (see footnote 2) merely gave plaintiff a maximum of 30 days after the termination of the contract to dispose of the supply it had on hand at that time. Within such 30 days plaintiff was obligated to return all the unsold Calvert merchandise. To apply plaintiff's interpretation would render paragraphs 11 [4] and 12 of the contract meaningless. Plaintiff could cause the contract to continue indefinitely, even beyond its February 28 termination date, simply by placing orders in January and February for delivery in March, April, May and so forth. Plaintiff could thus obtain a substantial number of cases each month even though the contract had terminated. The only reasonable interpretation of the contract, therefore, is that Calvert was not required to fill orders for delivery in months subsequent to the termination of the contract, regardless of when such orders were placed.

[8, 9] We turn now to the questions raised by plaintiff's cross-appeal which have not already been discussed. These involve the various allegations of tortious conduct by Calvert. With one exception the material allegations and facts proved in this regard are substantially the same as those in the A.B.C. case. See 154 Cal. App.2d at pages 178–183, 316 P.2d at pages 73–76. We there answered the same contentions which plaintiff makes in the instant case. 154 Cal.App.2d at pages 187–193, 316 P.2d at pages 79–82. We pointed out that Calvert's refusal to renew the contract because A.B.C. was taking on the line of one of Calvert's principal competitors did not provide a sufficient basis for finding an antitrust law violation. We found no substantial evidence of any conspiracy, restraint of trade or other unfair competition. And we found that plaintiff suffered no injury by reason of the provisions in the contract which it alleges are illegal. Our conclusions in the instant case are the same, and it is unneces-

4. Paragraph 11 provides:
"This contract shall be effective for a period of 1 year * * * from March 1, 1953 * * *."

sary here to duplicate our discussion in the A.B.C. case of the pertinent authorities.[5] It will suffice to consider the additional recent cases upon which plaintiff now relies. One of these is Black v. Magnolia Liquor Co., 355 U.S. 24, 78 S.Ct. 106, 2 L.Ed.2d 5, in which the United States Supreme Court held that a wholesaler of alcoholic beverages who made tie-in sales (i. e., compelling a retailer to buy certain brands which he did not desire in order to obtain other brands which he did desire) violated section 5 of the Alcohol Administration Act, 27 U.S.C.A. § 205, and that the suspension of the wholesaler's license was therefore proper. The Black case has no application to the one at bar. There is no evidence of any tie-in sales in the instant case. Moreover, the Black case deals with a license suspension by an administrative agency; the question of the right of a private party to seek damages was not involved. One of the aims of the Alcohol Administration Act is to prohibit practices which are analogous to those prohibited by the antitrust law (Black v. Magnolia Liquor Co., supra), and we held in the A.B.C. case that a violation of an antitrust statute is not actionable by a private party in the absence of any injury to him. 154 Cal.App.2d at page 191, 316 P.2d at page 81. Since plaintiff has failed to establish the fact that it suffered any injury because of Calvert's alleged violations of the above act or any of the antitrust laws, it may not maintain an action based upon such alleged violations.

Plaintiff also relies upon the recent case of Flintkote Co. v. Lysfjord, 9 Cir., 246 F.2d 368. That case deals with an unlawful conspiracy to restrain trade among contractors in the acoustical tile industry. It is not in point because there is not sufficient evidence in the instant case to establish any unlawful conspiracy to restrain trade. The court in the Flintkote case even recognized that "one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause, or for no cause whatever." Flintkote Co. v. Lysfjord, supra, at page 376.

Plaintiff also relies upon two California cases decided subsequent to the A.B.C. decision. They are Garmon v. San Diego Bldg. Trades Council, 49 Cal.2d 595, 320 P.2d 473, and Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16. Neither of these cases has any relevancy to the issues before us.

[10–12] There is one particular which makes the instant case sigificantly different from the A.B.C. case. One Donald Richardson, who was employed by plaintiff at the time of the trial, testified that he was working for Calvert during the latter part of 1953 and the first few months of 1954. His job was to cooperate with the Calvert distributors, check their inventories and aid them in securing orders for Calvert products from retailers. Mr. Richardson would sometimes take an order and telephone it in to one of the distributors. Early in February he was told that California Beverage & Supply Company was no longer to be a distributor and he was instructed to confine his operations to the other distributors. He testified that he

5. The recent case of Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 313 P. 2d 936, supports our conclusion in connection with plaintiff's allegations of unlawful refusal to deal on the part of Calvert. In that case the appellate court reversed the trial court and ordered judgment for defendants upon a cause of action alleging an unlawful agreement to eliminate the plaintiff as a dealer of Hudson automobiles. The court held (152 Cal.App.2d at pages 439–447, 313 P.2d at pages 949–954) that the allegations and proof of defendants' refusal to deal with plaintiff did not establish a cause of action under the Cartwright Act, Bus. & Prof.Code, § 16700 et seq. See, also, Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S.App. D.C. 161, 243 F.2d 418, certiorari denied, Webster Motor Car Co. v. Packard Motor Car Co., 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38; Schwing Motor Co. v. Hudson Sales Corp., D.C., 138 F.Supp. 899, affirmed, 4 Cir., 239 F.2d 176, certiorari denied, 355 U.S. 823, 78 S.Ct. 30, 2 L.Ed.2d 38, both of which are relied upon in the Milton case.

thereafter instructed retailers that plaintiff was no longer a distributor and he sent their orders to one of the other distributors. He stated that on certain occasions during February, 1954, he diverted from plaintiff to other distributors purchases by retailers who had regularly purchased their Calvert products from plaintiff. This testimony, if believed by the jury, would lend support to a finding that Calvert, through its employee, committed acts constituting unlawful interference with a business relationship during February, 1954. The unjustifiable inducement of a third person not to enter into or continue a business relationship with another, or the wrongful interference with the formation of a contract, is an actionable tort in California. Guillory v. Godfrey, 134 Cal.App. 2d 628, 632, 286 P.2d 474; Masoni v. Board of Trade of San Francisco, 119 Cal.App.2d 738, 741, 260 P.2d 205. "Whether an intentional interference by a third party is unjustifiable and actionable depends on a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances, among which the methods and means used and the relation of the parties are important." Masoni v. Board of Trade of San Francisco, supra, 119 Cal.App.2d at page 742, 260 P.2d at page 208. The aforementioned testimony raised a question of fact—namely, whether or not Calvert was guilty of unlawful interference with plaintiff's business relationships by diverting purchases from plaintiff during February, 1954. It was error for the trial court to rule as a matter of law that the admitted conduct of Calvert's employee, Richardson, was not wrongful. The jury should have been permitted to determine this question and pass upon the credibility of Richardson. Therefore, there must be a new trial upon this issue. In the event that it is determined upon a retrial that Calvert was guilty of a tort in this connection, it should be noted that plaintiff's recovery should be limited to the damage it suffered during February, 1954. Richardson's conduct after March 1, 1954, cannot be considered wrongful in view of the fact that plaintiff's distributorship expired on February 28. Even though plaintiff still had a quantity of Calvert products on hand, Calvert was at liberty to encourage retailers to purchase their supplies of its products from its then distributors.

The judgment is reversed and the cause remanded for a new trial on the two issues specified herein, and the trial court is directed thereafter to enter a new judgment not inconsistent with this opinion. Each party shall bear its own costs on this appeal.

ASHBURN, J., and KINCAID, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



159 Cal.App.2d 4

Cecil WETSEL and Lillian Wetsel, Plaintiffs and Respondents,

v.

Theresa GARIBALDI, Henry J. Garibaldi and Mary O. Garibaldi, Defendants and Appellants.

Civ. 9112.

District Court of Appeal, Third District, California.

March 28, 1958.

Proceeding to confirm award of arbitrators. The Superior Court, Amador County, Jay L. Henry, J., entered order confirming award and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that under contract providing that in the event of any disagreement or dispute on any point arising under contract or in carrying out same matter in difference should be determined by arbitration, arbitrators' construction of provisions of contract as to which error was assigned and the factual determinations, were beyond scope of review accorded by statutes.

Affirmed.

1. Appeal and Error ⇐81
Arbitration and Award ⇐73

Order to arbitrate was not appealable, but propriety of order to arbitrate could be reviewed on appeal from order confirming arbitrators' award.

2. Contracts ⇐292½

Where there was nothing in contract provision respecting arbitration which justified holding that arbitrators were given power to pass on arbitrability of dispute, it would be assumed that parties to proceeding for order to compel arbitration expected court determination of arbitrability.

3. Contracts ⇐292½

Where contract provided for arbitration of any disagreement or dispute, and a dispute arose but one of the parties denied right of arbitration on ground that other party, by its alleged breach of contract, had forfeited all rights under contract including right to arbitration, by their action in petitioning for order compelling arbitration parties initially submitted to the court question of whether agreement to arbitrate had been unilaterally terminated by breach of contract. West's Ann.Code Civ.Proc. § 1282.

4. Contracts ⇐292½

Where contract provided that all disputes should be submitted to arbitration but one party refused to arbitrate on grounds that plaintiffs, by allegedly material breaches of contract, had forfeited rights thereunder including right to arbitration, and plaintiffs petitioned for order compelling arbitration, even though trial court in ordering arbitration made no specific finding as to whether contract had been terminated for cause or remained in all its parts in full force and effect, it impliedly decided that issue in favor of plaintiffs since it otherwise would not have ordered arbitration. West's Ann.Code Civ.Proc. § 1282.

5. Arbitration and Award ⇐73

Where plaintiffs brought proceeding to compel arbitration of differences in accordance with contract provision and defendants claimed that plaintiffs had forfeited their rights under contract including right to arbitration because of material breaches of contract, on appeal from order confirming arbitration award in absence of transcript of all proceedings, District Court of Appeal must affirm trial court's order directing parties to arbitrate.

6. Arbitration and Award ⇐73

Where plaintiffs brought proceeding to compel arbitration of dispute in accordance with contract provision and defendants claimed that plaintiffs had forfeited rights under contract including right to arbitrate because of material breaches of contract, but order of trial court compelled arbitration and then defendants joined with plaintiffs in submitting difference to arbitrators but still opposed arbitration based on claim of unilateral termination of contract by plaintiffs, defendants effectively reserved right to review arbitration order on appeal from order confirming award.

7. Appeal and Error ⇐907(2)

Where plaintiffs brought proceeding to compel arbitration of disputes arising under contract providing for arbitration but defendants claimed that plaintiffs had forfeited rights under contract because of their unilateral termination thereof, but there was no record of oral proceedings before trial court which resulted in order compelling arbitration, District Court of Appeal would assume that trial court on proper facts decided that there had been no unilateral termination.

8. Arbitration and Award ⇐73

On appeal from order confirming arbitration award, appellate court cannot go into the merits of the arbitrated disputes between the parties if such matters are not subject to judicial review.

9. Contracts ⇐290

Where plaintiffs brought proceedings to compel arbitration of disputes under contract providing for arbitration and secured order compelling arbitration proceedings which were then had, after arbitrators had made their award the institution of lawsuit for injunctive relief on matters connected with contract did not constitute a waiver by plaintiff of right to arbitrate.

10. Arbitration and Award ⇐72

If parties accept and abide by an award of arbitrators there is no need for further judicial procedure, and ordinarily proceeding to confirm award is not initiated unless one of the parties refuses to abide by the award or unless it be the desire of a party that an official record of the confirmation and judgment be made. West's Ann.Code Civ.Proc. § 1287.

11. Arbitration and Award ⇐66, 73

Every intendment will be indulged in to give effect to arbitration proceedings, and to justify setting aside of an award on account of error it must be shown that rights of one of the parties is prejudiced by the award.

12. Arbitration and Award ⇐73

On appeal from order confirming arbitration award, appellate court cannot review merits of award of arbitrators who are empowered to determine issues of law as well as of fact.

13. Arbitration and Award ⇐72

In proceeding to confirm award of arbitrators made under contract providing that in the event of any disagreement or dispute on any point arising under contract, or in carrying out same, matter in difference should be determined by arbitration, arbitrators' construction of provisions of contract as to which error was assigned and their factual determinations were beyond the scope of review accorded by statute. West's Ann.Code Civ.Proc. §§ 1282, 1287.

Adon V. Panattoni, Sacramento, for appellants.

Geo. Gard Chisholm, Jackson, and J. A. Montgomery, Jr., Sacramento, for respondents.

VAN DYKE, Presiding Justice.

Appellants, hereinafter called Garibaldi, appeal from an order confirming an award of arbitrators and from the judgment entered thereon. Respondents, hereinafter called Wetsel, on June 27, 1940, entered into a written agreement with Garibaldi for the purchase by Wetsel of growing timber with the right to cut and remove the same from Garibaldi lands. The contract contained numerous provisions as to what trees might be cut and removed, as to the conditions of such cutting and removal and as to the price to be paid. The contract also contained a paragraph, numbered 27, reading as follows: "In the event of any disagreement or dispute on any point arising under this contract, or in carrying same out, the matter in difference shall be determined by arbitration, * * *."

The contract also contained a paragraph, No. 31, which provided that if Wetsel defaulted under the contract and did not cure such default within 30 days after receiving notice to do so Garibaldi might reenter the premises and exclude Wetsel therefrom, and at their option terminate the agreement, retaining all moneys paid.

At various times the parties executed amendments to the contract, affecting such matters as price, addition of lands to the lands covered by the agreement and conditions governing the cutting and removal of trees. During this time Wetsel exercised their rights. After the execution of the last amendatory agreement disputes arose and on April 24, 1950 Wetsel made written demand upon Garibaldi for the appointment of an arbitrator to determine a dispute concerning Wetsel's right to cut and remove timber from a specific parcel of land. Garibaldi notified Wetsel that an arbitrator had been appointed, but that there were additional disputes to arbitrate. They proposed that the arbitrators consider 19 items of dispute and that the arbitrators also consider Garibaldi's claim that Wetsel had forfeited all of their rights under the contract, including the right to arbitration, by having committed material breaches thereof, for which Garibaldi had exercised their option to end the agreement and terminate all rights of Wetsel. A dispute arose as to the matters to be covered by the proposed arbitration and Garibaldi notified Wetsel that they withdrew from arbitration and would resort to other remedies for the preservation of their rights. Thereupon Wetsel

petitioned the Superior Court for an order compelling arbitration. The court issued an order to show cause why arbitration should not be ordered and in response thereto Garibaldi moved that the arbitration proceedings be dismissed, asserting their contentions that the right to arbitrate was gone. The court heard the matter and ordered that the controversies between the parties be submitted to arbitration on all matters arising under the contract. The court denied the motion to dismiss the proceeding. No specific findings were made on the issue of contract termination.

Arbitrators were appointed and those appointed selected a third. The arbitrators made an award disposing of the various disputes. Wetsel applied to the court to confirm the award and for the entry of judgment thereon. Garibaldi opposed and moved to vacate the award. The court set the award aside, deeming that on certain issues submitted the arbitrators had not made a complete determination. It ordered the arbitrators to take further action. This they did. A new award was made. Petition for confirmation and judgment was filed. Garibaldi renewed their opposition, but the court ordered confirmation of the award and thereupon entered judgment. The appeal followed.

Appellants Garibaldi contend that there were major controversies existing between the parties which were outside of the arbitration clause and therefore not arbitrable, and that even assuming such controversies were arbitrable, still there existed no right of arbitration at all because, acting under paragraph 31 of the principal contract and by reason of substantial breaches of the contract by Wetsel, Garibaldi had elected to terminate, and had terminated, the entire contract, with the result that there no longer existed an agreement to arbitrate. The question of the existence of an agreement to arbitrate and of the scope of the arbitration permissible under that agreement are issues which, in the first instance, the code refers to judicial action. Section 1282 of the Code of Civil Procedure provides:

"A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. * * If no jury trial be demanded said court shall hear and determine such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

[1–3] The order to arbitrate is not appealable. Corbett v. Petroleum Maintenance Co., 119 Cal.App.2d 21, 258 P.2d 1077; Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668; Jardine Matheson & Co., Ltd. v. Pacific Orient Co., 100 Cal.App. 572, 280 P. 697. But the propriety of the order to arbitrate, including any order delineating the issues to be arbitrated may be reviewed on appeal from the final order confirming the arbitrators' award or from the judgment entered thereon. No contention is advanced herein that the parties have, as they might have done, agreed that the arbitrators themselves might pass upon the arbitrability of disputes. McCarroll v. Los Angeles, etc., Carpenters, 49 Cal.2d 45, at page 65, 315 P.2d 322, at pages 333, 334. Certainly there is nothing in

the broad and simple language of the arbitration clause in the principal contract justifying a holding as a matter of law that the arbitrators were given such powers and the assumption, therefore, is that the parties expected a court determination of arbitrability. McCarroll v. Los Angeles, etc., Carpenters, supra, 49 Cal.2d at page 45, 315 P.2d at page 334. The parties therefore in the proceedings under Section 1282 of the Code of Civil Procedure submitted to the court initially the question of the existence of an agreement to arbitrate, concededly having once been made but challenged as to continuing validity by Garibaldi's contention that the contract had for breach been terminated by their unilateral action. They rely upon Hanes v. Coffee, 212 Cal. 777, 300 P. 963; Abraham Lehr, Inc., v. Cortez, 57 Cal.App.2d 973, 135 P.2d 684, and Friedlander v. Stanley Productions, 24 Cal.App.2d 677, 76 P.2d 145.

[4] Although the trial court made no specific finding as to whether the contract had been terminated for cause, as contended by Garibaldi, or remained in all its parts in full force and effect, as contended by Wetsel, it impliedly decided that issue in favor of Wetsel since otherwise it would not have ordered arbitration.

[5] The record here does not disclose the proceedings before the trial court except to present to us the order that it made and its preparatory recitals that the matter had been heard and submitted for decision. In trying out the issue of unilateral termination the parties would be entitled to present evidence to the court concerning such matters as whether in fact Wetsel had breached the agreement, how serious the breaches were as either justifying or not justifying unilateral termination, whether or not breaches, if committed, had been cured or waived. In the absence of a transcript of oral proceedings, we have something in the nature of a judgment roll appeal from the court's order impliedly ruling that unilateral termination had not occurred; that, therefore, the parties had an existing agreement to arbitrate; that there was a refusal to arbitrate existing disputes by Garibaldi; and that these disputes arose out of the contract or its performance and were, consequently, arbitrable. We must, therefore, affirm the trial court's order directing the parties to arbitrate. We may say here that there is a claim by Wetsel that Garibaldi, notwithstanding their contentions advanced in their opposition to the order to arbitrate that the contract had been terminated, nevertheless submitted the issue of unilateral termination to the arbitrators. This, of course, they could have done, and had they done so they would be bound by the arbitrators' determination of that issue. We think, however, it would be unfair on this record to say that Garibaldi had in this manner waived or deprived themselves of the right to object to arbitration on the ground under discussion, and to have judicial determination of that issue.

[6] Having been ordered to arbitrate, Garibaldi joined with Wetsel in submitting to the arbitrators a number of differences that had arisen and some of these included the same alleged breaches of contract which furnished in part a foundation for their claim of unilateral termination. In doing so, however, they recited the fact of their opposition to arbitration based on their claim of unilateral termination. We think they effectively reserved their right to review the arbitration order on appeal, though, perforce, accepting the arbitration order involving the same disputes in so far as the arbitrators might award damages or other remedies for any breaches found by the arbitrators to have been committed by Wetsel. The arbitrators did find in a number of instances that Wetsel had breached the agreement, and as a remedy therefor the arbitrators directed Wetsel to take steps to repair the injuries their acts had caused. Thus the arbitrators ordered Wetsel to restore fences wrongfully removed, and to clear springs wrongfully choked with logging debris, within designated time limits, with damage awards as alternatives if they failed to remedy the injuries they had caused. It also appears that Wetsel in designating disputes to be arbitrated referred

to the issue of unilateral termination, in terms asserting that the superior court had ruled upon that matter and it appears further that the arbitrators considered that the issue had been ruled upon by the court adversely to Garibaldi. The arbitrators, therefore, made no determination of that issue.

[7] In the absence of a record disclosing the oral proceedings before the trial court upon the issue of unilateral termination, we find that the record before us would not warrant us in holding that, as a matter of law, the arbitration order was erroneous. We must assume the court, on proper facts, decided there had been no unilateral termination. This being so, then the arbitration clause was sufficiently broad to make arbitrable every other controversy arbitrated.

[8] We think it unnecessary to relate the several issues, numbering seventeen, which were arbitrated. We cannot sustain Garibaldi's contention that some were not arbitrable. They say that, while some defaults, such as damage to fences, water springs, etc., are by the terms of the contract such that arbitration would probably follow, other alleged breaches, such as the wrongful relogging of land already cut over, and the removal of trees and logs reserved to appellants, are not arbitrable. We do not so construe the arbitration agreement. We have noted its broad language, broad enough, indeed, to have even covered the subject of unilateral termination as a dispute arising out of the contract had not Garibaldi elected, as they did, to demand judicial determination of that issue. The arbitrators summarily stated the issues arbitrated. They were claims by Garibaldi that Wetsel had cut timber on property not included within their contract; that Wetsel had cut timber that was undersized; that the contract's specifications as to size must be determined as of the date of the execution of the contract and not as of the time of cutting, which occurred years later; that Wetsel had no right to cut dead timber and had done so; that they had cut unmerchantable timber, thus violating the reserve rights of Garibaldi; that they had cut timber closer to buildings than was permitted; that they had wrongfully cut trees marked as being reserved to Garibaldi; that they had constructed unnecessary and unwarranted access roads on the property; that they had damaged reserve timber by careless logging; that they had logged closer to springs than permitted and had damaged some and destroyed others; that they had relogged areas contrary to their rights; that they had interfered with mining operations by Garibaldi; that they had damaged fences; that they had failed to continuously log as required by the contract. It is apparent that the arbitrators were required to determine many issues, both of fact and of law, but that is necessary in most arbitrations. It is permitted by the statute and was within the agreement of the parties. Of course we cannot on appeal go into the merits of the arbitrated disputes between the parties. Such matters are not subject to judicial review. O'Malley v. Petroleum Maintenance Co., 48 Cal.2d 107, 111, 308 P.2d 9; Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 671, 220 P.2d 973. It appears that the arbitrators in this case diligently and intelligently acted upon every issue submitted. It is indicated by their award that they made many field investigations and obtained the services of men fitted by training to inspect the timber lands and testify as to conditions found. The arbitrators must have spent a great deal of time and appear to have done a thorough job.

[9, 10] It is contended by Garibaldi that Wetsel waived their right to arbitrate by filing a separate lawsuit for injunctive relief on a matter connected with the principal contract. Reference is to a suit filed by Wetsel whereby they sought to enjoin Garibaldi from interfering with their logging operations on a specified tract. This suit was brought on May 2, 1952, about two months after Wetsel had petitioned the court for an order confirming the award of the arbitrators and about six months after the arbitrators had rendered their award. Impliedly the trial court resolved this issue of waiver against Garibaldi in the proceed-

ings to confirm the award and for the entry of judgment thereon. The arbitrators having made their award, the arbitration proceeding was at an end. Whether or not there would be any application to a court for confirmation pursuant to Section 1287 of the Code of Civil Procedure would depend upon the conduct and desires of the parties. If parties accept and abide by an award there is no need for further judicial procedure. And ordinarily such procedure is not initiated unless one of the parties refuses to abide by the award or unless it be the desire of a party that an official record of confirmation and judgment be made. The complaint in the action filed by Wetsel recited that Wetsel had the right to cut timber on a tract known as the Stevenson place; that on the 1st of May, 1952 Garibaldi had prevented Wetsel from entering for the purpose of cutting and removing timber greatly to the damage of Wetsel and they prayed that Garibaldi be enjoined from thus interfering with the exercise of their rights. The right of Wetsel to cut timber from the Stevenson place was one of the matters that had been submitted to the arbitration and the arbitrators had ruled that Wetsel had such right. The right relied upon by Wetsel, therefore, in the injunction suit was one which the arbitrators had determined Wetsel possessed and their action in requesting injunctive relief against such actions could not legally constitute a waiver of the already exercised and completed right to arbitrate. The court was amply authorized to hold, as it impliedly did, that there had been no waiver.

[11, 12] Finally, Garibaldi contends that the arbitrators exceeded their powers and that, therefore, the trial court erred in confirming the award. It should be observed here that every intendment will be indulged to give effect to arbitration proceedings and that to justify the setting aside of an award on account of error it must be shown that the rights of one of the parties is prejudiced by the award. Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 207 P.2d 647. Under this assignment Garibaldi contends that the arbitrators exceeded their powers in the determination of several issues. They assert that the arbitrators erroneously interpreted various parts of the principal contract and then applied their interpretations to the resolution of issues which would have been otherwise determined had the arbitrators correctly construed the agreement; that the arbitrators, as to another issue, reached an agreement that dead timber was not sold to Wetsel and yet made no award in spite of the fact, as shown by a minority report, that quantities of timber had been obtained from dead trees; that the arbitrators had assessed money damages for various breaches they found that Wetsel had committed and that on occasion they had accepted the estimates of third persons in assessing damages. As we have said, we cannot review the merits of the arbitrators' award. They are empowered to determine issues of law as well as of fact. As said in Sapp v. Barenfeld, 34 Cal.2d 515, 523, 212 P.2d 233, 239:

> "Even though a party expressly asserts a lawful claim in the submission or raises it by the presentation of evidence to the arbitrators, the law does not guarantee that the claim will be allowed. Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action."

Said the court in Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 186, 260 P.2d 156, 172:

> "* * * [I]t must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute."

[13] Under the broad provisions of the arbitration clause in the principal contract we have before us we hold that the arbitrators' construction of the provisions of the contract as to which error is assigned

and their factual determinations are beyond the scope of the review accorded by the statutes.

The order and the judgment appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.



159 Cal.App.2d 172

Longino ROLLO, Plaintiff and Appellant,

v.

CALIFORNIA STATE AUTOMOBILE ASS'N et al., Defendants,

Truck Insurance Exchange, an Inter-Insurance exchange, Defendant and Respondent.

Civ. 17577.

District Court of Appeal, First District, Division 1, California.

April 4, 1958.

Rehearing Denied May 2, 1958.

Hearing Denied May 27, 1958.

Employee's action against employer's automobile liability insurer. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the financial responsibility laws do not require, expressly or impliedly, that employer must have liability policy covering injuries for which employer is liable, and only liable, under workmen's compensation laws, and held that automobile liability policy, extending coverage to anyone driving vehicle with permission of owner but specifically excluding as additional insured any fellow employee of employee injured in course of his employment by named insured while automobile was being operated in business of employer, excluding coverage for bodily injuries suffered by employee of named insured while engaged in employ of insured, and excluding coverage where benefits were payable under workmen's compensation law to injured employee or where employer could be held liable under workmen's compensation law, was not invalid as contravening provisions of financial responsibility law.

Affirmed.

1. Insurance ⇐435.19

Employer's automobile liability policy, containing omnibus clause extending coverage to anyone driving vehicle with permission of owner but specifically excluding as an additional insured a fellow employee of injured employee of same employer injured in course of his employment by named insured while automobile was being operated in business of employer, afforded no coverage for injuries sustained by employee when employer's automobile was negligently driven into collision by a fellow employee.

2. Automobiles ⇐55

An unsatisfied judgment against person whose registration privileges are involved is a condition precedent to suspension of registration privileges under Vehicle Code sections providing for suspension of license of owner of vehicle unless he files affidavit stating that he was insured on date of accident giving rise to judgment for personal injuries. West's Ann.Vehicle Code, §§ 410 to 418.5, 420.

3. Automobiles ⇐43

Vehicle Code section, providing that where employee is driving his employer's automobile with consent, and has accident, employer, unless insured, must deposit security sufficient to satisfy expected judgment, has no application where employer could not be held liable for negligence of driver and where no judgment has or can be secured against employer because of provisions of Workmen's Compensation Act. West's Ann.Vehicle Code, §§ 410 to 418.5, 420.

4. Automobiles ⇐43

The financial responsibility laws do not require, expressly or impliedly, that em-

ployer must have liability policy covering injuries for which employer is liable, and only liable, under workmen's compensation laws; and automobile liability policy, extending coverage to anyone driving vehicle with permission of owner but specifically excluding as an additional insured any fellow employee of employee injured in course of his employment by named insured while automobile was being operated in business of employer, excluding coverage for bodily injuries suffered by employee of named insured while engaged in employ of insured, and excluding coverage where benefits were payable under workmen's compensation law to injured employee or where employer could be held liable under workmen's compensation law, was not invalid as contravening provisions of financial responsibility law. West's Ann.Labor Code, §§ 3600, 3601, 3706; West's Ann.Vehicle Code, § 415.

Hoberg & Finger, San Francisco, for appellant.

Clark, Heafey & Martin, Oakland, for respondent.

PETERS, Presiding Justice.

On May 26, 1952, Norman, Lawrence and Charles Nurrisso were a partnership doing business as the Broadway Plumbing Company. Appellant, Longino Rollo, and one Valentino Vanelli, were, on that date, employees of Broadway Plumbing Company, and both were acting in the course and scope of their employment during all of the events here involved. Vanelli was driving Broadway's automobile and Rollo was riding in the car as a passenger. Vanelli drove negligently, an accident ensued, and Rollo was injured. Rollo received compensation benefits from the workmen's compensation insurance carrier of Broadway. Subsequently, Rollo sued Vanelli and recovered a $25,000 judgment against him, which is final, and which is unsatisfied.

On May 26, 1952, the date of the accident, Broadway had a liability policy issued by the respondent, Truck Insurance Exchange. This policy admittedly covered the operation and use of the automobile here involved. An omnibus clause extended coverage to anyone driving the car with the permission and consent of Broadway, but specifically excluded as an additional insured, a fellow employee of the injured employee of the same employer, injured in the course of his employment while the automobile was being operated in the business of the employer. The policy also excluded coverage for bodily injury suffered by an employee of the assured while engaged in the employ of the assured, and it further excluded coverage where benefits were payable under a workmen's compensation law to the injured employee, or where the employer could be held liable under a workmen's compensation law.

Appellant brought this action against the Truck Insurance Exchange on the policy issued to Broadway, claiming that the policy covered Vanelli as an additional insured, and that the insurance company is therefore liable for the amount of the judgment secured against Vanelli. The trial court found that Vanelli was not an insured within the meaning of the policy, and that under the exclusions here involved bodily injury to appellant was not a risk covered, but, in fact, specifically excluded from coverage. The court also held that the exclusions in the policy were not contrary to the public policy of California as expressed in the financial responsibility laws, nor are they inconsistent or contrary to the provisions of Vehicle Code, section 415. Thus, the Truck Insurance Exchange was held not to be liable to appellant on its policy. Judgment was entered accordingly. Rollo appeals.

[1] The first contention of appellant is that Vanelli was an "insured" within the meaning of the policy, and that the injury to appellant was one of the risks covered. Appellant correctly points out that appellant was not an employee of Vanelli and was not, therefore, an "employee of the insured" referred to in the exclusion provisions.

There can be no doubt that Vanelli, as to certain risks, was an insured within the meaning of the policy. Clause III of the policy defines "Insured," in part, as follows: "The unqualified word 'insured' includes the named insured and also includes (1) under coverages A and B any partner, executive officer, * * * and (2) under coverages A and B, any person while using an owned automobile * * *, provided the actual use of the automobile is by the named insured or with his permission." Vanelli was, of course, using the automobile with the permission of the named insured, Broadway Plumbing Company. He was, therefore, an "insured" within the meaning of the above clause. But the same clause then continues as follows:

> "The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement: * * *
>
> "(c) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer; * * *
>
> "Exclusions
>
> "This policy does not apply: * * *
>
> "(d) under coverage A, except with respect to liability assumed under contract covered by this policy, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured, other than a domestic employee for whose injury benefits are not payable or required to be provided under any workmen's compensation law; or to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law."

It is quite apparent that, under these provisions, and particularly under "(c)" *supra,* the policy expressly excludes the very risk here involved. It is there expressly provided that the policy should not include as an insured one using the car with the permission of the owner (Vanelli) for injury to another employee (Rollo) of the same employer (the named insured, Broadway) who is injured by the use of the automobile in the business of the employer while such employee (Rollo) is in the course of such employment. This language is too clear to require interpretation. It clearly provides that it was not the intent of the insurance company or of Broadway to provide coverage for an employee of Broadway who injures another employee of Broadway when both are within the course of their employment.

Appellant relies on the case of Pleasant Valley Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., 142 Cal.App.2d 126, 298 P.2d 109. In that case one Nungaray, employed by Brucker, was injured by a vehicle belonging to his employer while that vehicle was being used by one Croker, an employee of Pleasant Valley. Nungaray sued Croker and Pleasant Valley. The latter sought declaratory relief to compel Cal-Farm, Brucker's liability carrier, to assume liability. The court decided that the policy issued to Brucker covered Pleasant Valley and Croker for the injury to Nungaray. The policy there excluded liability for bodily injury to "any employee of the insured." 142 Cal.App.2d at page 129, 298 P.2d at page 113. The court properly held that, since Croker and Pleasant Valley were additional insured entities within the terms of policy, and, since neither was the employer of Nungaray, the exclusion had no application.

But the policy involved in that case did not involve a clause comparable to "(c)" above quoted. If it were not for clause "(c)", *supra,* the rule of the Pleasant Valley case would require us to hold that since Rollo was not the employee of Vanelli, both being employees of Broadway, and since Vanelli is an insured within the meaning of the clause first above quoted, the policy of respondent covered Vanelli even though Broadway, the named insured, was

not liable. But the policy here involved does contain clause "(c)". That clause clearly and without ambiguity excludes this very risk.

At the oral argument appellant conceded that the Pleasant Valley case was distinguishable from the instant case and placed his reliance for a reversal on the claim that, admitting the policy expressly excludes liability in cases like the instant one, such exclusions are invalid because they contravene the provisions or the intent of the so-called financial responsibility laws of California. This contention is predicated on the premise that Vanelli was an additional assured under the policy in question and upon the argument that the attempt to exclude his liability when he injured another employee is necessarily in violation of the financial responsibility laws. Respondent replies that the exclusion here involved applies only to an employee of the named insured who injures another employee and the employer is liable to the injured employee for compensation benefits. In other words, under the omnibus clause Vanelli was an additional insured as to the whole world, except that, under clause "(c)" above quoted, there was excepted from the whole world an injured fellow employee injured by Vanelli when both were acting in the course of their employment with the named insured. The named insured, Broadway, of course, paid for the liability policy that made Vanelli an additional insured with this one exception. Broadway also paid for the compensation policy that covered the injured employee. The exception involved simply excluded liability where the employer also was liable under the compensation laws. Thus, the exclusion simply provided that the employer was not required to pay for two policies to cover the same injury. This would not seem to violate the spirit or intent of the financial responsibility laws.

[2] Appellant makes a most involved argument in reference to these laws. He places considerable reliance on the unpaid judgment provisions of the act—sections 410 to 418.5 of the Vehicle Code. These sections provide that where there is an unpaid judgment for personal injuries, the license of the owner of the vehicle will be suspended unless he files an affidavit stating that he was insured on the date of the accident. Appellant urges that unless Broadway files such an affidavit, including an averment that Vanelli was covered, Broadway must suffer a suspension of its registration privileges. But it will be noted that no judgment has been secured against Broadway. A reading of the sections clearly indicates that an unsatisfied judgment against the person or company whose registration privileges are involved is a condition precedent to suspension of the registration privileges. The case of Continental Casualty Co. v. Phoenix Construction Co., 46 Cal.2d 423, 296 P.2d 801, 57 A.L.R.2d 914, cited by appellant, does not hold to the contrary, because in that case the injured person had an unpaid judgment against both the employer and the negligent employee. Thus, these sections in no way affect the validity of the exclusion here involved.

[3] Appellant next calls attention to Vehicle Code, section 420. That section, among other things, provides that where an employee is driving his employer's automobile with consent, and has an accident, the employer, unless insured, must deposit security sufficient to satisfy the expected judgment. It is argued that unless Broadway was protected by its liability policy, it is required to post the security required by the section. But, obviously, the section has no application where the named insured could not be held liable for the negligence of the driver, and where no judgment has or can be secured against such employer because of the provisions of the workmen's compensation acts.

Appellant refers to several cases in which the courts have referred to the financial responsibility laws as a reason for interpreting a policy as covering a particular risk. Thus, in Oil Base, Inc., v. Transport Indem. Co., 143 Cal.App.2d 453, 299 P.2d 952, it was held that one Scherer, as agent of a company, was covered by a policy which

while it did not contain an omnibus clause did contain a reference to coverage under the financial responsibility laws. The court cited and relied upon Continental Casualty Co. v. Phoenix Construction Co., 46 Cal.2d 423, 296 P.2d 801, 57 A.L.R.2d 914. In that case the employer had a policy with Transport Indemnity Company. The policy contained no omnibus clause, but did provide coverage as an insured to any managing employee of the named insured. Mason, a truck driver, was negligent. The court first held that Mason was a managing employee of the named insured and so an insured under the policy. As an alternative ground it also held that Mason was covered because under the financial responsibility laws the employer was required to cover all drivers operating the truck for the employer.

In Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 307 P.2d 359, the Supreme Court properly held that an automobile insurance company cannot limit its coverage by excluding coverage when the automobile is used by someone other than the insured with the insured's permission in view of the financial responsibility laws. The court, in this connection, stated (48 Cal.2d at page 39, 307 P.2d at page 364):

> "It appears that section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles. Section 402 of the Vehicle Code provides that 'every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.' We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code."

[4] Respondent has no quarrel with these cases. They apply only where the employer is liable in a negligence action for the negligence of the employee driving the car. In the instant case the exclusions of the policy present no conflict at all with the financial responsibility laws. That is so because such responsibility statutes do not require, expressly or impliedly, that the employer must have a liability policy covering injuries for which the employer is liable, and only liable, under the workmen's compensation laws.

Section 3600 of the Labor Code provides the conditions under which compensation benefits are payable. The injury to Rollo is included within this section, and, in fact, Rollo has recovered compensation benefits under it. Section 3601 of the Labor Code provides: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death." Section 415 of the Vehicle Code, a key section of the financial responsibility laws, provides, in part: "Any liability policy issued hereunder need not cover any liability for injury to the assured or any liability of the assured assumed by or imposed upon said assured under any workmen's compensation law nor any liability for damage to property in charge of the assured or the assured's employees or agents."

Thus, both the workmen's compensation law and the financial responsibility law eliminate liability of an employer to an injured employee while acting in the course of his employment other than liability under workmen's compensation statutes. Thus, appellant's position that the exclusions are contrary to the financial responsi-

bility law are untenable.[1] The parties intended to exclude coverage in the situation here presented and such exclusions are not contrary to the financial responsibility law or to the public policy of this state.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.



159 Cal.App.2d 54

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Morris Harris GOODMAN, Defendant and Appellant.

Cr. 6079, 6080.

District Court of Appeal, Second District, Division 3, California.

March 31, 1958.

Prosecution for grand theft, attempted extortion and burglary. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgments of conviction and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence sustained convictions and where defendant entered victim's dwelling with intent to commit felony and while in dwelling stole and carried away property with intent to deprive victim thereof, defendant was guilty of offense of grand theft, a divisible transaction from burglary.

Affirmed.

1. Criminal Law ⇐1159(2)

On appeal from criminal conviction, test is whether there is substantial evidence to support conclusion of trier of fact, not whether guilt has been established beyond a reasonable doubt.

2. Burglary ⇐41(1)
Extortion ⇐15
Larceny ⇐65

Evidence sustained conviction of burglary, grand theft and attempted extortion. West's Ann.Pen.Code, §§ 487, subd. 1, 459, 524.

3. Burglary ⇐41(1)

Where record showed that entry into dwelling was made on January 27, at about 7:30 p. m., and there was evidence that one of the defendant's associates was armed and that defendant struck victim, evidence supported finding that burglary was of the first degree. West's Ann.Pen.Code, § 460.

4. Criminal Law ⇐29

Under statute providing that an act or omission punishable by different provisions of Code may be punished under either of such provisions, question is whether transaction is divisible or indivisible, and if a course of conduct results in more than one offense, each of which can be committed without committing any other, applicability of statute will depend on whether a separate and distinct act can be established as basis of each conviction, but if a single act violates more than one statute and only a single act is charged as basis of multiple convictions then only one conviction can be affirmed, notwithstanding that offenses are not necessarily included offenses. West's Ann.Pen.Code, § 654.

5. Extortion ⇐1

"Extortion" is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under a color of official right, and "fear" such as will constitute extortion may be induced by threat to do an unlawful injury to person threatened, to accuse him of any crime, or to expose or to impute to

1. This is the rule of the only other state where the precise question has arisen. In Arceneaux v. London Guarantee & Accident Company, La.App., 87 So.2d 343, the policy exclusions were identical with the instant exclusions. The factual situation was identical with that in the instant case. The court held that the exclusions applied and were not contrary to the public policy or laws of Louisiana.

him any disgrace or crime. West's Ann. Pen.Code, §§ 518, 519, 524.

See publication Words and Phrases, for other judicial constructions and definitions of "Extortion" and "Fear".

6. Extortion ⇐4

To constitute extortion, the victim must consent, albeit it is a coerced and unwilling consent, to surrender of his property and wrongful use of force or fear must be the operating or controlling cause compelling victim's consent to surrender the thing to extortionist. West's Ann.Pen.Code, §§ 518, 519, 524.

7. Extortion ⇐1

"Attempted extortion" consists of a specific intent to commit the crime and a direct, ineffectual act toward its commission.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempted Extortion".

8. Embezzlement ⇐1
False Pretenses ⇐1
Larceny ⇐1

"Theft" is ordinarily the felonious taking of property of another without his consent with intent to deprive him thereof, and includes larceny, embezzlement, obtaining money by false pretenses and kindred offenses. West's Ann.Pen.Code, §§ 484, 490a.

See publication Words and Phrases, for other judicial constructions and definitions of "Theft".

9. Burglary ⇐2

Where defendant entered victim's home with intent to commit a felony, offense of burglary was complete when he entered. West's Ann.Pen.Code, §§ 459, 461.

10. Burglary ⇐2
Extortion ⇐1
Larceny ⇐23

Where evidence showed that defendant entered victim's home with intent to commit a felony, and after entering the same stole and carried away a camera and its accessories with intent to deprive victim thereof, and also attempted to extract money from victim while posing as a police officer and threatening to charge victim with a crime, defendant committed separate and distinct acts rendering him guilty of burglary, grand theft, and attempted extortion, all of which comprised divisible transactions punishable under the various statutes. West's Ann.Pen.Code, §§ 459, 461, 484, 524.

11. Criminal Law ⇐1169(3)

In prosecution for burglary, grand theft and attempted extortion, where testimony showed that defendant had a certain woman associate, action of trial court in admitting a lady's purse which had been found by police in motel room, the key to which was taken from defendant after his arrest, did not constitute prejudicial error in view of defendant's admission that woman had been in room on night on which various offenses were allegedly committed.

12. Criminal Law ⇐386

Where identity of party against whom a telephone conversation is sought to be admitted has been established by some evidence, either direct or circumstantial, conversation may be shown in the same manner, and with like effect, as in conversations between individuals face to face.

13. Criminal Law ⇐386

In prosecution for attempted extortion, testimony of police officer who had been listening in on telephone extension to conversations between defendant and victim was admissible where victim had already testified as to conversations to which officer had listened and officer had testified that defendant's voice was similar to the one he heard on the telephone. West's Ann.Pen.Code, § 524.

14. Criminal Law ⇐406(1), 412(1)

Extrajudicial declaration or admission of an accused may be proved against him to show his guilt and such declaration or admission is not hearsay.

15. Criminal Law ⇐412(1)

In prosecution for attempted extortion, testimony of officer, who had listened on telephone extension to conversation between defendant and victim, as to conversation, was not inadmissible as hearsay.

Claude Vibart Worrell, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow and John A. Vander Lans, Deputy Attys. Gen., for respondent.

VALLÉE, Justice.

Appeals in two cases, numbers 6079 and 6080. In number 6079 defendant was charged by information in Count I with grand theft[1] in that he took personal property of Maurice Bailey valued at more than $200, in Count II with attempted extortion[2] in that he attempted by wrongful use of force and fear to obtain $5,000 from Maurice Bailey by posing as a law enforcement officer and without legal justification accusing Bailey of a crime and threatening to arrest him unless $5,000 was given him, and in Count III with burglary[3] in that he entered the apartment occupied by Bailey with the intent to commit theft. It was alleged the offenses were committed on January 27, 1957. It was further alleged that on April 6, 1955 defendant was convicted in the superior court for the county of Los Angeles of violating section 337a of the Penal Code.

In number 6080 defendant in 1955 pleaded guilty to a violation of section 337a, proceedings were suspended, and he was granted probation for three years.

In number 6079 defendant admitted the prior conviction. The cause was tried before a jury. Defendant was found guilty on all counts, and as to Count III the jury found the offense to be burglary of the first degree. On conviction in the present action the order granting probation in the 1955 action for violation of section 337a was revoked and defendant was sentenced to state prison for that offense. In number 6079 judgment was pronounced and defendant sentenced to state prison, the sentences as to Counts I and II to run consecutively, the sentence as to Count III to run concurrently with the sentences as to Counts I and II, and the sentences as to Counts I, II, and III to run consecutively to the sentence in number 6080. Defendant appealed from the judgments and orders denying a new trial in both actions.

The specifications of error in number 6079 are: 1. The evidence is insufficient to support the verdicts. 2. The court erred in admitting a purse and its contents in evidence. 3. The court erred in admitting evidence of a telephone conversation. 4. The court erred in refusing to instruct the jury with respect to the burglary count.

On January 27, 1957 Maurice Bailey, a furniture designer, lived at 968 North La Cienega, Los Angeles. Arminio Lozzi, who worked for Bailey, was in Bailey's home working. Bailey used the lower part of the building as an exhibition place for his work and lived in the upper part. He was working on a model of an office building. About 3 o'clock in the afternoon Ev and Marilyn Jackson, husband and wife, arrived at the house. Lloyd Crane arrived shortly thereafter. Bailey had met the Jacksons through Crane about six weeks earlier.

Shortly after the Jacksons arrived Ev made a phone call, then left for about 2½ hours, returning about 5:30 or 6 p. m. About 7:30 p. m. Bailey was in the hallway when he first noticed that three unknown and uninvited men, one of whom was defendant, were in the house. One of the three unidentified men had a badge in his hand and a gun in a holster on his hip. The third man had a pair of handcuffs in his hand. The man with the badge showed it to Crane and stated he was a policeman. The badge had the word "Patrolman" on it. Defendant told Bailey he was the sergeant in charge and he was there on a marijuana "rap." In the meantime defendant told the other two men to "shake" the apartment down.

1. Penal Code, § 487, subd. 1.

2. Penal Code, § 524.

3. Penal Code, § 459.

Lozzi and Crane were ordered to empty the contents of their wallets, which they did. One of the men told Bailey, Lozzi, and Crane to go into the bedroom. When they entered the bedroom Marilyn was lying upon the bed nude. Bailey, Lozzi, and Crane were each forced to be photographed with Marilyn. Crane at first refused to sit upon the bed with Marilyn and was struck on the jaw by defendant.

After Bailey had been photographed with Marilyn defendant told him to go to the kitchen, that he had a very young girl in there in a very compromising position, and "it was going to really be rough," if he took Bailey in and booked him it would take $50,000 bail to get him out, and it would cost Bailey at least $5,000. Bailey said he did not have that amount of money. Defendant said "How much can you raise tonight?" Bailey said he could not raise anything, that possibly in the morning he could raise part of it. Defendant asked Bailey if he had a checking account; Bailey said he did; defendant asked where the checks were; Bailey told him they were downstairs in the studio. Defendant told Bailey he would have to clear the matter through his superiors; he would have to split, so a small amount would not do any good because he would not get all of it. Defendant and Bailey went downstairs where defendant told him to write five checks for $1,000 each payable to cash. Bailey wrote the checks. He did not have that much money in his checking account. He told defendant he possibly had $700 to $900 in the account and that the checks would be worthless. Defendant asked Bailey if he could raise some money the next day to cover the checks. Bailey said he probably could get part of it. Defendant told him he would give him until 11 o'clock the next morning to raise the money and make the checks good. Defendant told Bailey the two men upstairs were not to be told of the transaction. Bailey handed defendant the five checks and asked him what his name was. Defendant said, "When I call you, I'll—it will be George." Bailey gave defendant the number of his private, unlisted telephone.

Defendant and Bailey went back upstairs. Defendant said to the two unidentified men, "We have got enough. Come on." One of them said, "Well, I'm still looking," to which defendant replied, "Never mind, come on, we have got enough." Defendant, the two unidentified men, and Ev and Marilyn Jackson left the place together. At defendant's direction one of the men took Bailey's motion picture camera, lens, case, and some film, all of a value in excess of $200, with him.

The next day Bailey contacted the police. He returned to his apartment at 5 p. m. accompanied by two police officers. Shortly after his return his private phone rang. He picked up the receiver, as did one of the officers on an extension. Defendant, who was calling, said, "This is George," and asked Bailey where he was at 11 o'clock that morning. Bailey said he had been out all day trying to raise the money; he had raised $3,500; and asked if defendant had his camera. Defendant said when Bailey raised the difference between 3,500 and 5,000 he could get the camera, said he would call back, and hung up. Some time later defendant called Bailey and said, "This is George again." The officer was on the extension. Defendant told Bailey to meet him in five minutes, to walk up to a bowling alley a block away, to walk back to the rear to the telephone booths, to walk into the rear booth, wait until he arrived, and bring the money with him. Bailey went to the bowling alley. An officer had preceded him and had placed defendant under arrest.

One of the officers took a key to room 9 in a motel from defendant's pocket. A few days before January 27 defendant had gone to the motel with a woman, had registered as John and Mary Wayne, and had paid the rent for room 9. Ev and Marilyn Jackson occupied room 9 on the 27th.

[1, 2] The argument with respect to the contention that the evidence is insufficient

to support the verdicts is that the testimony of Bailey and Crane is inherently improbable, confusing, and inconsistent; that Bailey's hands are not clean since "he admitted prior contributions to 'Marilyn's' delinquency"; Ev and Marilyn were not produced as witnesses; neither the check book nor the check stubs were produced; no stolen property was introduced in evidence; and no unlawful entry was proved. These were all matters for the consideration of the jury, not this court. The test on review is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt has been established beyond a reasonable doubt. People v. Daugherty, 40 Cal. 2d 876, 885, 256 P.2d 911; People v. Cahan, 141 Cal.App.2d 891, 897, 297 P.2d 715. Manifestly there was substantial evidence to support the conclusions of the jury with respect to the three offenses charged. People v. Case, 49 Cal.2d 24, 313 P.2d 840; People v. Jones, 25 Cal.App.2d 517, 519–522, 77 P.2d 897; People v. De Nava, 119 Cal.App.2d 82, 83–84, 258 P.2d 1073.

[3] It is argued the entry was before sundown and consequently the burglary was of the second, and not of the first, degree. The point is without merit. The entry was on January 27. Bailey testified it was about 7:30 p. m. when the three men entered the apartment and that it was dark. Further, there was evidence that one of defendant's associates was armed and that defendant struck Crane on the jaw. Every burglary committed in the daytime or nighttime by a person armed with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree. Pen.Code, § 460. The evidence supports the finding that the burglary was of the first degree.

Defendant asserts the three offenses charged constitute a single individual act and that the conviction of one offense only may be sustained. Section 654 of the Penal Code provides:

"An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *"

[4] The rules applicable to the determination of the question are stated in the recent case of People v. Brown, 49 Cal.2d 577, at page 591, 320 P.2d 5, at page 14, in which the court stated:

"Section 654 has been applied not only where there was but one 'act' in the ordinary sense * * * but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654. Where the question is whether a transaction is divisible or indivisible, each case must be resolved on its facts. * * * 'If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been committed so that more than one statute has been violated. If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. * * *

"[49 Cal.2d 593, 320 P.2d at page 14.] [S]ection 654 comes into application where a defendant by one act commits more than one offense."

In People v. Guarino, 132 Cal.App.2d 554, 282 P.2d 538, the defendant was convicted of grand theft and burglary. He had entered a store and therein had taken

a large amount of jewelry. It was contended the theft was not a separate offense from the burglary. This court held the point to be without merit, saying (132 Cal. App.2d at page 559, 282 P.2d at page 541):

> "The crime of burglary is complete on the entering of the building with intent to commit a felony, though the intended felony be not committed. Larceny is a separate act and involves the unlawful asportation of the personal property of another, with intent to deprive him thereof; and if a larceny is actually perpetrated after the burglarious entry a second crime is committed."

[5] Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right. Pen.Code, § 518. Fear, such as will constitute extortion, may be induced by a threat either to do an unlawful injury to the person of the individual threatened, or to accuse him of any crime, or to expose or to impute to him any disgrace or crime. Pen.Code, § 519. Every person who attempts, by means of any threat, such as is specified in section 519, to extort money or other property from another is guilty of a public offense. Pen.Code, § 524.

[6–8] Extortion and theft are not the same offense. To constitute extortion the victim must consent, albeit it is a coerced and unwilling consent, to surrender of his property; the wrongful use of force or fear must be the operating or controlling cause compelling the victim's consent to surrender the thing to the extortionist. 21 Cal.Jur.2d 595, §§ 4, 8. There are two elements to the crime of attempted extortion—specific intent to commit the crime, and a direct ineffectual act toward its commission. People v. Franquelin, 109 Cal. App.2d 777, 783, 241 P.2d 651. Ordinarily theft is the felonious taking of the property of another without his consent with intent to deprive him thereof. Pen.Code, § 484; People v. Cannon, 77 Cal.App.2d 678, 692, 176 P.2d 409. In this state theft includes larceny, embezzlement, obtaining money by false pretenses and kindred offenses, but the elements of the offenses have not been changed. Pen.Code, §§ 484, 490a; People v. Jones, 36 Cal.2d 373, 376–377, 224 P.2d 353. In the present case the theft was larceny.

[9, 10] The course of conduct shown by the evidence violated more than one statute. Defendant entered Bailey's home with intent to commit a felony. The offense of burglary was complete when he entered. It was punishable under sections 459 and 461 of the Penal Code. After entering Bailey's home defendant feloniously stole and carried away the camera and its accessories with intent to deprive Bailey thereof. This offense of grand theft comprised a divisible transaction punishable under section 487 of the Penal Code. Separately from the burglary and the grand theft, defendant committed the divisible offense of attempted extortion. Defendant did not by one act commit more than one offense. He committed separate and distinct acts and each act was established as the basis of each conviction.

We hold that each offense of which defendant was convicted was separate and distinct from each of the others.

[11] After placing defendant under arrest and taking the key to room 9 of the motel from his pocket, the officers went to the motel and had a conversation with the manager. They then entered room 9 and searched it. They found a lady's purse on the floor, which they took with them when they left. The purse and its contents were admitted in evidence over defendant's objection. He asserts error. He says the motel was a long way from the place where the arrest was made, which it was, and that the search cannot be predicated on the arrest. Assuming, without deciding, that the court erred, we think defendant was not prejudiced and that no miscarriage of justice resulted. Defendant does not say how he was prejudiced. In view of defendant's admission that Marilyn Jackson was in room 9 on January 27 it is

not reasonably probable that a result more favorable to him would have been reached in the absence of the error, if there was error. People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243.

[12–15] The court, over defendant's objection, permitted the officer who listened on the telephone extension in Bailey's home to testify to the conversations between defendant and Bailey. Defendant claims the testimony was hearsay and inadmissible. Bailey testified the telephone conversations to which the officer listened were with defendant. The officer testified defendant's voice was similar to the one he heard on the telephone. When the identity of the party against whom a telephone conversation is sought to be admitted has been established by some evidence, either direct or circumstantial, the conversation may be shown in the same manner, and with like effect, as conversations had between individuals face to face. People v. Lorraine, 28 Cal.App.2d 50, 54, 81 P.2d 1004. The telephone conversations between defendant and Bailey were not hearsay. An extrajudicial declaration or admission of an accused may be proved against him to show his guilt. Such a declaration or admission is not hearsay. 19 Cal.Jur.2d 133, § 397.

After the People rested defendant requested the court to direct a verdict in his favor on the burglary count. The court stated that in its opinion there was sufficient evidence of burglary to allow the matter to go to the jury and declined to give the instruction. Defendant claims error. There was no error. As stated earlier, there was substantial evidence of the commission of burglary. People v. De Nava, 119 Cal.App.2d 82, 258 P.2d 1073.

Defendant does not press the appeal from the judgment rendered on the violation of section 337a of the Penal Code.

The judgments and orders appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

158 Cal.App.2d 804

COUNTY OF LOS ANGELES, Plaintiff and Respondent,

v.

Carroll W. C. LORBEER et al., Defendants.

Carroll W. C. Lorbeer and Adeline Herrick, Defendants and Appellants.

Civ. 22639.

District Court of Appeal, Second District, Division 2, California.

March 28, 1958.

Eminent domain proceeding. The Superior Court, Los Angeles County, Leon T. David, J., entered an order obligating condemner to pay certain interest on the award, and it appealed. The District Court of Appeal, Ashburn, J., held that a 45-day delay in payment of an award in a condemnation case was not such a substantial interference with owner's property rights as to constitute the taking or damaging of same without just compensation, and therefore, owner was not entitled to interest on damage award for such period of time on theory of constitutional right to just compensation.

Order reversed with directions.

1. Eminent Domain ⇐246(2)

During statutory 30 days afforded a condemner for contemplation of award of damages, and the advisability of paying that amount for the property or of abandoning the project, there is no cognizable right or duty resting upon it, and the award cannot be collected in any manner, nor can the condemner be compelled to take or pay for the property. West's Ann.Code Civ. Proc. §§ 1251, 1255a.

2. Eminent Domain ⇐247(2)

An award of damages in a condemnation proceeding does not draw interest from date of judgment, but could draw interest from the date marking lapse of 30 days from date of judgment afforded the condemner by statute, for contemplation of award and advisability of paying that

amount for the property or of abandoning the project. West's Ann.Code Civ.Proc. §§ 1251, 1255a, 1264.7.

3. Eminent Domain ⇐90

Owner of condemned property is not entitled to compensation for an interference with his property rights which is not substantial in its nature.

4. Eminent Domain ⇐247(2)

A 45-day delay in payment of an award in a condemnation case was not such a substantial interference with owner's property rights as to constitute the taking or damaging of same without just compensation, and therefore, owner was not entitled to interest on damage award for such period of time on theory of constitutional right to just compensation. West's Ann.Code Civ.Proc. §§ 1251, 1255a, 1264.7.

5. Appeal and Error ⇐878(4)

A respondent may assert error only in aid of affirmance.

Clyde E. Holley and Milnor E. Gleaves, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Richard A. Del Guercio and A. R. Early, Deputy County Counsel, Los Angeles, for respondent.

Edmund G. Brown, Atty. Gen., Walter S. Rountree, Asst. Atty. Gen., Lester Ziffren and Henry K. Workman, Deputy Attys. Gen., amicus curiae on behalf of respondent.

ASHBURN, Justice.

Appellants were awarded $97,700 as compensation for taking their property in this eminent domain proceeding. The interlocutory judgment was entered on January 11, 1957, and payment of the award was made 45 days later, without interest. Appellants claim they were and are entitled to interest at seven per cent from the entry of the judgment to the date of payment, a sum of $843.30. A motion was made to that end; the plaintiff County opposed it, taking the position that appellants were entitled to interest for only the last 15 days of the period of delay in making payment. The trial judge ruled with plaintiff, holding that it is liable for no interest for the first 30 days after entry of the interlocutory but is obligated to pay interest for the succeeding 15 days, and the county was ordered to pay same in the sum of $281.10. The parties have raised no objection to the procedure adopted in the lower court and there is no occasion to inquire into its sufficiency.

The defendant owners have appealed from said order, arguing that error inheres in that portion determining that "plaintiff is not liable for the payment of any interest on said interlocutory judgment in condemnation for the first thirty days after the entry thereof." Counsel for both sides agree that the propriety of that ruling presents the only question for review.

Appellants argue that an interlocutory decree of condemnation has all the qualities of an ordinary money judgment and hence interest begins to run at once, regardless of any statutory or other stay of execution. Respondent takes the position that an award in eminent domain is not an adjudication which is presently enforceable, but is a conditional pronouncement which gives the condemner 30 days within which to decide whether the price set by the court is too high and whether it will pay that price or abandon the proceeding; that until that decision has been made or the time therefor has elapsed, there is no money due the landowner, no enforceable obligation resting upon the condemner and no withholding of money from the defendant, hence no legal basis for an award of interest. Respondent concedes that where, as here, there has been no abandonment and no payment of the damages within 30 days, an obligation becomes fixed and carries interest thenceforth.

This case is not complicated by any question arising out of the taking of possession by the condemner or by any showing that defendants' continued possession yielded any rents or profits, or by any delay due to an appeal or by any affidavit for extension of time for payment pursuant to § 1251,

Code of Civil Procedure.[1] An award was made; it was not paid for 45 days. Does it draw interest from date of judgment or from the date marking the lapse of 30 days after judgment? That is the question propounded by both sides. However, this statement of the problem involves an oversight concerning the time allowed the condemner for payment or abandonment, as will appear from the following discussion.

The immediately pertinent sections of the code contain the following provisions: Sec. 1251. "The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. * * *" Sec. 1255a. "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, * * *." Sec. 1264.7. "The term 'judgment' as used in this title means the judgment determining the right to condemn and fixing the amount of compensation to be paid by the plaintiff. The term 'final judgment' as used in this title means such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted." It is now established that the last quoted section refers to the interlocutory decree, and that: "The term 'final judgment' as used in section 1255a of the Code of Civil Procedure means a judgment when all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) motion to vacate the judgment, has been exhausted. (Code Civ.Proc. § 1264.7.)" Southern Public Utility District v. Silva, 47 Cal.2d 163, 165, 301 P.2d 841, 842. It was also held in that case that the filing of an affidavit under § 1251 declaring the issuance of bonds to be necessary to provide money for payment of the award, although it extends the time for payment to include a full year, does not affect the limitation upon the right to abandon, which is 30 days after final judgment as defined in § 1264.7; that an attempted abandonment made more than 30 days after the lapse of time to review the judgment was abortive because too late. Normally the condemner has 60 days (Rule 2(a) of Rules on Appeal) plus 30 days prescribed by § 1251, within which to pay the award, that period being enlarged in case of intervention of a motion for new trial (Rule 3). In the absence of an appeal or a bond affidavit under § 1251, the time for payment and that for abandonment are coincident. If an abandonment is not made within the period prescribed, payment of the award becomes immediately due (absent appeal or the like) and the judgment takes on all the qualities of an ordinary money judgment; the obligation to take the property and to pay the adjudged value has become fixed and is no longer subject to any condition. The condemner's "obligation to pay is fixed and is not subject to diminution or modification by the lapse of time." Southern Public Utility District v. Silva, supra, 47 Cal.2d at page 166, 301 P.2d at page 843. Prior to the expiration of 30 days computed according to § 1264.7 there is no withholding of money legally due to the owners, but after that time there is a retention which starts interest to running under generally recognized legal principles. In the instant case the time for appeal had not expired before payment and hence interest had not started to accrue upon the award.

[1] While the general rule seems to be that a condemnation award draws interest, either as part of just compensation or as

1. Code Civ.Proc. § 1251: "* * * In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said State or of any agency thereof, or of said public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided further, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made."

All section references point to the Code of Civil Procedure.

an incident to withholding of the damages after their adjudication (see, Annotation in 36 A.L.R.2d at page 413 et seq.), the California law has not evolved into a dogmatic rule that interest immediately follows the making of the award. During the 30 days afforded the condemner (§§ 1251 and 1255a) for contemplation of the award and the advisability of paying that amount for the property or of abandoning the project, there is no cognizable right or duty resting upon it; the award cannot be collected in any manner, nor can the plaintiff be compelled to take or pay for the property.

The Supreme Court of the United States in Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240, considered the question of interest upon damages fixed in an eminent domain proceeding which was controlled by a Federal statute. At page 286 of 308 U.S., at page 237 of 60 S. Ct. it said: "Where the condemnation is free from statutory direction, as here, there would be no interest before the taking." And at page 284 of 308 U.S., at page 236 of 60 S.Ct.: "No interest is due upon the award. Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. 'The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, * * *.'"

The same concept is expressed in City of Los Angeles v. Aitken, 32 Cal.App.2d 524, 90 P.2d 377, 94 P.2d 1045. While the facts of that case occurred prior to enactment of § 1264.7 and the court did not discuss that section, the reasoning upon the fundamental principles is not affected thereby; if the 30 days prescribed by § 1264.7 is substituted for 30 days after entry of interlocutory (which was deemed the period for payment or abandonment prior to enactment of § 1264.7), the Aitken case, supra, is fully applicable to current condemnation; nor was this case disapproved in Southern Public Utility District v. Silva, supra, 47 Cal.2d 163, 165, 301 P.2d 841, except as to its statement that the 30-day period runs from date of entry of interlocutory. The question under consideration was stated in Aitken, supra, 32 Cal.App.2d at page 526, 90 P.2d at page 378, as follows: "The sole question to be decided upon this appeal is whether or not interest at the legal rate should be allowed upon the compensation fixed in an interloctuory decree of condemnation during the pendency of an appeal from said decree, by the condemnor, where the condemnee, during such time, has remained in possession." At page 528 of 32 Cal.App.2d at page 379 of 90 P.2d City of Los Angeles v. Deacon, 3 Cal.2d 641, 46 P.2d 165, was quoted and discussed, the court saying: "'When an interlocutory decree of condemnation is entered, the condemnor, in the absence of an appeal by the condemnee, knows how much the improvement will cost. If it decides not to abandon, but decides to appeal, it may do so. If the appeal by the condemnor is unsuccessful, the condemnor has lost its right to abandon, and must pay. This rule is fair and just to all concerned.' From this it must necessarily follow that although the appeal had the effect of staying the execution, nevertheless when the time limitation mentioned in section 1255a expired, the judgment became a direct and fixed obligation, but subject to modification or reversal on appeal, as any other action. It then had the same force and effect as any other judgment for the payment of money, and the general rule with respect to the payment of interest thereon is applicable." It is further said in that opinion: "The only matter in which defendants were interested was the recovery of the amount of the judgment. Their right to *enforce* this judgment was stayed by the appeal, just as, in any ordinary damage action, execution may be stayed upon appeal. In the eyes of the law, the money was due when the thirty-day period provided in section 1255a,

supra, expired. The mere fact that respondents were deprived of the right, during appeal, to enforce such judgment, cannot affect its legal implications and consequences, so far as interest is concerned. The plaintiffs elected to waive the right to abandon, and decided to rely upon appeal. By thus failing to abandon, within the statutory time, they in effect, conclusively bound themselves to pay the judgment in the event that no reversible error was found on appeal." 32 Cal.App.2d at page 529, 90 P.2d at page 380. "We therefore conclude that an interlocutory judgment in condemnation, where there has been no abandonment of the proceedings by the condemnor, is not merely an adjudication of a conditional liability, but becomes a 'judgment' within the meaning of section 22, article XX, of the Constitution, and that pending an appeal by the condemnor, such judgment bears interest at the legal rate from the expiration of thirty days after its entry until paid. As we have stated, this is the precise situation which is found in any ordinary action for the recovery of a money judgment, and we see no valid reason why interest upon the judgment here should not be recovered as it is recovered in other cases." 32 Cal.App. 2d at page 531, 90 P.2d at page 381. "Under the laws and Constitution of this state respondents were entitled to interest upon their judgment, at the legal rate, from and after the expiration of the thirty days from the entry thereof, as a portion of the just compensation for the taking. Such interest could, however, be offset by proof that the possession, pending appeal, was profitable to respondents." 32 Cal.App.2d at pages 534–535, 90 P.2d at page 382.

Colusa & H. R. Co. v. Superior Court, 31 Cal.App. 746, 750, 161 P. 1011, 1013: "Moreover, it is not proper to say that the judgment under consideration is one directing the payment of money. It is rather an adjudication that upon payment of a certain sum plaintiff may acquire the property. It did not vest the title to the money in defendant nor the real property in plaintiff. It is rather a conditional award to plaintiff upon the payment of a certain price for the land. It cannot be fairly construed as creating or evidencing a present and unqualified obligation to pay any sum of money. When said judgment was rendered, plaintiff had the right to decline to take the land at the price fixed. No doubt, the payment was purposely made contingent in view of the further proceedings that were open to the parties. Thus it is provided in section 1255a that: 'Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment.' It is therefore plain that plaintiff was not 'required to perform the directions of the judgment' at the time it was rendered. It could not, therefore, be enforced by a writ of execution, and it has been held that said section 942 applies only to a judgment which directs the payment of a specific amount of money and which can be directly enforced by a writ of execution."

Cases which seem to hold that an interlocutory decree in eminent domain is on an exact parity with an ordinary money judgment are not actually opposed to the views just quoted (with the possible exception of People v. Superior Court, 145 Cal.App. 2d 683, 303 P.2d 628, later discussed herein), for the specific question was not before the court and was not under discussion.

Vallejo & N. R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426, is an outstanding example. In that instance the amount of the award was paid into court within 30 days, the court required deposit of an additional $25,000 to cover further damages and costs and made an order authorizing plaintiff to take possession. Defendant refused the award as inadequate and appealed from the judgment. After it was affirmed defendant sought an order for payment to it of the amount deposited, together with interest from the date of the

order for possession; the court denied the claim for interest and defendant appealed from that order. At page 251 of 177 Cal., at page 427 of 170 P. the court said: "[T]he sole question thus squarely presented is whether a condemnor who, after judgment of condemnation and after paying into court for the landowner the full amount of the compensation awarded, and who upon an order of court receives possession of the property condemned, must thereafter pay interest on the money so paid pending an unsuccessful appeal from the judgment prosecuted by the landowner who refuses to accept the award." It was in this connection that the opinion used the following language: "In such proceedings the award constitutes a judgment in favor of defendant and against the plaintiff for the amount thereof, payment of which, unless the proceeding within the time be abandoned by plaintiff as provided in section 1255a, of the Code of Civil Procedure, shall be made within thirty days after final judgment (section 1251 Code Civ.Proc.), and in the absence of such payment of the money awarded or deposit thereof made in court, defendant may have execution to enforce the judgment as in civil cases (section 1252 Code Civ.Proc.). In this respect the rights of defendant are substantially identical with those of a plaintiff recovering a money judgment against a defendant in a civil action. In the instant case the money was paid into court for the benefit of defendant as a judgment creditor, pursuant to the provisions of section 1254 of the Code of Civil Procedure. A deposit so made for the benefit of one entitled thereto pursuant to a statute is at least equivalent to a tender thereof. Lewis on Eminent Domain, 579, and cases cited. By section 1504 of the Civil Code, the Legislature has declared that: 'An offer of payment * * * duly made * * * stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.' The deposit made constituted a tender of payment, acceptance of which, however, under the provisions of section 1254, did not bar an appeal based upon the ground of inadequacy of compensation. In the *absence of some special statute applicable* to the case, the effect of the tender was * * * to 'stop the running of interest on the obligation,' pending the unsuccessful appeal." 177 Cal. at pages 251–252, 170 P. at page 426. The ultimate holding is stated in syllabus 2: "The contention that sections 1249 and 1254 of the Code of Civil Procedure provide a special rule under which a defendant in condemnation proceedings may refuse to accept the tender of an award made by deposit in court for his benefit, appeal from the judgment, and, upon affirmance thereof, insist upon the payment of interest on the amount pending such appeal, is without merit." 177 Cal. at page 249, 170 P. at page 606. The observation of City of Pasadena v. Stimson, 91 Cal. 238, 250, 27 P. 604, 606, is immediately pertinent: "[I]t is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases." The Vallejo decision is in keeping with the general rule stated in 36 A.L.R.2d at page 421: "Thus, it has been held that interest will be denied where the delay in payment of the award is due to some fault of the owner."

Cases involving possession under order of court are not controlling. Metropolitan Water Dist. of Southern California v. Adams, 16 Cal.2d 676, 107 P.2d 618, is such an one. It is there held that interest is not recoverable for mere delay in payment of compensation (16 Cal.2d at pages 678–679, 107 P.2d at pages 619–620), but that it does accrue from date of possession (16 Cal.2d at pages 680–682, 107 P.2d at pages 620–621) as part of the owner's just compensation.

Heimann v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597. An inverse condemnation case in which it was claimed that injury to the property was inflicted prior to any suit. Held that, as costs are part of just compensation (30 Cal.2d at page

752, 185 P.2d at page 600), interest is allowable upon the same theory (30 Cal.2d at page 758, 185 P.2d at page 604), and the right is not dependent upon any statute (30 Cal.2d at pages 758–759, 185 P.2d at pages 604–605), but that the interest starts with the date of infliction of injury and not merely from the time of entry of judgment. The value of this case at bar is impaired by the fact that it was not a condemnation action and its discussion related to interest as a part of the compensation for actual possession or its equivalent, the infliction of substantial physical injury.[2]

[2] As above indicated we consider that the authorities support the conclusion that interest begins to run from the date when the right to abandon expires and the obligation to take becomes absolute. Formerly it was thought that the right to abandon expired and hence the right to receive interest accrued 30 days after entry of interlocutory (City of Los Angeles v. Deacon, 3 Cal.2d 641, 648, 46 P.2d 165, and City of Los Angeles v. Aitken, supra, 32 Cal.App.2d 524, 528, 90 P.2d 377), but these cases were disapproved in that one respect by Southern Public Utility District v. Silva, supra, 47 Cal.2d 163, 165, 301 P. 2d 841, which establishes that § 1264.7 governs the computation of the 30-day period.

The ruling in People v. Superior Court, supra, 145 Cal.App.2d 683, 303 P.2d 628, is not opposed to these views, although some of its language is not consistent therewith.[3] In that case the question was whether the owner was entitled to collect interest during the pendency of an appeal taken by the condemner and it was answered in the affirmative. The date for starting of interest is not disclosed by the opinion, doubtless due to the fact that there was no dispute between the parties in that respect. The original record shows that both parties took the position that interest, if any, dated from 30 days after entry of interlocutory judgment. There was no occasion for the court to discuss that point. It held that interest does accrue during appeal and did not attempt to fix the starting date. The point which we must decide, and the only one we dispose of, is that 45 days after the entry of the interlocutory falls short of the end of the period afforded the condemner for cogitation and therefore interest had not started to run at the time of payment of the award in the case before us.

The foregoing discussion seems to dispose of this case except for the constitutional argument that the right to just compensation includes within it the recovery of interest upon the award during any delay in payment. Logically, the contention could go back to the date of commencement of the action, as that is the date for fixing the damages in the ordinary case (§ 1249). But the rules relating to eminent domain are not governed by pure logic, unaffected by practical considerations. "Not every depreciation in the value of the property not taken can be made the basis of an award of damages." People v. Ricciardi, 23 Cal.2d 390, 395, 144 P.2d 799, 802, "On the other hand, the construction of the public improvement may involve many non-compensable factors. Generally it has been said: 'The damage for which compensation is to be made is a

2. Other cases holding that taking possession prior to trial gives right to interest beginning with that event are: Los Angeles County Flood Control Dist. v. Hansen, 48 Cal.App.2d 314, 317, 119 P. 2d 734, and City of San Rafael v. Wood, 144 Cal.App.2d 604, 607, 301 P.2d 421.

3. On page 687, of 145 Cal.App.2d, on page 630 of 303 P.2d appears this statement: "There is no doubt that petitioner is correct in its contention that the time within which it might pay the judgment did not expire until thirty days after the filing of the remittitur affirming the judgment, and that it is also correct in its contention that it might abandon the proceeding at any time prior to the expiration of thirty days from the filing of the remittitur." The citation of Southern Public Utility District v. Silva, supra, in support of that statement seems to be an inadvertence for the case holds the contrary.

damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution * * *.'" Heimann v. City of Los Angeles, supra, 30 Cal. 2d 746, 756, 185 P.2d 597, 603.

Necessary attorney fees seem to be as clearly a part of just compensation as the relatively insignificant taxable court costs which must be awarded the owner as part of his compensation. See, Heimann v. City of Los Angeles, supra, 30 Cal.2d at page 750, 185 P.2d at page 599. But the holdings are to the contrary. Prior to enactment of § 1255a in 1911 the property owner was remediless in case of abandonment; he could recover neither his attorney fee nor the expenses of preparation for trial other than statutory costs. (17 So.Cal.Law Rev. 407.) Under the present section attorney fees and expenses of preparing for trial are recoverable in case of abandonment less than 40 days prior to date set for trial, but not otherwise. Although a condemnation suit may not be brought to trial for eight or ten months and the value of the property may have increased substantially during that period, the statute requires it to be valued as of the date of the issuance of summons. The opinion in People v. Superior Court, supra, 145 Cal.App.2d 683, 691, 303 P.2d 628, 633, contains these pertinent observations: "While the entry of the judgment did not, in and of itself, operate to vest title in petitioner or give it the right to immediate entry, it effectually took from the Bank many elements which gave value to the land. After the entry of the judgment the Bank could not rent or sell the land except subject to the right of petitioner to take it at will; it could not improve it without in effect dedicating the improvement made to petitioner. The result is that payment being delayed, the Bank had neither use of the money to which it was entitled nor full use of the property which petitioner, under the judgment, had the right to take." Yet it was held in Los Angeles v. Gager, 10 Cal.App. 378, 102 P. 17, that no interest is recoverable for the delays prior to judgment and that the statute (§ 1249) is not rendered unconstitutional by that fact. See, also, City of Los Angeles v. Tower, 90 Cal. App.2d 869, 872–874, 204 P.2d 395, as to the constitutionality of said statute. If it is lawful to withhold interest for ten months of delay in reaching trial, even upon a rising real estate market, it would seem that a delay for 90 (or perhaps 120) days after judgment in making payment would not be a withholding of substantial compensation because of denial of interest on the award; that it would constitute one of the "many non-compensable factors" mentioned in the Heimann case, supra.

Another example of the same sort is found in the application of § 1255a to specific cases. It provides that upon abandonment the defendants may recover their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees, which fees must be fixed by the court. The amount allowed by the judge, based upon the opinion of himself and others, may be only a fraction of what defendant actually and in good faith paid or agreed to pay his lawyer. But the commencement and abandonment of the condemnation leaves him out of pocket to the extent of one-half or one-third of what he paid his attorney and he is remediless in that regard.

Again, the "costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action." Though the case be one involving large holdings and intricate valuation, the owner must do all his preparation within the last 40 days before trial or he loses part or all of those expenses in case of an abandonment made 40 days before the trial date. In this he is remediless, as in the other instances above cited. If the case

does not go to judgment or formal abandonment but is dismissed under § 583 for want of prosecution, no attorney fees or expenses (other than formal costs) are recoverable. City of Bell v. American States Water Service Co., 10 Cal.App.2d 604, 607, 52 P.2d 503.

[3] The justification for these rulings, so far as explained, is that they are procedural (City of Los Angeles v. Tower, supra, 90 Cal.App.2d 869, 873–874, 204 P. 2d 395; County of Los Angeles v. Hoe, 138 Cal.App.2d 74, 80, 291 P.2d 98; City of Pasadena v. Porter, 201 Cal. 381, 390, 257 P. 526, 53 A.L.R. 679; California Southern R. Co. v. Kimball, 61 Cal. 90, 91), but they seem to flow from the more fundamental principle that the owner is not entitled to compensation for an interference with his property rights which is not substantial in its nature (cf. City of Los Angeles v. Pomeroy, 124 Cal. 597, 644, 57 P. 585).

[4] We apprehend that, as these lesser burdens inflicted upon the landowner incident to an eminent domain proceeding fall short of a cognizable taking, a delay of 45 days in paying a condemnation award falls within the same category. We conclude that the 45-day delay in payment of the award here under consideration was not such a substantial interference with the property rights as to constitute the taking or damaging of same.

[5] Although it appears to us that appellants were entitled to no interest whatever upon the instant award, respondent's brief concedes a right thereto for the last 15 days of the delay and seeks affirmance of the order under appeal. It was also conceded by respondent's counsel upon oral argument that the order should be affirmed. Of course, a respondent may assert error only in aid of affirmance. City of Glendale v. Crescenta, etc., Water Co., 135 Cal.App.2d 784, 798, 288 P.2d 105. The attorney general, appearing as amicus curiae, argues that appellants are entitled to nothing; but he has no status in this litigation except that of friend of the court. We acknowledge valuable assistance afforded us by his brief herein, but he has no rights which are or can be invaded by the order in question. In the circumstances I would affirm the lower court's order.

Both of my associates, however, insist that the order must be reversed. Their reasons are stated in the concurring opinion of Mr. Presiding Justice FOX. Therefore, the order is reversed with directions to enter an order denying interest in its entirety.

FOX, Presiding Justice.

I fully concur in Mr. Justice ASHBURN'S reasoning and conclusion that under the law and the facts in this case appellants are not entitled to any interest. The trial court's order allowing interest on the award for 15 days (amounting to $281.10) is obviously wrong. Therefore it ought not be affirmed but should be reversed so that a proper order may be entered. It is neither good public policy nor proper administration of justice to affirm an order that misapplies the law because it has been misconceived by both counsel and the trial court. Where the prevailing party, through an erroneous interpretation of the law, seeks affirmance of an order which places a greater burden upon him than he is legally required to bear, the court should intervene of its own accord. It is the duty of the court to determine where justice lies under the law and the facts. This objective may be achieved in the instant case only by reversing the order herein and directing the entry of a new order denying interest in its entirety. Otherwise, appellants would receive from the public treasury $281.10 to which they are not entitled under the law.

KINCAID, Justice pro tem., concurs.

159 Cal.App.2d 114

The PASTIME CAFE, Inc., et al., Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, State of California, Defendant and Respondent.

Civ. 22812.

District Court of Appeal, Second District, Division 2, California.

April 3, 1958.

Proceeding on petition for writ of mandate to review decision of Alcoholic Beverage Control Appeals Board which affirmed the decision and order of Department of Alcoholic Beverage Control suspending liquor license for violation of statute forbidding sale of alcoholic beverages to a minor. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment of dismissal and licensee appealed. The District Court of Appeal, Fox, P. J., held that birth certificate was not documentary evidence of majority and identity within meaning of statute providing that in any proceeding for violation of statute respecting sale of liquor to minors proof that licensee or his agent demanded and received bona fide documentary evidence of age is a defense.

Affirmed.

Intoxicating Liquors ⇐108(1)

Birth certificate is not bona fide documentary evidence of majority and identity within meaning of statute providing that in any proceeding for violation of statute respecting sale of alcoholic beverages to minor proof that licensee or his agent demanded and received bona fide documentary evidence of age and identity is a defense. West's Ann.Bus. & Prof.Code, §§ 25658(a, b), 25660.

Berk & Bise, Los Angeles, and Edward J. Skelly, North Hollywood, for appellants.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

An accusation was filed with respondent charging appellant, as the holder of a general on-sale liquor license, with violations of subdivisions (a) and (b) of section 25658, Business and Professions Code, in that it did sell an alcoholic beverage to a minor 19 years of age and permitted said minor to consume the same upon the licensed premises. A hearing officer found both charges to be true and also found that appellant did not establish a defense under the provisions of section 25660[1] of the Business and Professions Code. The officer therefore recommended that the license be suspended for 15 days. The department adopted his decision and accordingly suspended the license. Appellant thereupon appealed to the Alcoholic Beverage Control Appeals Board, which affirmed the decision and order of the department.

Appellant then petitioned the superior court for a writ of mandate. Respondent's demurrer to appellant's amended petition was sustained without leave to amend. A judgment of dismissal followed, from which appellant licensee has appealed.

The evidence shows that Margaret Lochhead, a young woman 19 years of age, entered appellant's premises on March 7, 1956,

1. Section 25660, Business and Professions Code, reads as follows:

"In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, immediately prior to furnishing any alcoholic beverage to a person under 21 years of age, bona fide documentary evidence of majority and identity of the person issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the armed forces, is a defense to the prosecution or proceeding for the suspension or revocation of any license."

with her escort and occupied a booth with two other couples. When orders for drinks were being taken appellant's waitress asked Miss Lochhead for identification. She handed the waitress a birth certificate issued by the Health Department of Canton, Ohio, which was, however, the birth certificate of her sister, Roberta Janet, who was born on September 30, 1934. The waitress looked at the document, handed it back to Margaret, and took her order for a Tom Collins, which was later served and partially consumed by Margaret.

The only issue here is whether appellant established a defense under the provisions of section 25660, Business and Professions Code (quoted in the footnote)—i. e., was appellant's waitress shown "bona fide documentary evidence of majority and identity" of Margaret?

The Alcoholic Beverage Control Appeals Board, in affirming the decision of the department that a defense under section 25660 was not established, took the position that the birth certificate was not evidence of identity. We think the position of the department and appeals board is sound and that the trial court properly sustained, without leave to amend, the respondent's demurrer to appellants' amended petition.

Section 25660 demands documentary evidence of majority *and identity* which is intrinsically bona fide (5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control, 155 Cal.App 2d 748 318 P.2d 820) and the mere production of a birth certificate does not establish a defense. The only question here involved is identity. The purpose of requiring documentary evidence as proof thereof is that the licensee or his agent may, by comparing the picture, description, or signature appearing upon such documents with the appearance or handwriting of the person presenting them, have a reasonable basis for concluding that the person in question is the individual depicted in the documents, and has reached his majority as indicated by the information therein. If the document presented does not contain sufficient information to enable the licensee or his agent reasonably to conclude that the holder is the person described therein, it does not meet the requirements of this section. A birth certificate basically contains genealogical data. The descriptive information which appears therein, such as the sex, height, weight, color of eyes and hair of the newborn infant, does not provide sufficient data to enable a licensee 18 or 20 years later to identify the holder of such a certificate as the person described therein. Nor does a birth certificate contain a signature which may be compared with the handwriting of the holder. It is thus apparent that a birth certificate alone does not contain information sufficient to establish the "identity" required by section 25660.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



158 Cal.App.2d 795

Laura FAVA, Plaintiff and Appellant,

v.

John C. PFAHNL, Elizabeth G. Pfahnl, et al., Defendants and Respondents.

Civ. 17402.

District Court of Appeal, First District, Division 1, California.

March 28, 1958.

Action for injuries sustained in an automobile collision. From a judgment of the Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., in favor of defendants, the plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem, held, inter alia, that in action for injuries to wife in husband's automobile which, in effort to avoid collision with defendant's preceding automobile which had made an effort to enter husband's lane of traffic on multi-lane highway, swerved across two lanes to the right and landed on shoulder of highway, evidence

including showing that defendant in addition to looking in his rear vision mirror looked to his right rear window before commencing his lane changing movement, that only the right front wheel and fender ever impinged upon husband's lane of traffic, that defendant did immediately pull back into his lane, and that defendant did not slacken his speed, was sufficient for jury on issue of defendant's negligence, and also that the evidence was sufficient for jury on issue of husband's contributory negligence which was imputable to wife.

Affirmed.

1. Appeal and Error ⇐930(1)

On plaintiff's appeal from judgment for defendant pursuant to jury verdict, appellate court must view the evidence with all intendments in favor of defendant.

2. Appeal and Error ⇐930(1), 1001(1)

Where appellant urges that evidence is insufficient to justify verdict, reviewing court must review the evidence by resolving all conflicts in favor of prevailing party at trial and must indulge all legitimate and reasonable inferences to support the verdict, but if verdict is not supported by substantial evidence the judgment must be reversed.

3. Evidence ⇐265(2)

The fact that at scene of automobile accident defendant assumed blame for the accident, was not conclusive upon him and at trial such admission might be explained away or contradicted, and it was for jury to judge effect and value of such admission.

4. Automobiles ⇐245(15)

In action for injuries to wife in husband's automobile which, in effort to avoid collision with defendant's preceding automobile which had made an effort to enter husband's lane of traffic on multi-lane highway, swerved across two lanes to the right and landed on shoulder of highway, evidence including showing that defendant in addition to looking in his rear vision mirror looked to his right rear window before commencing his lane changing movement, that only the right front wheel and fender ever impinged upon husband's lane of traffic, that defendant immediately pulled back into his lane and that defendant did not slacken his speed, was sufficient for jury on issue of defendant's negligence.

5. Automobiles ⇐201(1)

Where there is testimony that one negligently failed to ascertain whether an overtaking vehicle was in the blank area of vision present in many automobiles, nevertheless, a threatened lane change, which only slightly impinged on overtaking vehicle's traffic lane and was a mere momentary swerve unaccompanied by deceleration might, in absence of impact, be found to lack element of proximate cause essential to imposing liability for negligence.

6. Automobiles ⇐245(81)
Negligence ⇐136(30)

In action for injuries to wife in husband's automobile which, in effort to avoid collision with defendant's preceding automobile, swerved to the right across two lanes of highway and landed on shoulder of highway, evidence including showing that defendant had not slackened his speed and that distances between the two automobiles remained roughly relative to each other at all times, was sufficient for jury on issue of husband's contributory negligence which could be imputed to the wife.

7. Automobiles ⇐246(58)

In action for injuries to wife in husband's automobile which, in effort to avoid collision with defendant's preceding automobile, turned across two highway lanes and landed on shoulder of highway, evidence warranted instructions on contributory negligence of husband.

8. Appeal and Error ⇐1066
Trial ⇐252(8)

In action for injuries to wife in husband's automobile which, in effort to avoid collision with defendant's preceding automobile, turned to the right and landed on shoulder of highway, wherein there was no evidence of wife's negligence, instruction that jury might consider whether wife was contributorily negligent should not have

been given, but its giving was not prejudicial to the wife under the circumstances.

9. Trial ⇐191(6), 296(4)

An instruction on contributory negligence was not erroneous as assuming such negligence, where portion of instruction complained of was more or less introductory and required a precise concentration to construe it as prejudicial and, read in conjunction with other proper instructions given, no error appeared.

10. Trial ⇐217

Instructions dealing with jury's duty to disregard rulings on objections and evidence rejected by court and a general instruction as to status of statements of counsel, might well have been given, but, in view of numerous instructions which were given as to jury's duties and place and function of evidence, no error was committed in not giving them.

11. Trial ⇐252(7)

Where there was no mention of unavoidable accident in trial of case, failure to instruct on subject of unavoidable accident was not error especially where such instruction would have been of questionable validity had it been given.

12. Evidence ⇐558(4)

Trial court did not err in allegedly permitting improper and irrelevant cross-examination of a witness on plaintiff's behalf, where cross-examination though thorough was relevant, in that it dealt with a physician's direct testimony that plaintiff's physical complaints were result of accident and with items of physician's bill for services.

Jack H. Werchick, San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, B. E. Atkisson, San Francisco, Daren T. Johnson, Los Angeles, for respondent.

McMURRAY, Justice pro tem.

Plaintiff sued defendant for injuries sustained by her while riding in a car her husband was driving. The jury returned a verdict in favor of defendant and this appeal is from the judgment upon such verdict.

[1] Viewing the evidence, as we must, with all intendments in favor of respondent, it appears that respondent was proceeding northbound in the fast lane of a divided highway with four lanes northbound at 50 miles per hour; appellant's husband was driving the car in which she was riding in the lane immediately to the right of respondent and was travelling "behind" respondent for "quite a ways" (300–400 yards) at approximately the same speed as respondent's car, and at a distance of about one car length between appellant's car's front bumper and respondent's rear bumper. Traffic ahead of respondent slowed up; he looked back and to the right and saw no traffic, and began a lane change; the front right fender portion of his car went into appellant's lane; no part of the back of the car got into it; respondent heard squealing of brakes and saw the hood of appellant's car simultaneously and, at that moment, he swung back into his original lane; appellant's husband blew his horn, stepped on the brake, turned his car to the right and finally stopped on the shoulder at the extreme right-hand lane of the four northbound lanes, having crossed two other northbound lanes to his right before stopping. Respondent stopped; appellant was on the floor of the car when her husband stopped, having got there during this right turn. In the conversation which ensued between appellant's husband and respondent, respondent stated that it was his fault and that the appellant's car had been in the blind spot between the rear vision afforded by his mirror and the rear vision apparent to him when he looked to the right rear through the right-hand windows in his car.

[2] The appellant urges that the evidence is insufficient to justify the verdict. When such ground is urged for a reversal, it is a familiar rule that a reviewing court must review the evidence by resolving all conflicts in favor of the pre-

vailing party at the trial and must indulge all legitimate and reasonable inferences to support the verdict. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. But if the verdict is not supported by substantial evidence the judgment must be reversed. In re Estate of Teed, 112 Cal. App.2d 638, 247 P.2d 54.

Appellant contends that the negligence of respondent was established as a matter of law by his testimony that he knew there was a blind spot in his field of rear vision but, nevertheless, failed to move his body to correct that defect before commencing his lane changing movement and by the fact that he admitted that the accident was his fault. Appellant also urges in this regard that the record is utterly devoid of any evidence of contributory negligence on the part of, or chargeable to, appellant.

[3, 4] Examining the evidence in the light most favorable to respondent, it would appear that the jury could have found that respondent was not chargeably negligent, his actions being reasonable under the circumstances since he testified that in addition to looking into his rear vision mirror, he did look through his right rear window before commencing his lane changing movement, that only the right front wheel and fender ever impinged upon appellant's lane of traffic, that he immediately pulled back into his lane upon seeing the car in which appellant was riding, and that he did not slacken his speed. The fact that at the scene respondent assumed blame for the accident is not conclusive upon him and at trial such admission may be explained away or contradicted. State Farm Mut. Auto. Ins. Co. v. Porter, 9 Cir., 186 F.2d 834, 52 A.L.R.2d 515. It is for the jury to judge the effect and value of such admission. Tieman v. Red Top Cab Co., 117 Cal.App. 40, 45, 3 P.2d 381.

[5] It would appear that where there is testimony that one negligently failed to ascertain whether an overtaking vehicle was in the blank area of vision present in many cars, nevertheless, a threatened lane change which only slightly impinged on the overtaking vehicle's traffic lane and was a mere momentary swerve unaccompanied by deceleration might, in the absence of impact, be found to lack the element of proximate cause essential to imposing liability for negligence.

Appellant urges that under the facts here adduced her husband could not as a matter of law have been guilty of contributory negligence and, in this respect, states that the time element here was such that there could be no contributory negligence. In support of this contention, she cites the cases of Ramos v. Linggi, 125 Cal.App.2d 632, 270 P.2d 857, and Flannery v. Koch, 103 Cal.App.2d 55, 228 P.2d 580.

Ramos v. Linggi, supra, was a case where a truck skidded across the center line of a two lane highway and struck a car coming in the opposite direction. The time from the commencement of the skid and the impact was almost instantaneous and the holding therein is restricted to the facts there contained; the opinion also contains language which requires that a driver does no positive act which contributed to the accident. The defense of contributory negligence may become a question of law rather than fact under such circumstances.

In Flannery v. Koch, supra, 103 Cal. App.2d 55, 228 P.2d 580, the holding was that there was no question of contributory negligence where the time available to act was a fraction of a second. Carr v. Holtslander, 112 Cal.App.2d 589, at page 591, 246 P.2d 678, at page 680, is a case where a defendant made a left turn directly in front of the plaintiff and the court said: "The demands of the law are not so extreme as to require one to anticipate such suicidal conduct." Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834, is also cited to the effect that one may assume that another will obey the law.

[6] None of these cases, it seems to us, apply to the facts here. While appellant makes much of the fact that the car in which she was riding was only a car length

behind and a lane to the right of respondent's car, she does not explain the somewhat drastic action of her husband in driving clear across two traffic lanes to the right upon seeing the respondent's car commence to enter the same traffic lane. She overlooks the fact that there is testimony that respondent did not slack his speed and that the distances between the two cars could therefore be assumed as having remained roughly relative to each other at all times. Under such circumstances, we believe that there was sufficient evidence to justify submitting the question of contributory negligence to the jury. The jury could well have found that appellant's husband's attempt to avoid an accident was so strenuous and unreasonable under the circumstances as to amount to contributory negligence and was a positive act which might be negligent; this negligence could be imputed to appellant.

The appellant cites several cases relating to proximate cause as affected by an intervening act of a third party which are not here in point.

Appellant complains of instructions given by the trial court.

[7] The instructions given on contributory negligence are attacked as erroneous because there was no evidence before the court to justify instructing on this defense. What has been said above negates this contention.

[8] However, attack is made upon a portion of a given instruction on the ground that the jury were told that, besides the imputation of contributory negligence therein contained, the jury might consider whether the appellant herself was contributorily negligent. Admittedly, there is no evidence of any conduct on her part that could be negligent. That portion of the instruction should not have been given, but it does not appear how it was prejudicial to the appellant.

[9] Instructions given on the subject of damages are attacked as erroneous and certain words singled out as implying some secret meaning which is not apparent when all of the instructions on the record are read. Likewise, appellant contends that an instruction given on contributory negligence assumed such negligence. The portion of the instruction complained of is more or less introductory and requires a precise concentration to construe it as prejudicial to appellant. Read in conjunction with the other proper instructions given, no error appears.

[10] Appellant also contends that the court erred in not giving two instructions submitted by her. These instructions dealt with the jury's duty to disregard rulings on objections and evidence rejected by the court and a general instruction as to the status of statements of counsel. Either or both might well have been given, but, in view of the numerous instructions which were given as to the jury's duties and the place and function of evidence, no error was committed.

[11] Appellant complains that the court erred in failing to instruct on the subject of unavoidable accident, contending that this issue was injected into the case by defendant in argument. A reading of the record before us fails to reveal any mention of unavoidable accident and, in any event, such an instruction would have been of questionable validity had it been given. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500.

[12] Appellant also contends that the trial court erred in permitting certain allegedly improper and irrelevant cross-examination of a witness on her behalf. The cross-examination was thorough but was relevant; it dealt with a physician's direct testimony that appellant's physical complaints were the result of the accident and with items of the physician's bill for services. Appellant also states that collateral matters were permitted and that impeachment was allowed without proper prior foundation. These statements are not supported by the record.

Neither are charges by appellant that respondent's counsel was guilty of prejudicial misconduct supported by the record

Only by a supersensitive interpretation could the matters complained of be misconduct. Attorneys in a trial should not be hypersensitive and usually are not.

Appellant groundlessly alleges that the trial court was guilty of prejudicial error in some of his comments and examinations of witnesses. The record before us is devoid of any remark of the trial judge that lends respectability to this allegation.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



159 Cal.App.2d 69

Fred KARP, Anna Karp, Aaron Karp, Plaintiffs, Respondents and Appellants,

v.

Harry MARGOLIS, Ann Margolis, Defendants, Appellants and Respondents.

Civ. 17720.

District Court of Appeal, First District, Division 2, California.

April 1, 1958.

Action for forcible entry and detainer. The Superior Court, San Mateo County, Edmund Scott, J., entered judgment in favor of plaintiffs for restitution of the premises, and for nominal damages of one dollar trebled to equal three dollars, and both plaintiffs and defendants appealed. The District Court of Appeal, Brazil, J. pro tem., held that where owners of certain premises following foreclosure of a deed of trust entered such premises which were in possession of plaintiffs, without legal process with the help of a locksmith, while plaintiffs were not physically in the building, and thereafter retained physical possession of the building, they were guilty of forcible entry, even though building was a commercial building, and even though there was no violence or circumstances of terror.

Judgment affirmed.

1. Forcible Entry and Detainer ⇐4

Where owners of certain premises following foreclosure of a deed of trust entered such premises, which were in possession of plaintiffs, without legal process with the help of a locksmith, while plaintiffs were not physically in the building, and thereafter retained physical possession of the building, they were guilty of forcible entry, even though building was a commercial building, and even though there was no violence or circumstances of terror. West's Ann.Code Civ.Proc. § 1159, subd.1.

2. Forcible Entry and Detainer ⇐4

Forcible entry is not confined to cases where a fight takes place, or physical force or restraint is used, or there are threats of physical harm, and no flat breach of the peace is necessary, the forcible entry statute having been enacted to obviate such incidents of self-help. West's Ann.Code Civ.Proc. § 1159.

3. Forcible Entry and Detainer ⇐3

Where defendants in a forcible entry and detainer action were given permission to enter premises by provision in a deed of trust in event of default in payment of note, following foreclosure after default deed of trust no longer existed, and therefore such deed did not justify defendant's forcible entry. West's Ann.Code Civ.Proc. § 1159

4. Forcible Entry and Detainer ⇐12(2)

Where defendants in forcible entry and detainer action acquired plaintiffs' title to property by a trustee's deed, they could not use plaintiffs' possession which they sought to disrupt as a basis of one year's quiet possession as a defense for their action of forcible entry. West's Ann.Code Civ.Proc. §§ 1159, 1172.

5. Forcible Entry and Detainer ⇐30(1)

Plaintiff in a forcible entry action in addition to being put back in possession is not entitled to substantial damages without

proof thereof. West's Ann.Code Civ.Proc. § 1172.

6. Forcible Entry and Detainer ⇐29(3)

In forcible entry and detainer action, evidence of title and ownership in defendants was admissible as bearing on question of how much damages plaintiffs suffered as natural proximate consequence of the forcible entry and detainer, and such evidence was also admissible for purpose of assisting court in exercising its discretion to treble damages found to be due. West's Ann. Code Civ.Proc. §§ 1159, 1174.

7. Forcible Entry and Detainer ⇐30(3)

In order to find out value of premises to plaintiffs who were dispossessed of possession by defendants' forcible entry and detainer there would have to be subtracted from the gross value whatever they would have been required to pay to defendants, who owned the premises, as rent.

8. Forcible Entry and Detainer ⇐30(2)

Where plaintiffs in forcible entry and detainer action claimed only damages for restitution of premises and loss of use and occupancy, trial court did not err in not allowing plaintiffs damages for defendants' retention of their equipment or personal property.

9. Forcible Entry and Detainer ⇐30(3)

In a case of forcible detainer by an owner from one who is entitled to possession, reasonable rental value alone is not a measure of plaintiffs' actual damages.

10. Forcible Entry and Detainer ⇐30(5)

In forcible entry and detainer action, where plaintiffs established forcible entry and detainer, but failed to establish actual damages, court could only award plaintiffs nominal damages and treble such amount. West's Ann.Civ.Code, § 3360; West's Ann. Code Civ.Proc. § 1174.

Jerome L. Schiller, San Francisco, for plaintiffs and appellants.

Harry Margolis in pro. per.

BRAZIL, Justice pro tem.

Both sides being displeased with the judgment, each has filed a separate appeal. To avoid confusion, reference to the parties will be that of plaintiffs and defendants as they appeared in the trial court, rather than as appellants and respondents.

In March 1953, plaintiffs borrowed $6,000 from defendants, which loan was secured by a deed of trust on a dry cleaning plant plaintiffs had built and were operating in Daly City. The plaintiffs, having failed to make payments on the note as required, the trust deed was foreclosed and on September 1, 1954, the defendants bought the property on trustee's sale and received a deed therefor. The plaintiffs were then operating the cleaning plant and were in actual possession of the premises until dispossessed by the defendants.

On Sunday afternoon, October 10, 1954, Mr. Margolis, his wife, three daughters, two friends and a couple of locksmiths took possession of the place without benefit of legal process. This was done in the absence of the plaintiffs and without previous notice of intention being given to them. The defendants did, however, notify the Daly City police, in advance, of what they were going to and did do. The place was entered with the help of a locksmith, who was brought along for that purpose, the defendants not having any keys to the building. The actual entry was made without any actual force, threats, intimidation, violence or injury, physical or mental, to any or the plaintiffs for none of them was there when it happened. The first plaintiffs knew what happened was about one o'clock the next morning when Mr. Karp telephoned the plant and found Mr. Margolis there. The defendants changed the locks, the combination of the safe, installed the burglar alarms, put a sign in the window, "No one is to be admitted to these premises without the permission of the owner, Harry Margolis," and with the aid of two or three guards effectively let the plaintiffs know that defendants were in possession to stay. The guards were kept on the premises for a

week or ten days, working in shifts. Before the entry, the defendants started to get the plaintiffs out in a legal manner by filing a complaint in unlawful detainer, which they apparently abandoned when a demurrer to the complaint in the municipal court was sustained. The trial court found that the Karps had not abandoned the property on October 10, 1954, and that defendants' entry was made at a time when plaintiffs were in peaceable possession.

Three days after the ouster, plaintiffs filed this action for forcible entry and detainer, seeking restoration of the place and damages. No claim is made in the complaint about damaging or taking any personal property which may have been in the building when it was taken over. Reasonable rental value is alleged to be $1,000 per month, and that is the amount the court found it to be, in line with a stipulation of the parties. After filing three memorandum opinions and correcting its original finding, judgment was entered in favor of plaintiffs for restitution of the premises, and nominal damages of $1 trebled to equal $3. The court impliedly found that the defendants owned the property during the period of detention and that plaintiffs were entitled to possession during the period of forcible detainer.

Defendants' Appeal

Section 1159 of the Code of Civil Procedure defines forcible entry as follows:

"Every person is guilty of a forcible entry who either:

"1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstances of terror enters upon or into any real property; or

"2. Who, after entering peaceably upon any real property, turns out by force, threats, or menacing conduct, the party in possession."

The judgment is in no way concerned with Subdivision 2 of Section 1159, sometimes referred to as dealing with "scrambling possession," for the plaintiffs were not present when defendants gained entry; and they made no physical attempt to get back in.

[1, 2] Defendants break Subdivision 1 of Section 1159 into two parts, reading it as if it applied to two kinds of structures, the first to a house, and the second to any other kind of building. They liken the word "house" to home, and say as the place entered is admittedly a commercial building, there was no forcible entry because there was no "breaking open doors, windows, or other parts of a house." The argument is not without some logical basis, and may be a reasonable interpretation of the section. However, courts have always before now read this section as a whole without making any division of affected subjects as suggested by defendants. In each of the following cases there was no "breaking open doors, windows, or other parts," each involved a commercial building and forcible entry was found to exist in each instance. San Francisco & Suburban Home Bldg. Soc. v. Leonard, 17 Cal. App. 254, 119 P. 405 (business office); Rutledge v. Barger, 82 Cal.App. 356, 255 P. 537 (store building); Pacific States Auxiliary Corp. v. Farris, 118 Cal.App. 522, 5 P.2d 452 (apartment house); Calidino Hotel Co. of San Bernardino v. Bank of America, etc., 31 Cal.App.2d 295, 87 P.2d 923 (hotel) and Pickens v. Johnson, 107 Cal.App.2d 778, 238 P.2d 40 (tavern).

Defendants also say there can be no forcible entry here because they got possession in the absence of plaintiffs and so there was no violence or circumstances of terror. Forcible entry is not confined to cases where a fight takes place, or physical force or restraint is used, or there are threats of physical harm. In Pickens v. Johnson and Rutledge v. Barger, supra, entry was made by breaking locks, without any other show of force, threat or intimidation. Many more cases of like import could readily be cited. No flat breach of the peace is necessary (Pacific States Auxiliary Corp. v. Farris, 118 Cal.App. at page 524, 5 P.2d at page 453, supra) the statute being enacted to obviate such incidents of self help as occurred here.

[3] Defendants next assert there is no forcible entry as they were given permission to enter the place by a provision in the deed of trust in the event there was a default in payment of the note. The ready answer to this contention (and it is not the only one) is that the deed of trust no longer existed after the foreclosure sale; it had served its purpose before defendants broke the lock and took possession.

[4] Finally defendants seek to avail themselves of the defense provisions of Code of Civil Procedure 1172 that "* * * [t]he defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year * * *." In this, they confuse title with possession. Defendants acquired plaintiffs' title to the property by the trustee's deed, but they could not use the very possession they seek to disrupt as a basis of one year's quiet possession under the section as a defense for their actions.

The evidence supports the findings that there was no abandonment, no consent to the entry and that all necessary elements to establish a forcible entry and detainer were present.

Plaintiffs' Appeal

Plaintiffs' complaint with the judgment is their dissatisfaction with the amount of damages awarded. As is said in Code of Civil Procedure Section 1172, "* * * the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. * * *" They claim error in the receipt of evidence, over objection, of title and ownership of the property by the defendants at the time of the entry and during the period of forcible detainer. Plaintiffs cite many cases to the effect that a defendant may not show title or ownership in himself to justify a forcible entry or a forcible detainer. The trial court, however, did find in plaintiffs' favor on these two issues, despite the admission of evidence of title and ownership. It determined first that there was a forcible entry and second that there was a forcible detainer.

[5] Because section 1172 requires that plaintiff "shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer" does not mean that in addition to being put back in possession he is actually entitled to substantial damages without any further proof.

"It will not, of course, be denied that the plaintiff was entitled to show, if it could, under a complaint sufficient for that purpose, any damages occasioned to it by the forcible or unlawful detainer complained of (section 1174, Code Civ.Proc.)—that is to say, it was entitled to recover, if it could prove it, under appropriate averments of its complaint, any damage that was the *natural* and *proximate consequence* of the alleged forcible or unlawful detainer. [Citations.] If, therefore, plaintiff could show that it had suffered the loss of rents through the acts complained of against defendants or had necessarily been put to expense in protecting its property while the defendants wrongfully and forcibly detained the same and by reason thereof or that it had sustained loss by the cessation of the prosecution of its business during the period of the wrongful detention and by reason thereof, then all such facts would disclose proper items of damages * * *." San Francisco & Suburban Home Bldg. Soc. v. Leonard, 17 Cal.App. 254, 266, 119 P. 405, 410.

[6] The trial court admitted the evidence of title and ownership in the defendants, not to disprove plaintiffs' right to a judgment, but as evidence bearing on the question of how much damages plaintiffs suffered as the natural and proximate consequence of the forcible entry and the

forcible detainer. It would also be admissible, in any case, for the limited purpose of assisting the court in exercising its discretion to treble the damages found to be due, as is provided in Section 1174 of the Code of Civil Procedure.

[7] Stockton Morris Plan Co. v. Carpenter, 18 Cal.App.2d 205, 63 P.2d 859; Haig v. Hogan, 82 Cal.App.2d 876, 187 P.2d 426, and many others cited by the plaintiffs to establish that "the reasonable rental value is the proper measure of damages" do not in any instance involve a factual situation like the one we have here. In each case the plaintiff would have been entitled to the rent of the premises, and not as in this case where the plaintiffs would have to pay rent for the place to the owner as part of the cost of doing business. The right to possession belonged to plaintiffs until they were lawfully evicted and its worth (the loss of which would be compensable) was its value in use to them, which of course could exceed the reasonable rental value. However, in order to find out its value in use to them, there would have to be subtracted from the gross value whatever they would in any case be required to pay as rent. If this were not so, an evicted plaintiff would receive a windfall, and the owner, who acted illegally, would be penalized the amount of the rent in addition to the penalty of treble damages already allowed in Code of Civil Procedure Section 1174. It would likewise make no difference whether the person forcibly kept from possession were an owner or a tenant, and it is obvious that the actual damages of such persons are not the same. The plaintiffs' contention on their measure of damages is not in harmony with Civil Code Section 3333 which provides "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

In the case of Roff v. Duane, 1865, 27 Cal. 565, 569, the court does say in laying down a general rule: "The inquiry is, Had the plaintiff the actual and peaceable possession at the time of the forcible entry complained of? And if that issue and the unlawful detainer are found for the plaintiff the law awards to him the monthly value of the rents and profits during the time of the detention without regard to his right or title in the premises." The Roff case has not ever been cited in California to support a rule that, as between an evicted plaintiff and a defendant owner, plaintiff is entitled to collect the rent from the owner by merely proving reasonable rental value of the premises. The factual situation in the Roff case so far as ascertainable from the opinion are not similar to those found to exist in this case.

[8, 9] The plaintiffs' further complaint that they were not allowed any damages for retention of their equipment or personal property is met with the simple answer that they never asked the trial court for such an award. A finding thereof would have found no support in the pleadings, nor did they ever ask leave of court to amend the pleadings in this regard. The only things they claimed by way of damages in the complaint upon which they went to trial were restitution of the premises and loss of use and occupancy. The only proof offered for such loss was establishing the reasonable rental value of the premises. As this is not a case of unlawful detainer and it is only a case of forcible detainer by an owner from one who was entitled to possession, reasonable rental value alone is not a measure of plaintiffs' actual damages.

[10] Damages are usually classified as actual, exemplary or nominal. Lacking proof of actual damages, the most the court could do was to award nominal damages. Pacific States Auxiliary Corp. v. Farris, 118 Cal.App. 522, 524, 5 P.2d 452. "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages." Civ.

Code, § 3360. The court, in its discretion, was authorized by Section 1174 of the Code of Civil Procedure to treble the amount which it found to be due.

Costs on appeal are not allowed to either party.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



158 Cal.App.2d 738

Helen G. MAKOVSKY, Plaintiff, Cross-Defendant, and Appellant,

v.

Leon T. MAKOVSKY, also known as Leon T. Mack, also known as Leon T. Tasem, Defendant, Cross-Complainant, and Respondent.

Civ. 17437.

District Court of Appeal, First District, Division 1, California.

March 27, 1958.

Wife brought suit for divorce. The Superior Court, County of Alameda, Marvin Sherwin, J., entered judgment awarding wife a divorce and dividing property, and the wife appealed from the portion of the judgment awarding business to husband as his separate property. The District Court of Appeal, McMurray, J. pro tem., held that where trial court's nunc pro tunc order correcting findings theretofore filed was based on amended pleading, which was improperly allowed, and therefore was not an order made to show what actually occurred at the time of trial, order was the correction of a "judicial error" rather than of a "clerical error," and the order was prejudicially erroneous.

Portion of judgment appealed from reversed, and cause remanded for further trial.

1. Trial ⇐400(1)

In order to establish that trial court was without jurisdiction to make nunc pro tunc order correcting findings theretofore filed, it was necessary to show that order was in fact the correction of a judicial error rather than a correction of a clerical error. West's Ann.Code Civ.Proc. § 473.

2. Appeal and Error ⇐440

Nunc pro tunc order of trial court correcting findings theretofore filed was not objectionable merely because order was signed after filing of notice of appeal. West's Ann.Code Civ.Proc. § 473.

3. Courts ⇐114

Trial court may correct its own clerical mistakes on its own motion nunc pro tunc in order to make record state what actually occurred. West's Ann.Code Civ. Proc. § 473.

4. Pleading ⇐236(5)

Discretion of trial court to allow amendment of pleadings to conform to facts proved must be exercised in such manner as to avoid any disadvantage to opposing party.

5. Pleading ⇐236(7)

Where proof adduced is in conformity with pleadings, there is no room for trial court to exercise its discretion and allow amendment of pleading to change an admission therein to a denial.

6. Pleading ⇐377

Generally, facts not controverted by answer are not in issue, and no evidence need be offered to prove their existence.

7. Pleading ⇐236(4)

Where proof at a trial is consonant with admitted facts, it is an abuse of discretion for trial court, after submission of case, to allow amendment of pleadings to the prejudice of opposing party.

8. Pleading ⇐420(2)

The basic reason that a party cannot ordinarily object to amendment of pleadings to conform to the proof is that at the trial, without objection, such party permitted the issue to be tried, so that he is estopped from challenging the amendment, but the

estoppel must be based on the failure to assert a right he should have asserted.

9. Pleading ⇐420(2)

Where proof adduced at trial of divorce suit relative to business of husband might well have been admissible under the pleadings on file at time of trial, and such evidence might have been regarded by wife as evidence of value of community interest rather than evidence of status of business as separate property of husband, and it might have been a factor for consideration in any division made of the business, failure of wife to object to separate property evidence concerning such business did not create an estoppel which would prevent wife from challenging subsequent amendment of husband's pleading to conform to facts allegedly proved.

10. Appeal and Error ⇐1071(1)
Trial ⇐400(1)

Where trial court's nunc pro tunc order correcting findings theretofore filed was based on amended pleading, which was improperly allowed, and therefore was not an order made to show what actually occurred at the time of the trial, order was the correction of a "judicial error" rather than of a "clerical error," and the order was prejudicially erroneous. West's Ann. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Clerical Error" and "Judicial Error".

Golden & Stefan, Oakland, J. Bruce Fratis, San Francisco, for appellant.

Harris, Darter & Older, Oakland, Cyril Viadro, San Francisco, of counsel, for respondent.

McMURRAY, Justice pro tem.

Appellant Helen G. Makovsky was granted an interlocutory decree of divorce from respondent Leon T. Makovsky on the grounds of extreme cruelty and was awarded certain of the community property of the parties together with counsel fees and permanent alimony. This decree also awarded respondent a business known as "Plaza Jewelry and Loan Office" as his separate property.

This appeal is directed against the trial court's action in awarding the business to respondent as his separate property.

After a nonjury trial, the trial judge filed a "Memorandum Decision" which reads as follows:

> "Interlocutory decree of divorce will be granted to plaintiff on the ground of extreme cruelty. No provision will be made for support of children because they are both self-supporting. Order will be made requiring defendant to pay to plaintiff for her support the sum of $225.00 per month, payable on same dates as temporary order. Defendant is ordered to pay to counsel for plaintiff for additional attorney's fees the sum of $600.00.
>
> "The community property is found to consist of an unimproved lot in Piedmont, a dwelling house at 3217 Ardley, flats at 3209 Ardley, an Oldsmobile, a Hudson, and stock in uranium corporation. In addition to the above, the defendant owns a promissory note and a business which are his separate property by reason of an inheritance.
>
> "The community property will be divided by awarding to plaintiff the Hudson automobile, 50 shares of Federal Uranium Company, the household furniture and furnishings, the dwelling house, and the unimproved lot, subject to its balance. Defendant will be awarded the Oldsmobile, 50 shares of Federal Uranium Company, and the flats at 3209 Ardley.
>
> "Defendant is authorized to amend pleadings to conform to proof and allege that the business is separate property of defendant."

Thereafter respondent filed an "Amended and Supplemental Answer * * * to Conform to Proof." Appellant's counsel prepared and submitted proposed Findings of Fact on April 20, 1956, which were signed

by the judge on May 11, 1956. In these findings appellant's counsel included findings to the effect that the business, together with two similar prior businesses operated by respondent during the marriage, had increased in value by reason of respondent's personal services and efforts in connection with their operation, and that to the extent that this increment in value was due to respondent's personal efforts and services it was community property.

On May 17, 1956, after service on respondent's counsel, Notice of Entry of Judgment was filed. On June 11, 1956, appellant filed Notice of Appeal from that portion of the judgment awarding the business to respondent as his separate property.

Fifteen days after the Notice of Appeal and on June 26, 1956, the trial judge, upon his own motion and without prior notice to the parties, filed an "Order Correcting and Clarifying Findings of Fact" which read:

"Whereas, the above entitled Court on May 11, 1956 signed its findings of fact and conclusions of law and interlocutory decree of divorce in the above entitled action; and

"Whereas, said findings of fact and conclusions of law and judgment were prepared by counsel pursuant to instructions of the Court contained in a written memorandum of decision theretofore rendered, which memorandum did not include matters hereinafter quoted from said findings, and said findings of fact included the phrase, Paragraph XII at Page 4, Line 22:

"'* * * it is true that the increase in value of the interest of defendant *is* said business resulted, in part, from his personal services and effort in connection with the operation of said business; it is true that to the extent that this increment in value was due to the personal efforts and services of defendant, it was community property;' and

"Whereas, said findings also included, Paragraph XIII at Page 5, Lines 3 to 9:

"'It is true that the increase in value of the interest of defendant and cross-complainant in said business from $6,886.22 in 1947 to $22,500.00 on July 10, 1952 resulted, in part, from defendant's personal service and effort in connection with the operation of said business; it is true that to the extent this increment in value was due to the personal efforts and services of defendant, it was community property;' and

"Whereas, said findings also included, Paragraph XV at Page 6, Lines 3 to 9:

"'It is true that the increase in value of the interest of defendant and cross-complainant in said business from $46,336.99 on July 15, 1952 to the sum of $54,071.34 on May 14, 1954 resulted in part from defendant's business; it is true that to the extent this increment in value was due to the personal efforts and services of defendant, it was community property;' and

"Whereas, this Court inadvertently failed to notice said quoted portions thereof at the time of signing the same; and

"Whereas, this Court in determining that the business referred to in Paragraph XVII of said findings was the separate property of defendant so concluded by reason of the Court's determination that the preponderance of evidence and inferences therefrom established that the value of said business was less than the cost thereof, and its value, if any, in excess of the amount of separate funds invested by defendant therein was not in excess of the fair and usual increase in value normally derived by or reasonably to be allocated to risk capital so invested; and that in fact defendant had withdrawn and expended for community purposes earnings in excess of a fair compensation for such services and such withdrawals included a portion of profits normally allocated and expected to be earned by risk capital so invested, and the Court did not intend to find that there was any increase in value of the separate property of defendant invested in the business in which defendant had last invested his separate funds, or that any such increase had been caused by or could be attributed to his personal efforts during the period of marriage, but, on the contrary,

the Court believed that withdrawals therefrom made by him during such period exceeded any amount of increase of capital that could be attributed to his personal efforts;

"It is hereby ordered, adjudged and decreed that the findings of fact be corrected and clarified to correctly set forth the determination of this Court by striking therefrom each of the portions thereof above quoted, and that this order shall be retroactive and entered nunc pro tunc as of May 11, 1956."

[1] Appellant urges that the trial court was without jurisdiction to make its order correcting the findings theretofore filed, especially since such order was filed after the Notice of Appeal had been filed. In so urging, appellant is required to support the proposition that such order was in fact the correction of a judicial error rather than of a clerical one.

"The distinction between a clerical error and a judicial error does not depend so much on the person making it as on whether it was the deliberate result of judicial reasoning and determination." 29 Cal.Jur. 2d § 101. In George v. Bekins Van & Storage Co., 83 Cal.App.2d 478, at page 480–481, 189 P.2d 301, at page 303, it is said: "The term 'clerical error' covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. If an error, mistake, or omission is the result of inadvertence, but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence. Kowalsky v. Nicholson, 23 Cal.App. 160, 162, 137 P. 607; Freeman on Judgments, 5th ed., vol. 1, p. 283, § 146. The court has inherent power to correct such errors. This power extends to striking out findings of fact and conclusions of law and a judgment and substituting wholly different findings of fact and conclusions of law and judgment." In Brashear v. Gerbracht, 128 Cal.App.2d 263, 274 P.2d 933, the fact that the trial judge wrote a memorandum decision was given weight by the court in determining the nature of an order *nunc pro tunc,* and this court in Nathanson v. Murphy, 147 Cal.App.2d 462, 305 P.2d 710, gave weight to an oral expression of a trial judge as set forth in an affidavit of counsel to determine that the order *nunc pro tunc* there involved was proper as the correction of a clerical rather than a judicial error.

[2] The order in the instant case recites that the original findings were signed inadvertently as to the findings relating to the status of respondent's businesses. The fact that such order was signed after the filing of the notice of appeal is not an objection. "The pendency of an appeal does not destroy the power of a court to make such correction [order correcting findings] of its record when the mistake is obvious from the other parts of the record and the proper correction can be made therefrom." Crawford v. Meadows, 55 Cal.App. 4, 11, 203 P. 428, 431.

[3] That a court may correct its own clerical mistakes on its own motion is explicitly stated in section 473 of the Code of Civil Procedure; such corrections are properly made *nunc pro tunc* in order make the record of a court state what actually occurred. Crawford v. Meadows, supra.

Appellant also contends that the finding that the business was the separate property of respondent is not supported by the evidence, and that while the evidence supports the original findings it does not support the corrected findings.

This contention is inextricably interwoven with another of appellant's contentions to the effect that the trial court's authorization to respondent to amend his answer to conform to proof set forth in the "Memorandum Decision" resulted in denying appellant the opportunity to present evidence on a material issue to her prejudice.

The complaint of appellant alleged that the business here under consideration was community property worth $25,000. The answer at time of trial admitted this al-

legation, but alleged that the business was worth $12,500; the same allegation and value were pleaded in the respondent's cross-complaint.

[4] Respondent argues that, by participating in the trial to the extent of allowing a showing that some of the business was in the nature of separate property of respondent, appellant waived any objections to amendment of the pleadings to conform to the facts proved, and cities 2 Witkin, California Procedure, pages 1609–1610. Granting that a trial court has broad discretion in allowing amendments to conform to proof and also that such amendment may be made even after submission upon completion of trial (Feigin v. Kutchor, 105 Cal.App.2d 744, 234 P.2d 264), nevertheless, it appears that such discretion must be exercised in such manner as to avoid any disadvantage to the opposing party (LeCyr v. Dow, 30 Cal.App.2d 457, 461–463, 86 P.2d 900).

[5] In this case the proof adduced at the trial relative to the business might well have been admissible under the pleadings on file at the time of trial. Evidence of the method of acquisition of the business here under consideration was not necessarily beyond the scope of the pleadings before the trial court. Such evidence might have been regarded by appellant as evidence of the value of the community interest rather than evidence of its status as separate property of respondent and would also be a factor for consideration in any division made of the business, and it appears that appellant's attorney so assumed at the trial as is shown by his statement relative to the admissibility of such evidence: "* * * I have no objection * * * to it being permitted for historical reasons only." Under such circumstances, that is, where proof adduced is in conformity with the pleadings, there is no room for a court to exercise its discretion and allow amendment of the pleading to change an admission therein to a denial.

[6, 7] It is the general rule that facts not controverted by answer are not in issue and no evidence need be offered to prove their existence (Fuentes v. Tucker, 31 Cal. 2d 1, 4, 187 P.2d 752), and where proof at a trial is consonant with such admitted facts it is an abuse of discretion for a judge, after submission of the case, to allow amendment of the pleadings to the prejudice of a party.

[8, 9] The basic reason that a party cannot ordinarily object to such an amendment is that at the trial, without objection, that party permitted the issue to be tried. He is therefore estopped from challenging the amendment, but an estoppel must be based on the failure to assert a right he should have asserted. In the instant case, the failure to object to the separate property evidence does not create an estoppel for the reasons herein stated.

Had appellant been apprised of the fact that the trial court was considering the evidence relating to the business as determinative of its status as community or separate property, she might have adduced different evidence at the trial and states in her brief that she would have done so. By not being so apprised she was in effect deprived of a full and fair trial on this issue.

[10] The order *nunc pro tunc*, being based upon the amended pleading which was improperly allowed, is, therefore, not an order made to show what actually occurred at the time of trial and becomes an attempt to correct a judicial error rather than a clerical error.

The other contentions of appellant as to the evidentiary establishment of the value of the business need not be here discussed since, because of the prejudicial error above set forth, the judgment insofar as it determined that the business known as the "Plaza Jewelry and Loan Company" was the sole and separate property of respondent must be reversed. That portion of the judgment appealed from is reversed and remanded for further trial.

PETERS, P. J., and FRED B. WOOD, J., concur.

158 Cal.App.2d 818

John B. HILL, Plaintiff and Respondent,

v.

J. D. WRATHER, Jr. and Mazie Wrather, Defendants and Appellants.

Civ. 22817.

District Court of Appeal, Second District, Division 2, California.

March 28, 1958.

Rehearing Denied April 21, 1958.

Hearing Denied May 21, 1958.

Action to recover on a promissory note wherein defendant filed a cross-complaint for alleged fraud of plaintiff in that defendants were induced to enter into a transaction for sale of stock in a television station based upon an alleged representation that plaintiff and another were not married to each other. From a judgment granting plaintiff's motion to strike the cross-complaint, granting plaintiff's motion to strike portions of the first amended answer and denying defendants' motion for a leave to join as a cross defendant a new party in the Superior Court of Los Angeles County, Burnett Wolfson, J., the defendants appealed. The District Court of Appeal, Kincaid, J. pro tem., held that orders striking from the files, the cross-complaint, certain affirmative defenses, and counterclaims were not separately appealable, and that the cross-complaint failed to state a cause of action for fraud and that it failed to establish that defendants suffered any detriment as result thereof.

Judgment affirmed.

1. Appeal and Error ⇐78(3)

Orders striking cross-complaint, affirmative defenses in the amended answer, and counterclaims are interlocutory and are reviewable only on an appeal from the final judgment. West's Ann.Code Civ.Proc. § 963.

2. Appeal and Error ⇐78(2), 870(2)

An order denying defendants' motion to bring in a new party is interlocutory and not appealable and must be reviewed on the appeal from the final judgment.

3. Pleading ⇐364(2, 3)

Irrelevant and redundant matter inserted in a pleading may be stricken by the court. West's Ann.Code Civ.Proc. § 453.

4. Pleading ⇐360(1)

A motion to strike cannot be made to serve the purpose of a special demurrer.

5. Pleading ⇐354(16)

Where a motion to strike is so broad as to include relevant matters, motion should be denied in its entirety.

6. Fraud ⇐41

A pleading setting up fraud must show a false representation of fact made by the representor, knowledge or belief by the representor that the representation is false, and intention to induce representee to act or refrain from action in reliance thereon, reasonable reliance, and damage to the representee resulting therefrom.

7. Fraud ⇐47

In action to recover on a note evidencing obligation of defendant to pay final installment of purchase price for television stock, cross-complaint for fraud was insufficient where it failed to establish that defendants suffered any detriment as result of claimed fraud. West's Ann.Code Civ. Proc. §§ 389 and 453; West's Ann.Civ. Code, § 3343.

8. Fraud ⇐25

A false representation which cannot possibly affect the intrinsic merits of a business transaction is immaterial, since reliance upon it could not produce injury in the legal sense.

9. Fraud ⇐25

Deception which does not cause loss is not fraud in a legal sense.

10. Fraud ⇐59(1)

Actionable fraud in the sale of stock requires that the measure of damages be the so-called "out-of-pocket" loss rule. West's Ann.Civ.Code, § 3343.

11. Conspiracy ⇐6

As respects right to recover for alleged fraud, fact that plaintiff alleged a conspiracy was immaterial, since damages to

the plaintiff was no less essential and all elements of the basic tort must be established or the charge of conspiracy fails.

Kaplan, Livingston, Goodwin & Berkowitz, Monte E. Livingston, Bayard F. Berman, Beverly Hills, and Arthur L. Stashower, Long Beach, for appellants.

John W. Preston, Jr., and Robert P. Schifferman, Los Angeles, for respondent.

KINCAID, Justice pro tem.

Defendants-appellants appeal from the judgment rendered in favor of plaintiff-respondent, based upon a promissory note in the amount of $75,000, interest and attorney fees, on the grounds that the trial court committed prejudicial error in (1) granting plaintiff's motion to strike the cross-complaint; (2) in granting plaintiff's motion to strike portions of the first amended answer; and (3) in denying defendants' motion for leave to join as a cross-defendant the new party, Maria Helen Alvarez.

For convenience, the defendants-appellants will hereinafter be referred to as "defendants," or "the Wrathers," plaintiff-respondent as "plaintiff" or "Hill" and Maria Helen Alvarez as "Alvarez."

On September 4, 1956, plaintiff commenced his action in the court below to recover from defendants (and an additional defendant, General Television, Inc., as to which the suit was dismissed prior to judgment) the sum of $75,000, plus interest, allegedly due under a promissory note dated August 5, 1952. Defendants filed separate answers on September 21, 1956, and November 2, 1956. Thereafter, plaintiff moved to strike defendants' answers and for summary judgment, and defendants moved for leave to file a proposed cross-complaint and proposed amended answer and for an order joining as a cross-defendant the new party named in the proposed cross-complaint, Alvarez. These proceedings resulted in a minute order which denied plaintiff's motion to strike and for summary judgment, denied defendants' motion for an order joining Alvarez as a cross-defendant, and granted defendants' motion for leave to file their proposed cross-complaint and proposed amended answer. This order was entered on January 4, 1957. Defendants then filed their cross-complaint and first amended answer in the form of the proposed pleadings. Thereafter, plaintiff demurred to defendants' cross-complaint and amended answer and moved the court for an order striking these pleadings, for summary judgment and/or judgment on the pleadings. On February 6, 1957, an order was made which overruled plaintiff's demurrer to defendants' first amended answer, placed off calendar plaintiff's demurrer to the cross-complaint, denied plaintiff's motion for summary judgment and/or judgment on the pleadings, and granted plaintiff's motion to strike on the cross-complaint and the following portions of the first amended answer: Paragraphs X through XV of the first counterclaim, the second and third counterclaims in their entirety, and paragraph 2 of the prayer. This minute order was entered on February 8, 1957.

[1, 2] It is clear that the orders herein striking from the files the cross-complaint, certain of the affirmative defenses in the amended answer and the counterclaims are not separably appealable. Such orders are interlocutory in character and are not included among those scheduled in section 963, Code of Civil Procedure, from which appeal may be taken. Hence such orders are reviewable only on an appeal from the final judgment. Sjoberg v. Hastorf, 33 Cal.2d 116, 118, 199 P.2d 668; Couch v. McGregor, 19 Cal.App.2d 633, 634, 66 P.2d 159; Merchants Nat. Bank of Los Angeles v. Clark-Parker Co., 97 Cal.App. 757, 276 P. 387. The order denying defendants' motion to bring in the new party Alvarez is likewise not appealable and must be considered on the appeal from the final judgment. Evans v. Dabney, 37 Cal.2d 758, 760, 235 P.2d 604.

The material allegations of the cross-complaint are identical with those of the first and second counterclaims of defend-

ants' amended answer. Section 442, Code of Civil Procedure, authorizes the filing of a cross-complaint whenever the defendant seeks affirmative relief relating to or depending upon the transaction upon which the action is brought. Prior to adoption of the 1957 amendment to section 442, if a new party named as a cross-defendant in a cross-complaint was necessary to a complete determination of the controversy then before the court, within the meaning of section 389, Code of Civil Procedure, the court was required to order him brought in as a party cross-defendant. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

The facts of the transactions as claimed by defendants are set forth in the cross-complaint generally as follows: About April 22, 1952, cross-defendants Hill and Alvarez each owned 150 shares of television company stock representing 15 per cent interest for each and were employed as the managers of station KOTV. The other 70 per cent of the stock was owned by George E. Cameron, Jr., who sold it to defendants. Defendants then went to Oklahoma and personally investigated the television company and station and met Hill and Alvarez. The latter agreed to continue to manage the station in consideration of an increase in their total ownership interest from 30 per cent to 50 per cent. Later Hill indicated his desire to sell his stock to defendants and in reliance upon claimed misrepresentations of material facts by Hill and Alvarez as hereinafter set forth, defendants agreed to purchase Hill's 150 shares for $400,000 and entered into an oral agreement with Alvarez to increase her ownership interest in the television station from 15 per cent to 50 per cent in consideration of her agreement to manage such station. Defendants thereafter caused capital stock of the television company to be issued to Alvarez to increase her holdings accordingly. The claimed misrepresentations of material facts and active concealment and suppression thereof by Hill and Alvarez consisted of behavior and acts on their part in an impersonal manner towards each other, referring to the other as if the other were a single unmarried person and as if he or she were engaging in a separate and individual deal with defendants and had no interest in the other's deal; each actively concealed and suppressed the fact that a long standing personal relationship existed with the other with each having a financial stake in the benefits and profits to be derived by the other; actively concealing and suppressing the fact that they were married to each other and/or lived together as husband and wife and behaving in such manner as to lead defendants to believe that each bore the same arm's length relationship to each other as to defendants. Hill and Alvarez made such representations to induce the Wrathers to execute and carry out the agreements of April 22, 1952, with Hill and with Alvarez and in reliance thereon and induced thereby the Wrathers bought Hill's interest for the price demanded and at the same time increased Alvarez's interest in the station by 35 per cent; that had they known the true facts the Wrathers would not have parted with this valuable property interest; that as a result of such deceitful conduct they were defrauded in the sum of $750,000, being the reasonable value of the 35 per cent ownership interest in station KOTV.

The foregoing allegations seek affirmative relief relating to or depending upon the note transaction upon which the action was brought. The court ordered the cross-complaint to be filed. Defendants argue that its allegations further indicate that Alvarez, the new party they sought to have joined as a party cross-defendant, was necessary to a complete determination of the controversy then before the court and the court was required by the provisions of section 389, Code of Civil Procedure, to order her brought in as such a party.

[3–5] Irrelevant and redundant matter inserted in a pleading may be stricken by the court. § 453, Code Civ.Proc. But a motion to strike cannot be made to serve the purpose of a special demurrer. Where a motion to strike is so broad as to include relevant matters, the motion should be denied in its entirety. Allerton v. King, 96

Cal.App. 230, 234, 274 P. 90; People ex rel. Department of Public Works v. Buellton Development Co., 58 Cal.App.2d 178, 185, 136 P.2d 793. Here the entire cross-complaint was ordered stricken and the demurrer thereto was ordered placed off calendar without any ruling thereon. Thus the cross-complainants were deprived of the right to amend if the pleading was faulty in any particular which could have been corrected by such an amendment. We now examine this pleading to ascertain whether it states a cause of action for fraud and, if it does not, whether under the facts herein alleged an amendment may correct any defects found therein.

[6, 7] A pleading setting up fraud must show a false representation of fact made by the representor; knowledge or belief on the part of the representor that the representation is false; an intention to induce the representee to act or to refrain from action in reliance upon the misrepresentation; reasonable reliance upon the misrepresentation on the part of the representee in taking action or refraining from it; damage to the representee resulting from such reliance. (See 23 Cal.Jur.2d 164, 165, § 66; Restatement of the Law, Torts, p. 59, § 525.) Measured by these rules the cross-complaint does not state a cause of action in that its allegations fail to establish that defendants have suffered any detriment as a result of the claimed fraud. It further appears from the facts pleaded that amendment could not serve to correct this defect.

The transaction as between Hill and the Wrathers was simply a sale of 150 shares of the capital stock of Cameron Television, Inc., for the sum of $400,000. The promissory note here sued upon evidenced the obligation of the Wrathers to pay the final installment of the purchase price which they agreed to pay for this stock.

The transaction as between Alvarez and the Wrathers resulted simply in an agreement whereby the former's interest in the television company was increased from 15 per cent to 50 per cent in consideration of her agreement to continue in the management of the television station.

The essence of the Wrathers' charge of fraud is that they were induced to enter into these two related transactions in reliance upon an alleged representation that Hill and Alvarez were not married to each other. It is asserted that by virtue of this false representation and the concealment of the intimate personal relationship which had existed between Hill and Alvarez, defendants thought they were dealing with two independent individuals whose relationship had been, and was at that time, a purely business one. Defendants further allege that had they known the true relationship between Hill and Alvarez they would not have agreed to pay Hill $400,000 for his stock; neither would they have agreed to give Alvarez an additional 35 per cent interest in the business in return for her agreement to manage it. Defendants allege that the damage they sustained as a proximate result of this alleged fraud was equal to the reasonable value of a 35 per cent interest in the television company, or $750,000.

[8] The allegedly concealed and misrepresented relationship between Hill and Alvarez must be regarded as wholly collateral and immaterial since it had no bearing upon the value of either the property or the services which defendants bargained for. There is no allegation in defendants' pleadings, nor any suggestion in their briefs, that the value of the stock which they acquired was less than they paid for it or that Alvarez failed in any respect to perform faithfully and competently the services that she was expected to perform in the management of the business. A false representation which cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance upon it could not produce injury in a legal sense. 37 C.J.S. Fraud § 18, pp. 253, 254.

It is difficult to comprehend defendants' theory that the alleged fraud damaged them

to the extent of 35 per cent of the value of the operating company. So far as the record reveals, they received all that they expected to receive. It is difficult to perceive how any assumed relationship between Hill and Alvarez could have had any adverse effect upon the latter's competence to perform the services she was expected to perform. Certainly her increased interest in the business gave her increased incentive to strive for its success.

[9] The case thus presented, therefore, invokes the rule that fraud without damage or injury is not remediable. Deception which does not cause loss is not a fraud in the legal sense. 37 C.J.S. Fraud § 40, p. 288; 23 Cal.Jur.2d 99, et seq., §§ 41, 42 and 43 and decisions cited.

As said in Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 571, 126 P. 351, 355, 42 L.R.A.,N.S., 125, "It is fundamental, of course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." See also Gutterman v. Gally, 131 Cal.App. 647, 650–651, 21 P.2d 1000; Tsang v. Kan, 78 Cal.App.2d 275, 281, 177 P.2d 630; Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 76 P.2d 109. In Baker v. Littman, 138 Cal.App.2d 510, at pages 516–517, 292 P.2d 595, 599, this court quotes with approval from Woodson v. Winchester, 16 Cal.App. 472, 476, 117 P. 565, as follows: "It must be shown in the pleading that the damage claimed was sustained by reason of [the] fraud and should show the relation between the fraud and the damage alleged; that is, it must appear that the fraud and the damage sustain to each other the relation of cause and effect."

[10] Had there been actionable fraud in the sale of the stock, the measure of damages would have been that set forth in section 3343 of the Civil Code, the so-called "out-of-pocket" loss rule. Bagdasarian v. Gragnon, 31 Cal.2d 744, 762, 192 P.2d 935; Anderson v. Fay Improvement Co., 134 Cal.App.2d 738, 749, 286 P.2d 513; Oliver v. Benton, 92 Cal.App.2d 853, 855, 208 P.2d 375. There is no suggestion that defendants could plead or prove damage according to this rule. Indeed defendants' counsel state that their affirmative defense of fraud would have been "frustrated" by the application of this rule.

[11] The fact that the Wrathers alleged a conspiracy does not alter the case because the same alleged fraud was the gist of the conspiracy count. Damage to the complaining party is no less essential; all the elements of the basic tort must be established or the charge of conspiracy falls. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 488, 110 P.2d 396; Barkett v. Brucato, 122 Cal.App.2d 264, 274, 264 P.2d 978; Gutterman v. Gally, supra.

By the pre-trial conference order in the case the stricken provisions of the amended answer from paragraph 10 to the end thereof were ordered reinstated for purposes of defense but not for purposes of counterclaim. At the trial defendants offered no evidence under the reinstated provisions of their amended answer, taking the position then as they do now that they do not assert the claimed misrepresentations as a defense to plaintiff's action on the note but for the purpose of asserting independent, although related, causes of action against plaintiff and Alvarez. That if these stricken pleadings had remained for the consideration of the trier of fact, and defendants had prevailed, plaintiff's claim on the note not only would have been entirely offset but defendants also would have been entitled to substantial additional damages. Defendants concede even if they had proved, by way of affirmative defense only, that they signed and delivered the note to plaintiff induced by and in reliance upon the misrepresentations made by plaintiff, the "out-of-pocket" loss measure of damages prescribed by section 3343, Civil Code (see Bagdasarian v. Gragnon, supra, 31 Cal.2d 744, 762, 192 P.2d 935), would have frustrated this defense. Defendants contend however that this measure of damages would have no application to their independent cause of action against plaintiff and Alvarez in tort for damages for fraud

involving the grant of the additional 35 per cent interest to Alvarez. For the reasons stated we cannot agree with defendants in this regard.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.



158 Cal.App.2d 746

Maria K. GREGERS, as Executrix of the Estate of Christian Henning Gregers, deceased, substituted in the place of Christian Henning Gregers, and Maria K. Gregers, Plaintiffs, Cross-Defendants and Respondents,

v.

PETERSON ICE CREAM COMPANY, Inc., a corporation, Defendant,

Milk Producers Association of Central California, a cooperative association, Defendant, Cross-Complainant and Appellant.

No. 17612.

District Court of Appeal, First District, Division 1, California.

March 27, 1958.

Action for declaratory relief. The Superior Court, Alameda County, A. T. Shine, J., rendered judgment for plaintiffs, and the cross-complaining defendant appealed. The District Court of Appeal, Bray, J., held that evidence would sustain finding that defendant had agreed, upon purchasing producer's business, to assume producer's obligations, under exclusive distributorship contract binding producer to supply frozen dairy products to plaintiffs at fixed prices, and that plaintiffs had not waived their rights under such contract.

Affirmed.

1. Declaratory Judgment ⇐347

In action for declaratory relief, evidence would sustain finding that defendant had agreed, upon purchasing producer's business, to assume producer's obligations, under exclusive distributorship contract binding producer to supply frozen dairy products to plaintiffs at fixed prices, and that plaintiffs had not waived their rights under such contract.

2. Assignments ⇐109

As a general rule, mere assignments of rights and benefits under executory contract does not impose on assignee obligations of assignor unless assignee consents to assumption of obligations; and whether there has been an assumption of obligations is to be determined by intent of parties as indicated by their acts, their words and subject matter of contract. West's Ann.Civ.Code, § 1589.

3. Estoppel ⇐56

Estoppel requires a change of position relying upon representation by other party.

4. Assignments ⇐109

Successors in interest are bound by construction reasonably given contractual terms by original parties.

5. Declaratory Judgment ⇐347, 369

In distributor's action against producer's successor in interest for declaration that defendant had assumed producer's obligations, under exclusive distributorship contract binding producer to supply frozen dairy products at fixed prices, evidence would sustain finding that it had been necessary for plaintiffs to institute legal proceedings to determine rights and liabilities of parties under contract; and that finding would support award of attorneys' fees, pursuant to distributorship contract provision that reasonable attorneys' fees should be recoverable by successful party if it became necessary for either party to employ an attorney to enforce any of terms, covenants, or conditions in agreement.

Nathan B. McVay, Modesto, C. O. Thrasher, Jr., Modesto, of counsel, for appellant.

Wells, Murphey & Coffey, Oakland, for respondents.

BRAY, Justice.

In an action for declaratory relief plaintiffs obtained judgment against defendant Milk Producers Association of Central California for $1,196.32 and attorneys' fees of $1,500, and that said defendant take nothing by reason of its cross-complaint. Defendant Peterson Ice Cream Co., Inc., was awarded judgment that plaintiffs take nothing against it. Defendant Milk Producers[1] appeals.

Questions Presented.

1. Did defendant assume the obligations of the contract between plaintiffs and Peterson? If so, was another agreement substituted?

2. Is the amount of the judgment correct?

3. Are plaintiffs entitled to attorneys' fees?

1. Assumption of Contract.

[1–3] December 31, 1950, plaintiffs and defendant Peterson entered into a contract by which, for a period of five years, plaintiffs were granted certain territory in which to sell Peterson's frozen dairy products and in which plaintiffs agreed to buy and Peterson to supply to plaintiffs said products at fixed prices. A conditional sales contract for sale to plaintiffs of certain equipment was included. Plaintiffs paid in full the purchase price of the equipment and both parties had complied with the terms of the contract up to February 19, 1954. On that date Peterson entered into an agreement with defendant effective March 1 by which Peterson sold defendant "free from all liabilities and encumbrances" the ice cream and ice cream products business owned by it, including the good will of the business, all customer lists, merchandise, specified personal property, trade accounts receivable, inventory, and "all other personal property" (except certain moneys). A bill of sale was executed at the same time describing the business and property as in the agreement of sale with specific listing of equipment and fixtures. A clause stated that the seller represented that all of the property was free and clear of all liens and encumbrances except listed accounts payable and taxes. The Gregers' contract was not specifically mentioned. The agreement and bill of sale provided that Peterson would not engage in the ice cream business in Northern California. This restriction included the area given plaintiffs in their contract with Peterson. The controversy is whether Peterson and Milk Producers intended that the Gregers' contract be assigned to and its obligations accepted by Milk Producers. For the first month after the contract went into effect (March) plaintiffs were charged the contract price. Thereafter plaintiffs were billed at a new price. There is a conflict in the evidence as to whether the conduct of the parties thereafter constituted an acceptance by plaintiffs of the new prices or an insistence by plaintiffs that they were standing on their contract rights and were paying Milk Producers C.O.D. charges under protest in order to continue in business. Likewise there was a conflict in the evidence as to whether or not it was the intention of Peterson and Milk Producers that the Gregers' contract be assigned and its obligations accepted. The evidence, although not overwhelming, substantially supports the court's findings that it was not only the intention of the parties that the Gregers' contract was to be assigned to defendant but also that defendant agreed to perform its terms. We do not deem it necessary to detail the evidence. Suffice it to say that there was evidence that Milk Producers negotiated with Peterson to purchase its going business

1. As used herein, defendant "Milk Producers" refers to Milk Producers Association of Central California.

and to hold all its customers and accounts, and knew of the Gregers' contract; that Milk Producers performed a contract made between Peterson and the Veterans' Administration and also two other contracts which like the Gregers' contract were not specifically designated in the sale agreement; that Milk Producers performed the Gregers' contract for one month after the sale became effective; that prior to the sale plaintiffs when informed by Peterson and his office manager Ellis of the proposed sale referred to his contract and was told by Ellis that he was staying on as manager for Milk Producers and that everything would go on as usual. There was a clause in the agreement by which Peterson was concluded from thereafter competing with Milk Producers in the territory covered by the Gregers' contract, which made it impossible for Peterson thereafter to perform the Gregers' contract. Milk Producers purchased all of the assets of the Peterson business except the real property (this, of course, would include the Gregers' contract); both by the terms in the contract "all customer lists," "all other personal property," and by transfer of the good will of the business, the Gregers' contract was necessarily included. (See Pecarovich v. Becker, 113 Cal.App.2d 309, 311, 248 P.2d 123, holding that purchase of "all other assets" of a ball club included an unmentioned coaching contract.) Peterson testified that in his negotiations with the general manager of Milk Producers the Gregers' contract was discussed although not shown, that it was regarded as an important part of the good will and that the manager wanted the business kept intact; that Peterson did not specifically mention the assumption of the contract by Milk Producers since the manager was interested in taking over a going concern as a whole and was not particularly interested in going into the details of all contracts or any individual contract, but was impressed with the fact that the Gregers and the three other contractors were sewed up. Significant circumstances are that the Veterans' Administration contract assumed by defendant had fixed prices and that defendant claimed that it and the two other contracts assumed by it had been expressly assigned but the assignments were never produced. The agreement of sale provided "Seller, up to date of closing, will operate and maintain its business in regular course, and *will not violate the terms of any contract connected with its business.*" (Emphasis added.) In Stevens v. Selma Fruit Co., Inc., 18 Cal.App. 242, 123 P. 212, there was a situation somewhat similar to that here. The contract by which the new corporation was to take over the business of the old corporation, as a "going business" (and the agreement of sale in our case provided that the business was to be sold to defendant "as a going concern"), contained a provision to the effect that the old corporation would operate the business until the new corporation could take it over. The court there said that this provision among other matters indicated that it was intended that the new corporation should not only take over all the properties of the old corporation but also assume its obligations and contracts. Here there was testimony which would have supported conclusions that Milk Producers did not know of or intend to accept the obligations of the Gregers' contract. It was the province of the trial court to, and it did, resolve this conflict in favor of plaintiffs.

Here there was evidence from which it could be concluded that Milk Producers knew of the obligations of the Gregers' contract. In any event, the evidence clearly shows they should have known of them. They, at the very least, knew that Gregers were customers of Peterson and in purchasing Peterson's business they were obligated to make some inquiry, if they had not already been told, to learn the terms under which Gregers were on Peterson's list of customers. Actually, the price for the good will of the business was based upon certain prices per gallon of the Peterson sales for the preceding year, which sales defendant's auditor checked. Of course, it is the gen-

eral rule that the mere assignment of rights and benefits under an executory contract does not impose on the assignee the obligations of the assignor unless the assignee consents to the assumption of the obligation. Griffin v. Williamson, 137 Cal.App.2d 308, 309, 315, 290 P.2d 361. However, whether there has been an assumption of the obligations is to be determined by the intent of the parties as indicated by their acts, the subject matter of the contract or their words. Jegen v. Berger, 77 Cal.App.2d 1, 6, 174 P. 2d 489. The circumstances here support the court's finding that defendant intended to and did assume the obligations of the Gregers' contract and then when it found that its rigid price schedule made it somewhat unprofitable, tried to keep plaintiffs as customers but at a higher price. Section 1589, Civil Code, provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." While Armstrong Co. v. Shell Co. of Cal., 98 Cal.App. 769, 277 P. 887, held that that section only applied to a person who was a party to the original transaction, Weidner v. Zieglar, 218 Cal. 345, 23 P.2d 515, referred to the Armstrong case as distinguishable on its facts, referred to three cases in California holding that the application of the section was not limited to parties to the original transaction, and stated "We might multiply considerably the authorities to the same effect as the first three discussed, but no useful purpose would be served." (218 Cal. at page 351, 23 P.2d at page 517.) It then held liable the assignee, although not a party to the original obligation, because of his acceptance of the benefits of the contract. See also Bergin v. Van der Steen, 107 Cal.App.2d 8, 19, 236 P.2d 613, similarly applying section 1589, and Witkin, Summary of California Law, 6th ed., p. 180.

Defendant contends that assuming that it agreed to the obligations of the contract, a new agreement or agreements were made substituting the new prices demanded by defendant. As stated before, defendant for the first month after it took possession of the Peterson business billed plaintiffs at the contract rate. Defendant contends that it did so because it had not discovered that the Gregers' contract contained a rigid price schedule. The Gregers' contract was in the Peterson safe along with other documents and the safe and its contents were taken possession of by defendant on March 1 although there is no evidence that any employee of defendant except Ellis, who was Peterson's office manager until the transfer and then became defendant's saw it there. On April 1, plaintiffs were notified that from then on they would be billed at a changed rate. Plaintiffs protested that they had a contract and expected defendant to live up to it. From then on defendant billed plaintiffs at the changed rates. At the time of the transfer plaintiffs owed Peterson some $5,700. Defendant wanted this money paid. There is a conflict in the evidence as to whether plaintiffs agreed to pay a specific amount each week on this indebtedness or merely what they could. As plaintiffs were billed at the new rate they would figure out what the contract rate was and send a round sum to defendant which they intended to include the weekly bill and a payment on the old. On October 23, 1955, defendant wrote plaintiffs that thereafter, in order that they continue to supply plaintiffs, all products would be billed C.O.D. on defendant's price list and that all orders received by plaintiffs would be accepted on the basis of that list. Plaintiffs immediately replied to the effect that they would insist upon their rights under the contract and the price schedule provided therein but would pay under protest on the C.O.D. basis for the balance of the contract period and would hold Peterson, "its successors and assigns, responsible for any damages" plaintiffs suffered. These facts do not constitute the making of a new contract or contracts. Defendant had plaintiffs over the proverbial barrel. To keep in business plaintiffs had to have products and as defendant had required Peterson to keep out of the area in which plaintiffs were located, the logical place to get the products

was from defendant, to pay defendant's prices under protest and through the courts to maintain plaintiffs' rights under the contract. As a practical matter plaintiffs were benefitting defendant by minimizing the damages defendant would be required to pay if the court should hold, as it did, that defendant was obligated under the contract. The evidence is clear that at all times plaintiffs were insisting upon their rights under the contract, continuing to dispute with defendant, and complied with defendant's terms, if at all, under protest. There never was any meeting of minds between the parties on any new contract or contracts. For the same reasons, there was never any agreed, executed, oral modification of the written contract. D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 is not in point. There there was an orally agreed change of basis of computation entered into between the parties before performance was started, the court holding that substitution of new rights and duties based upon the new method of computation and the additional duty of the plaintiff to provide daily reports was adequate consideration for the relinquishment of the reciprocal rights under the written contract. In our case performance under the written contract had started and defendant did no more than it was required to do under the contract. Moreover, the evidence supports the conclusion that plaintiffs by accepting defendant's products and paying the invoice price, if they did pay it,[2] still did not agree to defendant's contentions. While defendant seemed to put the situation on a "do it my way or not at all" basis, plaintiffs always insisted upon their contract rights. Defendant contends that the language in the sale agreement that the seller shall sell "free from all liabilities and encumbrances (except as hereinafter provided)" and in the bill of sale, the seller's representation that all of the property "is free and clear of all liens and encumbrances, save and except the amounts payable hereinabove referred to" and taxes already a lien, necessarily excludes the Gregers' contract which was not specifically mentioned in either document. To hold that "liabilities and encumbrances" means the obligations in a reciprocal executory contract under the circumstances here would be a distortion of the English language. Moreover, defendant itself by its action in the Veterans' Administration contract matter as well as its first month's operation under the Gregers' contract did not so interpret the terms.

Defendant cites authorities on estoppel (Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770, and others) and contends that plaintiffs accepted deliveries on its price schedule thereby creating an estoppel with each delivery, as stated in the cases cited. Estoppel requires a change of position relying upon a representation by the other party. At no time did plaintiffs represent that they would accept defendant's price schedule other than under protest and while insisting upon their rights under the contract. There was no estoppel.

2. Amount of the Judgment.

[4] The amount of the judgment in plaintiffs' favor and the refusal to award defendant any sums on its cross-complaint were based upon the figures supplied by plaintiffs. Defendant first contends that the bulk-ice cream price was not applicable to the Sealrite ½-gallon ice cream containers but that the package price should have been applied. Evidence was introduced to the effect that in the trade ½-gallon containers were generally considered as package ice cream and bore the package rate. However, the evidence also showed that at all times during the existence of the Gregers' contract prior to its assignment to defendant, plaintiffs and Peterson had interpreted

2. In defendant's exhibit B–2 (the new account which ran from May to December, 1955), it appears that while plaintiffs no longer, as theretofore, paid in round figures, plaintiffs based their payments on the contract rate, so that in the first two weeks of that account there was a difference of over $1000 between what plaintiffs paid and the charges made by defendant. At one time this difference rose as high as $2,632.20.

the rate applying to Sealrite ½-gallon containers (but not to other brands) to be the bulk rate and not the package rate. This was for the purpose of inducing plaintiffs to accept and sell the Sealrite product. "* * * successors in interest are bound by the construction reasonably given contractual terms by the original parties." See Doll v. Maravilas, 82 Cal.App.2d 943, 949, 187 P.2d 885, and 12 Cal.Jur.2d 328. For the first month after the transfer defendant gave the same construction to the contract.

Defendant contends that it was improper to correlate the ice cream prices with the prices of butter on the wholesale market in San Francisco. The contract so provides. While defendant objected to this correlation when the price of butter fell below 60 cents, it objected and thereby prevented plaintiffs from showing that while plaintiffs received the benefit of the effect of 60 cent butter, defendant actually received the benefit of the effect of butter going above 75 cents.

Defendant further contends that the payments made by plaintiffs after the first month constituted an executed oral agreement to take its products at the rate billed after the first month. We have heretofore disposed of that contention by showing that there never was such an agreement.

3. Counsel Fees.

[5] The Gregers' agreement provides that reasonable attorneys' fees are recoverable by the successful party "if it becomes necessary for either party hereto to employ an attorney to enforce any of the terms, covenants, or conditions in this agreement."[3] The court found that it was necessary for plaintiffs to institute legal proceedings to determine the rights and liabilities of the parties under the contract. Defendant states that it does not quarrel with this finding but contends that it is not a finding that the attorney was necessary to "enforce any of the terms * * * in this agreement." It is obvious that an action to declare defendant bound by the contract which it expressly repudiated is an action to enforce the contract. Moreover, plaintiffs were required to set up the contract as a defense to defendant's cross-complaint and in obtaining a judgment against defendant on it they were successful in enforcing the terms of the contract. The finding was sufficient and amply supported.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



158 Cal.App.2d 779

Lois L. PARSONS and William H. Spencer, Plaintiffs and Respondents,

v.

Pete KAZANGE and Maudie May Kazange, Defendants and Appellants.

No. 9298.

District Court of Appeal, Third District, California.

March 27, 1958.

Action to quiet title to unpatented placer gold mining claims. The Superior Court, Sierra County, Raymond McIntosh, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Schottky, J., held that amended location notice, including additional names not on original, could be treated as an amended notice as to old locators, and as an original notice as to added names, so long as rights of others were not prejudiced thereby, and could correct original notice's defective description, which encompassed more acres than the 40 allowed and claimed by the notice.

Affirmed.

3. Defendant does not contend that the amount awarded was unreasonable.

1. Mines and Minerals ⇐38(15)

In action to quiet title to unpatented placer gold mining claims, fact question was presented with regard to whether plaintiffs' predecessors in title had properly posted location notices. West's Ann.Public Resources Code, § 2303.

2. Mines and Minerals ⇐19(2)

An amended location notice cannot add new ground. West's Ann.Public Resources Code, § 2303.

3. Mines and Minerals ⇐19(2)

Amended location notice, including additional names not on original, could be treated as an amended notice as to old locators, and as an original notice as to added names, so long as rights of others were not prejudiced thereby, and could correct original notice's defective description, which encompassed more acres than the 40 allowed and claimed by the notice. West's Ann.Public Resources Code, § 2303.

4. Mines and Minerals ⇐38(15)

In action to quiet title to unpatented placer gold mining claims, evidence would sustain finding that plaintiffs' predecessors in title had complied with Public Resources Code section requirement that locator perform at least one dollar's worth of work for each acre included in claim consisting of more than 20 acres. West's Ann.Public Resources Code, § 2305.

5. Mines and Minerals ⇐38(20)

Where services of nontechnical nature are relied upon to satisfy Public Resources Code section requirement, that locator perform at least one dollar's worth of work for each acre included in claim consisting of more than 20 acres, judge may fix value from description of services performed, bringing to bear his own general knowledge, and he is not necessarily bound by express evidence of value of services performed. West's Ann.Public Resources Code, § 2305.

6. Mines and Minerals ⇐38(20)

In action to quiet title to unpatented placer gold mining claims, testimony that discovery work on claims had been done by removing seven cubic yards from each in two working days was not unbelievable as a matter of law, notwithstanding defendant's contention that it was highly improbable that two men could do work in time it purportedly took.

7. Mines and Minerals ⇐17(1)

The term "discovery", as applied to placer gold mining claim, means acquirement of knowledge that claim is reasonably valuable for such mining.

See publication Words and Phrases, for other judicial constructions and definitions of "Discovery".

8. Mines and Minerals ⇐38(17)

In action to quiet title to unpatented placer gold mining claims, evidence would sustain implied finding that discovery had been made by plaintiffs' predecessors in interest, who had excavated an open cut and removed seven cubic yards of material but had not panned actual dirt removed. West's Ann.Public Resources Code, § 2304(b).

9. Mines and Minerals ⇐17(2)

Discovery shaft or its equivalent should disclose mineral-bearing rock therein, but discovery may be made elsewhere within location and validate it. West's Ann.Public Resources Code, § 2304(b).

10. Alteration of Instruments ⇐10

A grantor may, before delivery, make such alterations on deed as he desires.

11. Mines and Minerals ⇐34

Deed to mining claim was not void, as far as third parties were concerned, even though one grantee's name appeared before words "parties of the first part" and even though a signature was blocked out, where it was clear that such grantee was intended to be grantee, or party of second part, and blocked out signature was on deed when it was delivered.

12. Mines and Minerals ⇐38(22)

In action to quiet title to unpatented placer gold mining claims, it was for trial judge to resolve conflicts in evidence.

13. Mines and Minerals ⇐38(15)

In action to quiet title to unpatented placer gold mining claims, evidence would support trial court's finding that there had been a substantial compliance with mining statutes by plaintiffs and their predecessors in interest.

Victor L. Huber, Marysville, for appellants.

Alan H. Thieler, Quincy, for respondents.

SCHOTTKY, Justice.

Defendants above named have appealed from a judgment quieting the title of plaintiffs to two unpatented placer gold mining claims known as Atlas No. 1 and Atlas No. 2.

The record shows that the claims were originally located in 1920. In 1942, a John Finlayson and his wife acquired an interest in the claims and thereafter performed the necessary assessment work through the mining year ending July 1, 1950. Both claims were open for location after July 1, 1951. On July 1, 1951, a Vernon Aaserude and Raymond Minners posted notices of location on both claims. The notice on Atlas No. 2 was posted in a berry box nailed to a tree. The notice on Atlas No. 1 was nailed to a tree in a similar fashion, though it may have been placed in a tobacco can. Both notices were faulty. The descriptions encompassed more land than was claimed. The notice as to Atlas No. 2 claimed only 40 acres but the description encompassed an area of 160 acres. On August 18, 1951, the locators and their wives posted amended notice of location as to Atlas No. 1. This time they claimed a total of 70 acres. The amended location notice as to Atlas No. 2 was signed by the locators and their wives and an Anna Berg and a Terry Morrill. The amount of land claimed was 105 acres. Aaserude testified that he and Minners performed the required discovery work on each claim by making a cut or digging a trench from each of which an estimated seven cubic yards of material were removed. Notice of the discovery work on each claim was recorded on September 22, 1951. Proof of performance of assessment work was made for the year ending July 1, 1953. In 1954 respondent Parsons performed the annual assessment work at Minners' request.

In September, 1954, both claims were quitclaimed to respondents herein. The deed to Atlas No. 1 is executed by Raymond E. Minners, Jacqueline Minners, S. Vernon Aaserude and Dorothy Aaserude; the deed to Atlas No. 2 by the same four persons plus Anna Berg and Terry Morrill. A name is blocked out in the deed to Atlas No. 2.

Appellant Pete Kazange and his wife testified that they located a claim in June, 1953, and performed the necessary discovery work. This claim occupies part of the territory occupied by Atlas No. 1 and Atlas No. 2. They also testified that they never saw Aaserude or Minners on the Atlas claim in 1951 nor did they ever see their location notices or any evidence of work done by them.

[1] Appellants contend that respondents' predecessors in title, Minners and Aaserude, did not make valid locations on the two claims. They first contend that the location notices were not properly posted. Public Resources Code, section 2303, requires that a placer claim location be made "(a) By posting thereon, upon a tree * * * a notice of location, containing the name of the claim, name of the locator or locators, date of location, number of feet or acreage claimed, and such a description of the claim * * * as will identify the claim located." Mr. Aaserude testified that the notices were posted. He testified that the notice for Atlas No. 2 was in a box nailed to a tree on the rim of the hydraulic pit and that the notice for Atlas No. 1 was posted in a similar manner. While appellants testified they never saw either notice this merely created a conflict for the trial judge to resolve.

[2, 3] Appellants next contend that the location notices were invalid because an excess amount of land was included therein. The original notices were faulty because the description encompassed more acres than the 40 allowed and claimed by the notice. Amended notices were filed within 90 days, and even if the original notice was defective the amended notice corrected the defect before appellants located their claim. Appellants, however, argue that since the amended notices included additional names not on the original the amendment could not correct the defect. While an amended notice cannot add new ground (Clarke v. Mallory, 22 Cal.App.2d 55, 70 P.2d 664), we think it may be treated as an amended notice as to the old locators and an original notice as to the added names as long as the rights of others are not prejudiced thereby (Thompson v. Spray, 72 Cal. 528, 14 P. 182), and as such could add land.

[4, 5] Appellants also contend that the locators did not comply with the provisions of section 2305 of the Public Resources Code which requires that where a claim consists of more than 20 acres a locator shall perform at least one dollar's worth of work for each acre included. There was evidence that a road approximately 100 feet long was constructed on the claims in the fall of 1951 and that it gave access to the claims. While the work was not done by the locators it was done with their consent and they received the benefit of it. The amount of land covered by the claims was approximately 175 acres, and while there was no precise evidence as to value of the road construction work we believe that the trial judge could reasonably conclude that it was in excess of $175. For as stated in Estate of Reinhertz, 82 Cal.App. 2d 156, at page 160, 185 P.2d 858, at page 860, 186 P.2d 755: "In the case of services of a non-technical nature, such as here involved, the judge may fix the value from a description of the services performed bringing to bear his own general knowledge and is not necessarily bound by express evidence of the value of the services performed. [Citing cases.]" And in Johnson v. Snyder, 99 Cal.App.2d 86, at page 90, 221 P.2d 164, at page 167, the court, in affirming a judgment allowing $400 for the removal of fixtures from leased premises, stated: "There is no express testimony of the cost of removing the fixtures but for services of a commonplace or nontechnical character the trial judge can call on his own general knowledge of their value."

[6] Appellants also claim that Aaserude's testimony that the discovery work on the claims was done by removing seven cubic yards from each in two working days is unbelievable because it is highly improbable that two men could do the work in the time it purportedly took. The trial court believed the witness and this court cannot hold that the evidence is unbelievable as a matter of law.

[7–9] Appellants also argue that the discovery work would not qualify as such even if it were done. The testimony of Aaserude was that they removed the dirt to get down to bedrock. The actual dirt removed was not panned. The term "discovery" as applied to a placer claim means the acquirement of knowledge that the claim is reasonably valuable for such mining. 58 C.J.S. Mines and Minerals § 42, p. 88. Mr. Aaserude had previously found evidence of gold on Atlas No. 1. There were indications of prior mining operations and it was his opinion that the property could be operated profitably. As to Atlas No. 2, he had panned over there, found colors and saw evidence of previous mining activities. This testimony was sufficient to sustain an implied finding that a discovery was made by respondents' predecessor in interest and the removal of 7 cubic yards of material could comply with the requirements of section 2304 of the Public Resources Code which provides: "(b) In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within ninety days of the date of location, excavate an open cut upon the claim, re-

moving from the cut not less than seven cubic yards of material." Furthermore, it has been held that it is not necessary that discovery be made in the discovery shaft, and as stated in American Mining Law, Bulletin No. 123, at page 355: "The discovery shaft or its equivalent should disclose mineral-bearing rock therein but it has been held that discovery may be made elsewhere within the location and validate it."

[10, 11] The final attack of appellants is on the validity of the quitclaim deed to Atlas No. 2. Appellants claim that it is invalid because respondent Parsons' name appears as a grantor rather than a grantee and a signature was blocked out. An examination of the deed discloses that Parsons' name does appear before the words "parties of the first part." However, it is clear that she was intended to be a grantee or a party of the second part. As far as the blanked out signature is concerned it may not avail appellants. The deed was signed by all the grantors. The deed is not void as far as third parties are concerned. A grantor may make such alterations on a deed as he desires before delivery. The deed as delivered had the blanked out signature on it. The deed, therefore, would not be void and respondents could rely on it to prove their right to the mining claim. 4 Tiffany on Real Property (3rd Ed.), p. 85; Miller v. Williams, 27 Colo. 34, 59 P. 740.

It has frequently been proclaimed by both state and federal courts that mining statutes should be liberally construed and that every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture. MacDonald v. Midland Mining Co., 139 Cal.App.2d 304, 312, 293 P.2d 911.

[12, 13] As is not unusual in actions involving mining claims the evidence in the instant case was highly conflicting. The case was tried by an experienced trial judge in a county in which mining has always been one of the major activities, and it was for him to resolve the conflicts in the evidence. While the evidence might have been more specific as to certain issues, we believe that, taking the record as a whole, there is substantial evidence to support the conclusion of the trial court that there was a substantial compliance with the mining statutes by respondents and their predecessors in interest.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



159 Cal.App.2d 104

Louise SWINGLE, Plaintiff and Appellant,

v.

Betty Ruth HOFFMAN et al., Defendants and Respondents.

Betty Ruth HOFFMAN et al., Plaintiffs, Cross-Defendants and Respondents,

v.

Claude Arthur MITCHELL and Helen Louise Mitchell, Defendants, Cross-Complainants and Appellants.

Civ. 5605, 5606.

District Court of Appeal, Fourth District, California.

April 2, 1958.

Actions arising out of collision between southbound automobile and eastbound automobile at uncontrolled intersection. The Superior Court of Kern County, Warren Stockton, J., rendered the judgments challenged on appeal. The District Court of Appeal, Mussell, J., held that evidence had not required finding as a matter of law that driver of southbound vehicle had negligently failed to see other vehicle when she entered intersection.

Affirmed.

1. Automobiles ⇐245(39)

In actions arising out of collision between southbound automobile and eastbound automobile at uncontrolled intersection, evidence did not require finding as a matter of law that driver of southbound vehicle negligently failed to see other vehicle when she entered intersection.

2. Trial ⇐260(1)

Court was not required to instruct jury in particular language requested when subject matter of requested instruction was fully covered by other instructions.

3. Trial ⇐253(1), 296(1)

A so-called "formula" instruction must contain all of elements essential to recovery, and absence of any one of such elements may not be compensated for or cured by reference thereto in other instructions correctly and fully stating law.

4. Trial ⇐295(1)

In determining whether jury was properly instructed as to law, instructions taken as a whole must be considered.

Robert E. McGurl, Los Angeles, for appellants.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

MUSSELL, Justice.

These actions arose out of an automobile collision in the intersection of Seventeenth and K Streets in the city of Bakersfield. K Street runs north and south and Seventeenth Street runs east and west. At the time of the accident Betty Ruth Hoffman formerly Betty Ruth Simpson, accompanied by her daughter, Diane Louise, aged thirteen, and by Leona Johnson, also aged thirteen, was driving a 1947 Plymouth coupe southerly on K Street. Claude Arthur Mitchell, accompanied by his wife, his adult daughter, Louise Swingle, and a Mr. Fagan, was driving a Buick automobile easterly on Seventeenth Street. The two vehicles collided in the southwest quadrant of the intersection.

On July 22, 1955, a complaint for damages was filed in the Municipal Court in Bakersfield by Betty Ruth Simpson, individually, and as guardian ad litem of Diane Louise Simpson, and Margaret Johnson, individually, and as guardian ad litem of Kathleen Leona Johnson, against Claude Arthur Mitchell and Helen Louise Mitchell. In this action the Mitchells answered and cross-complained. The matter was then transferred to the Superior Court and the complaint was filed therein on August 31, 1955. It was amended to increase the prayer for general damages and to show that Betty Ruth Simpson had married and that her name was then Betty Ruth Hoffman.

On August 29, 1955, Louise Swingle filed in the Superior Court of Kern county an action for damages for personal injuries against Betty Ruth Hoffman arising out of the accident here involved. These two actions were consolidated for trial and a jury returned verdicts in the action filed by Betty Ruth Simpson in her favor in the sum of $3,072.64, in her favor as guardian of Diane Louise Simpson for $1,500, in favor of Margaret Johnson in the sum of $108.89, and in favor of Margaret Johnson, guardian ad litem of Kathleen Leona Johnson, for the sum of $1,500. The jury further found against the cross-complainants Claude A. Mitchell and his wife and in favor of the cross-defendant Betty Ruth Hoffman (formerly Simpson). At the same time the jury returned a verdict in the companion action in favor of Betty Ruth Hoffman and against plaintiff Louise Swingle. Claude A. Mitchell and Helen Mitchell appeal from the judgment in favor of plaintiff and cross-defendant Betty Ruth Hoffman and against the said defendants and cross-complainants Claude A. Mitchell and Helen Mitchell. Louise Swingle appeals from the judgment entered in favor of Betty Ruth Hoffman and against plaintiff Louise Swingle.

The collision between the two automobiles involved occurred at about 3:00 p. m. on June 23, 1955. There were no traffic

signals or stop signs at the intersection. Both streets were approximately 50 feet in width and they were paved and level. There was a large garage-type building on the northwest corner of the intersection, obstructing the view from both cars. The weather was clear and dry. The two vehicles collided in the southwest quadrant of the intersection at a point 37 feet south of the north curb line of Seventeenth Street and 17 feet east of the west curb line of K Street. The force of the impact knocked the Plymouth coupe, being driven south on K Street by Betty Ruth Simpson, 36 feet easterly and turned it around. The Mitchell Buick traveled easterly 51 feet before coming to rest and while traveling this distance, struck an automobile which was parked on the south side of Seventeenth Street east of the intersection. This automobile was parked with the brakes set and was knocked a distance of 16 feet by the Buick. The Buick also climbed the curb and struck a tree in the parkway before it finally stopped.

Betty Ruth Hoffman testified that she was proceeding south on K Street in her Plymouth at approximately 20 miles per hour and her testimony in this connection was corroborated by that of her daughter, Diane Louise, and by Kathleen Leona Johnson, who looked at the speedometer. Kathleen testified that the Mitchell car was traveling considerably faster than they were but she was unable to estimate its speed. She observed the Mitchell car some 25 feet westerly from the intersection as the Plymouth coupe in which she was riding had already entered the intersection. Betty Ruth Hoffman did not see the Mitchell car until after she had reached approximately the center of the intersection and it was then to her right. She had looked both to the right and to the left before entering the intersection and had observed no approaching traffic. The first time she looked she was approximately 25 feet north of Seventeenth Street and she again looked to her right when she was at the north line of the crosswalk. At that time she could see down Seventeenth Street to her right about half a block and saw no car approaching from the west. She then proceeded on into the intersection and had traveled about half way into it when she saw the Mitchell car.

[1] Appellants Claude Arthur Mitchell and Helen Mitchell in their appeal contend that plaintiff Betty Ruth Hoffman was negligent as a matter of law in failing to see the Mitchell car when she entered the intersection and that the verdict entered in her favor cannot be upheld for that reason. We are not in accord with this contention.

In Ribble v. Cook, 111 Cal.App.2d 903, 907, 245 P.2d 593, 595, the court said:

> "While to look and not see what is plainly visible may, under some circumstances, be negligence as a matter of law, Huetter v. Andrews, 91 Cal.App. 2d 142, 204 P.2d 655, that question is usually one of fact for the jury, Leader v. Atkinson, 49 Cal.App.2d 265, 121 P.2d 759; Prato v. Snyder, 12 Cal.App.2d 88, 55 P.2d 255 * * *."

In the instant case Mitchell testified that the Plymouth was roughly two car lengths away when he first saw it and he was then six or eight feet into the intersection and driving at a speed of 15 to 20 miles per hour. This testimony merely created a conflict in the evidence and there was substantial testimony from which it could be inferred that his car was traveling at a considerably faster rate of speed. It traveled 51 feet after the impact, knocked a parked car a distance of 16 feet, climbed a curb and struck a tree before it was stopped. The view was obstructed by a building on the northwest corner of the intersection and it was a question of fact for the jury whether plaintiff Betty Ruth Hoffman was negligent in not observing the Buick before she entered the intersection. We cannot hold that she was negligent as a matter of law under the circumstances shown by the record.

Appellant Louise Swingle contends that the court erred in refusing to give the following instruction:

"You are instructed that as a matter of law that the status of Louise La Rue Swingle, the plaintiff, is a passenger. Therefore, there is no issue of contributory negligence applicable to her. If you find that there was any negligence on the part of Defendant Simpson, no matter how slight, that contributed in any degree in causing the collision and injury to Plaintiff Swingle, then and in that event you shall return a verdict in favor of Plaintiff Swingle, and against Defendant Simpson."

[2-4] Complete and correct instructions were given on contributory negligence and proximate cause and the issues in the causes were correctly stated. The court was not required to instruct the jury in the particular language requested when, as here, the subject matter of the requested instruction was fully covered by other instructions Temple v. De Mirjian, 51 Cal. App.2d 559, 565, 125 P.2d 544. The offered instruction omitted the issue of proximate cause. As is said in Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237, 238, "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law." In determining whether the jury was properly instructed as to the law, the instructions taken as a whole must be considered. Trelut v. Kazarian, 110 Cal. App.2d 506, 512, 243 P.2d 104. The jury by its verdict absolved Betty Ruth Hoffman of negligence and we find no reversible error in the refusal to give the offered instruction under the circumstances shown by the record.

Judgments affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

158 Cal.App.2d 776

Paul C. HELMICK, doing business as Paul C. Helmick Company, Plaintiff and Respondent,

v.

W. R. RITCHIE, Individually and doing business as Ritchie Logging Company, Defendant and Appellant.

Civ. 9175.

District Court of Appeal, Third District, California.

March 27, 1958.

Action to recover possession of a tractor. From a judgment of the Superior Court, Humboldt County, Delos A. Mace, J., in favor of plaintiff, defendant appealed. The District Court of Appeal, Peek, J., held, inter alia, that where defendant claimed that a third party with whom defendant had a contract for logging operations was real purchaser and that defendant was "out of the deal", evidence sustained findings that tractor had been sold to defendant and not to third party.

Affirmed.

1. Sales ⇐87(3)

In action to recover possession of one of three tractors sold by plaintiff to defendant, wherein defendant claimed that a third party with whom defendant had a contract for logging operations was real purchaser and that defendant was "out of the deal", evidence sustained findings that tractor had been sold to defendant and not to third party.

2. Replevin ⇐108

Where, although plaintiff's complaint originally contained three causes of action, at trial he elected to stand on the cause for recovery of possession of a tractor, necessarily, in regard to element of damages, the plaintiff thereby placed himself within provisions of statute that in action to recover possession of personalty, judgment for plaintiff may be for possession or value thereof, in case delivery cannot be had, and damages for detention. West's Ann. Code Civ.Proc. § 667.

3. Replevin ⇐76

Since court in action to recover possession of tractor, on substantial evidence, found that defendant retained possession without plaintiff's consent, plaintiff was properly permitted to recover the tractor or its value, and additionally to recover value of use of the tractor where the amount thereof exceeded the interest on such value, inasmuch as latter measure did not furnish adequate compensation for wrongful detention. West's Ann.Code Civ.Proc. § 667.

Blaine McGowan, Eureka, Sidney Ainsworth, Ashland, Or., for appellant.

Edgar L. Martin, Sandy, Or., Stanley J. Mitchell, Oregon City, Or., for respondent.

PEEK, Justice.

Defendant appeals from an adverse judgment in an action to recover possession of a tractor which was one of three sold by the plaintiff to defendant. Defendant contends (1) that the equipment was in fact sold to the Magnolia Motor and Logging Company, Inc., and not to defendant, and (2) that the court applied the wrong measure of damages.

The defendant Ritchie, who was doing business as the Ritchie Logging Company, was interested in purchasing some heavy equipment for use in logging operations he was conducting near Pecwan in Humboldt County under a contract with Magnolia. In January of 1953 he discussed with the plaintiff the possible purchase of three tractors, two of which were located at Kettle Falls, Washington. The third was in the possession of the American Machinery Company in Spokane where it was undergoing repairs and is the only one with which we are concerned on this appeal. Following a series of negotiations, an agreement was reached between the parties relative to the acquisition of the three tractors by Ritchie. As a part of the agreement defendant delivered to the plaintiff Helmick a personal check in the sum of $10,000 drawn on his bank at Ashland, Oregon. Helmick in turn delivered this check to one Ryan, his agent, together with three bills of sale executed by Helmick and running to Ritchie. Thereafter Ryan and Ritchie returned to Ashland where defendant maintained and shared an office with Magnolia. A check was then drawn by one Lamb, president of Magnolia, in the sum of $46,750 payable to Helmick. A second check from Magnolia to Helmick in the sum of $10,000 was delivered to Ryan to cover the check previously issued by Ritchie which had been dishonored. Ryan thereupon delivered to Ritchie on behalf of Helmick, two bills of sale covering the two tractors completely paid for but retained the bill of sale for the third tractor on which there remained a balance of $5,000. The evidence showed that the third tractor was not to be removed or taken from the possession of the American Machinery Company at Spokane unless, within 90 days, the $5,000 balance was paid or a chattel mortgage executed. This balance was never paid and the mortgage never executed. But in August of 1953, several months thereafter, the tractor was found in the possession of defendant and being used by him in his logging operations at Pecwan.

Throughout the trial defendant insisted that he had abandoned his "sale transaction for the tractors" and that the Magnolia Motor and Logging Company "took over"; his position being, as stated by his counsel, that when he failed to finance the deals insofar as he was concerned the transaction was abandoned and Magnolia then entered into an arrangement with plaintiff; that all sums were paid by Magnolia and title was vested in the corporation and he was "out of the deal." Although there was testimony to the contrary, this merely raised a conflict in the evidence.

[1] The findings of the court pertinent to the appeal were that plaintiff was the owner and entitled to the possession of the tractor which had a value of $14,000 on February 15, 1953; that Ritchie had ob-

tained possession without the consent of plaintiff and, although demand had been made for its return, defendant refused to deliver possession to plaintiff; that the reasonable rental value during the time defendant retained possession was the sum of $11,500; and that plaintiff had been damaged in that sum. The judgment which was in accordance with the findings was that plaintiff recover the tractor and the sum of $11,500 as damages for its use, and in the event the property could not be delivered forthwith to plaintiff, then plaintiff to have judgment for the further sum of $14,000.

Defendant's argument in support of his contention that Magnolia and not he was the purchaser of the tractor is but a reargument of the weight and effect of the evidence, particularly in regard to the checks given by Magnolia to plaintiff in Ashland Oregon. The rule pertaining to the review of evidence upon appeal is at least presumptively too well known to warrant citation of authority.

Upon the question of damages, defendant argues that plaintiff was entitled to no more than the balance due on the tractor, together with interest. This is so, he says, because the plaintiff conceded that the evidence showed he had only a vendor's lien for the balance of $5,000 and could recover only the value of such special interest. We find no such concession in the record.

[2] Although plaintiff's complaint originally contained three causes of action, at the trial he elected to stand on the first, for the recovery of possession of the tractor. Necessarily, therefore, in regard to the element of damages he thereby placed himself within the provisions of section 667 of the Code of Civil Procedure which provides in part:

> "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case delivery can not be had, and damages for the detention. * * *"

[3] Since the court on substantial evidence found that defendant retained possession of plaintiff's property without his consent, he properly was entitled to recover the property or its value and additionally to "recover the value of the use of his property where the amount thereof exceeds the interest on such value, inasmuch as the latter measure does not furnish adequate compensation for the wrongful detention." Guerin v. Kirst, 33 Cal.2d 402, 414, 202 P.2d 10, 17, 7 A.L.R.2d 922.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



159 Cal.App.2d Supp. 841

Mercedes ENTER, Plaintiff and Respondent,

v.

Lee CRUTCHER, Defendant and Appellant.

C.A. 9458.

Appellate Department, Superior Court, Los Angeles County, California.

March 18, 1958.

Action on two accepted bills of exchange upon which defendant was both drawer and acceptor, directing plaintiff's assignor, upon acceptance, to charge the sums so due to defendant's account in accordance with advices of defendant. The Municipal Court of Los Angeles Judicial District, Lucius P. Green, J., denied defendant's motion for change of venue and defendant appealed. The Appellate Department of the Superior Court, David, J., held that plaintiff failed to prove any probative facts by which court could hold that plaintiff had overcome prima facie showing made by defendant in affidavit to effect that defendant's residence was not in county where action was brought.

Order denying motion for change of venue reversed with directions to enter order granting defendant's motion and to transfer cause to appropriate judicial district for further proceedings.

1. Evidence ⇐81

Where two bills of exchange were accepted in Costa Rica, and action was brought on the bills of exchange in California, in absence of a contrary showing, Appellate Department of Superior Court would presume that law of Costa Rica concerning government bills of exchange was same as that of California.

2. Venue ⇐21

Where by acceptance, two bills of exchange became chargeable by payee to account of drawer, in United States funds, drawer's indebtedness to payee was personal and where both bills and acceptances were made in Costa Rica but it was not alleged that suit on bills of exchange was brought where contract of payment was to be performed, for purposes of suit on bills venue would be residence of drawer. West's Ann.Code Civ.Proc. § 395.

3. Venue ⇐21

The general spirit and policy of venue provisions is to give defendant the right to have all personal actions against him tried in county of his residence. West's Ann.Code Civ.Proc. § 395.

4. Domicile ⇐1

A person has only one residence at a time.

5. Venue ⇐28

The term "residence" as used in statute relating to venue does not refer to "domicile" but is used in the sense of live, dwell, abide, sojourn, stay, remain or lodge. West's Ann.Code Civ.Proc. § 395.

See publication Words and Phrases, for other judicial constructions and definitions of "Domicile" and "Residence".

6. Venue ⇐28

For purposes of determining venue, one who is merely stopping over at a place in a hotel, motel, rooming house, or who is vacationing is not a "resident." West's Ann.Code Civ.Proc. § 395.

See publication Words and Phrases, for other judicial constructions and definitions of "Resident".

7. Venue ⇐28

For purposes of venue, a residence is established by personal presence in a fixed and permanent abode with the intent of remaining there. West's Ann.Code Civ. Proc. § 395.

8. Venue ⇐28

For purposes of venue, the fundamental elements necessary to create a residence in a particular place are actual bodily presence in the place combined with a freely expressed intention of remaining there permanently or for an indefinite time, without any present intention to remove from the same. West's Ann.Code Civ.Proc. § 395.

9. Venue ⇐66

For purposes of determining venue, allegation of plaintiff's verified complaint as to defendant's residence would serve as an affidavit. West's Ann.Code Civ.Proc. § 395.

10. Venue ⇐66

Plaintiff's affidavit with respect to residence of defendant made on information and belief, when submitted for evidentiary purpose, was hearsay and was to be disregarded. West's Ann.Code Civ.Proc. § 395.

11. Venue ⇐28

For purposes of venue, an "address" is not always synonymous with "residence". West's Ann.Code Civ.Proc. § 395.

See publication Words and Phrases, for other judicial constructions and definitions of "Address".

12. Evidence ⇐5(2)

While "address" could be synonymous with "residence," the receipt of mail by persons at places other than their residences is so common that the Appellate Department of the Superior Court would take judicial notice that a post-office address may not be the same as a residence address. West's Ann.Code. Civ.Proc. § 395.

13. Venue ⇐70

In action on bills of exchange plaintiff failed to prove any probative facts which

overcame prima facie showing made by defendant-drawer, by affidavit, indicating his residence was not in county where the action was brought. West's Ann.Code Civ. Proc. § 395.

14. Venue ⇐70

For purposes of venue there should be much more required in an affidavit made by a person other than defendant himself and the affidavit of a person, other than defendant, should, to be of any value as proof addressed to question of residence, state some fact or facts by which court would be aided in forming some conclusion of its own upon question of defendant's residence. West's Ann.Code Civ.Proc. § 395.

Myers, Martin & Leedy, Encinitas, for appellant.

Ray H. Enter, Los Angeles, for respondent.

DAVID, Judge.

This action is brought upon two accepted bills of exchange upon which the defendant was both drawer and acceptor, directing plaintiff's assignor, upon acceptance, to charge the sums so due to defendant's account, in accordance with the advices of the defendant. The acceptances were executed in the city of San Jose, Costa Rica. No place of presentment or payment was specified in the documents in question. The verified complaint alleges assignment of the documents to the plaintiff, that residence of plaintiff is in Los Angeles, Los Angeles County, California, and that "Defendant is also a resident of Los Angeles, California."

The defendant made a motion for change of venue to the appropriate Municipal Court of Oceanside Judicial District, San Diego County, and in his affidavit of merits, under oath, declared: "That he is not a resident of the County of Los Angeles, State of California as alleged in plaintiff's complaint and that he has not been a resident of said county for more than fifteen years past; that he is a resident of the County of San Diego, State of California, and has resided at Ramona in said latter county for more than one year last past; That he has not at any time entered into any contract, either oral or written, with the plaintiff herein or with the assignor of plaintiff herein in the County of Los Angeles, nor has he entered into any contract with plaintiff herein, or with the assignor of plaintiff herein, the performance of which was to be made and had in the County of Los Angeles, State of California; * * *" Reference is made to all the record.

The plaintiff countered with an affidavit, under oath, in which she states, "That she is the affiant herein. That upon the ground of information and belief affiant alleges that the real and true address of said defendant Lee Crutcher is 615 South Pasadena, California, in that he has mail sent there." Defendant's verified answer, filed prior to the hearing of the motion for change of venue, asserts, "Answering Paragraph I of plaintiff's first cause of action denies that defendant is a resident of the County of Los Angeles, State of California, and alleges that defendant is now and for more than one year last past has been a resident of the County of San Diego, State of California; * * *" and realleges the same in reference to plaintiff's second and third causes of action in the form of common counts, for indebtedness, and for work and labor, respectively, in the amount claimed.

[1–3] (1) On the record before us, we must presume in the absence of a contrary showing, that the law of Costa Rica governing bills of exchange is the same as our own. Christ v. Superior Court, 1931, 211 Cal. 593, 598, 296 P. 612; Louknitsky v. Louknitsky, 1954, 123 Cal.App.2d 406, 408, 266 P.2d 910. By acceptance the bills became chargeable by the payee to the account of the defendant in U. S. funds thirty days after sight and acceptance, September 1, 1955, in each case. It would appear, therefore, that defendant's indebtedness was personal to the assignor, charged on its books against him in United States funds. Since both bill and accept-

ance are in the Spanish language, it would appear that the acceptance was made likewise in Costa Rica. It is not alleged that the present suit is brought where such contract of payment was to be performed. Hence, the venue is the residence of the defendant. Code Civ.Proc. sec. 395; Hayutin v. Rudnick, 1952, 115 Cal.App.2d 138, 141, 251 P.2d 707; Dawson v. Goff, 1954, 43 Cal.2d 310, 273 P.2d 1. The general spirit and policy of the venue provisions is to give the defendant the right to have all personal actions against him tried in the county of his residence. Turlock Theatre Co. v. Laws, 1939, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; Hale v. Bohannon, 1952, 38 Cal.2d 458, 241 P.2d 4; Deas v. Lido Lumber Co., 1955, 132 Cal.App.2d 402, 282 P.2d 90; Credit Bureau of San Diego, Inc., v. Clark, 1950, 98 Cal.App.2d 479, 220 P.2d 596.

[4] A person has only one residence at a time. As stated in Stone v. Everts, 1928, 203 Cal. 197, 198, 263 P. 236, 237, if defendants are residents of Fresno County "it must necessarily follow that said defendants are not residents of the city and county of San Francisco."

[5] In Bohn v. Better Biscuits, Inc., 1938, 26 Cal.App.2d 61, 78 P.2d 1177, 80 P.2d 484, it is said that "residence" as used in C.C.P. sec. 395 does not refer to "domicile", but was used in the sense of live, dwell, abide, sojourn, stay, remain or lodge. Some of the lexicographers indicate that "residence" also requires an intention to abide continuously, to dwell permanently, or for a length of time, to have a fixed abode; that to be a "resident", one must be an actual dweller in a certain place, though there may be a legal domicile elsewhere. Leroux v. Industrial Accident Commission, 1934, 140 Cal.App. 569, 35 P.2d 624, 626; Fort Worth & D. C. Ry. Co. v. Monell, 1908, 50 Tex.Civ.App. 287, 110 S.W. 504, 506.

[6–8] One who is merely stopping over at a place in a hotel, motel, rooming house, or who is vacationing is not a resident. Oelkers v. Hulseberg, 1951, 200 Misc. 352, 107 N.Y.S.2d 144, 145. A residence is established by personal presence in a fixed and permanent abode, with the intent of remaining there. Spurlin v. Siebrasse, 1951, 74 S.D. 150, 49 N.W.2d 604, 605. The fundamental elements necessary to create a residence in a particular place are actual bodily presence in the place combined with a freely exercised intention of remaining there permanently or for an indefinite time, Johnston v. Benton, 1925, 73 Cal.App. 565, 239 P. 60; Bryant v. Bryant, Mo.App. 1950, 232 S.W.2d 199, 203, without any present intention to remove from the same. Prince v. Inman, Tex.Civ.App.1955, 280 S. W.2d 779, 781, 782; In re Lesker, 1954, 377 Pa. 411, 105 A.2d 376; cf. Smith v. Smith, 1955, 45 Cal.2d 235, 288 P.2d 497; Hughes v. Illinois Public Aid Commission, 1954, 2 Ill.2d 374, 118 N.E.2d 14, 17, 18, 43 A.L.R.2d 1421; Southeastern Greyhound Lines v. Conklin, 1946, 303 Ky. 87, 196 S.W. 2d 961, 962; Willingham v. Swift & Co., C.C.1908, 165 F. 223, 224; Routt v. Barrett, 1947, 396 Ill. 322, 71 N.E.2d 660, 671; Fowler v. Fowler, 1945, 156 Fla. 316, 22 So.2d 817.

[9] The allegations of plaintiff's verified complaint as to defendant's residence serve as an affidavit. Atwater v. Argonne Van & Storage Co., 1946, 74 Cal.App.2d 410, 412, 168 P.2d 776; East-West Dairymen's Ass'n v. Dias, 1943, 59 Cal.App.2d 437, 441–442, 138 P.2d 772; Carnation Co. v. El Rey Cheese Co., 1948, 88 Cal.App.2d 857, 858, 200 P.2d 19.

[10] (2) Apart from the verified complaint, plaintiff's affidavit filed in answer to defendant's affidavit is not sufficient. First, it is made on information and belief. An affidavit made on information and belief when submitted for an evidentiary purpose is hearsay, and is to be disregarded. Franklin v. Nat C. Goldstone Agency, 1949, 33 Cal.2d 628, 204 P.2d 37; 2 Cal.Jur.2d p. 629, par. 19; Jeffers v. Screen Extras Guild, Inc., 1955, 134 Cal. App.2d 622, 286 P.2d 30.

[11, 12] Secondly, it relates to the "address" of the defendant. An address is not

always synonymous with "residence". Stewart v. City of Rio Vista, 1945, 72 Cal. App.2d 279, 164 P.2d 274, 275; Ridge v. Boulder Creek Union etc. School Dist., 1943, 60 Cal.App.2d 453, 140 P.2d 990, 992; Smith v. Whiting, 1910, 55 Or. 393, 106 P. 791, 794; Munson v. Bay State Dredging & Contracting Co., 1943, 314 Mass. 485, 50 N.E.2d 633, 636. While "address" may be synonymous with "residence" (San Diego Savings Bank v. Goodsell, 1902, 137 Cal. 420, 70 P. 299, 302), the receipt of mail by persons at places other than their residence is so common that we must take judicial notice that a post office address may not be the same as a residence address. People ex rel. Arfman v. Newell, 1911, 49 Colo. 349, 113 P. 643, 645; C.C.P. secs. 1875, 1963(28).

Thirdly, the address as given is "615 South Pasadena, California." Whether this relates to a street or a city is entirely speculative.

(3) Since this affidavit on information and belief has no probative value, plaintiff's opposition to defendant's motion for change of venue must rest entirely upon the statement in paragraph I of the verified complaint: "Defendant is also a resident of Los Angeles, California." This positive statement, sworn to by plaintiff, perhaps loses weight, when plaintiff's later affidavit as to defendant's residence is based only on information and belief that defendant receives mail at some point which inferentially plaintiff contends is in Los Angeles County. An allegation that a person is a "resident" involves mixed questions of fact, such as his presence in a place, his intention to remain there so as to constitute it more than a transitory presence, and the legal status arising therefrom. In an early case, it was held that an allegation that a person was a "resident", by whomever made, was a legal conclusion which was to be disregarded. Bernou v. Bernou, 1911, 15 Cal.App. 341, 346, 114 P. 1000. In matters respecting change of venue, a statement of residence was regarded to concern the ultimate fact which the court, rather than the witnesses, is to decide. The defendant's affidavit as to residence was rejected, in favor of plaintiff's, setting forth a multitude of circumstances from which the court could determine the ultimate fact.

[13] But in O'Brien v. O'Brien, 1911, 16 Cal.App. 103, 111, 116 P. 692, it was held that such an affidavit submitted by the defendant as to the fact of his residence made a *prima facie* case. His intention to remain is a matter particularly within his knowledge, and his affidavit as to his intention as to residence is presumed to be made with full knowledge of the legal import of the term. The burden imposed upon the plaintiff is greater. In the allegations of the complaint herein, the plaintiff has signally failed to plead any probative facts which a court could hold overcome the *prima facie* showing made by the defendant.

[14] As said in O'Brien v. O'Brien, supra, 16 Cal.App. at page 111, 116 P. at page 696: "there should be much more required in an affidavit made by a party other than the defendant himself, and used as a basis for a motion of the character of the one involved here than in an affidavit to be used for the same purpose, made by the defendant, whether the affidavit of such other party [sic, person] is for or against the defendant. The affidavit of a party [sic, person] other than the defendant himself should, to be of any value as proof addressed to the question of residence, on a motion of this kind, state some fact or facts by which the court may be aided in forming some conclusion of its own upon the question of defendant's residence. * * * With the circumstances by which such affiant has arrived at his conclusion the court should be made acquainted and itself thus afforded an opportunity to pass upon their weight and value as proof of the fact to be decided."

The rule of O'Brien v. O'Brien, supra, applies to this case. Johnston v. Benton, supra, 1925, 73 Cal.App. 565, 239 P. 60. The affidavit of the defendant as to his residence not having been overcome by any

competent proof, it was the duty of the trial court to grant the motion for change of venue.

The order denying the motion for change of venue is reversed, with directions to enter an order granting defendant's motion and transferring the cause to the appropriate judicial district in San Diego County for further proceedings. Jurisdiction to pass upon defendant's demurrer having depended upon the ruling on the motion for change of venue, the order overruling the demurrer is vacated, with directions to mark the same "off calendar".

BISHOP, P. J., and SWAIN, J., concur.



159 Cal.App.2d Supp. 848

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Julius H. SILBERSTEIN, Defendant and Appellant.

Cr. A. 3762.

Appellate Department, Superior Court, Los Angeles County, California.

March 20, 1958.

Defendant was convicted of vagrancy. The Municipal Court of the Los Angeles Judicial District, Julian Beck, J., entered order by which proceedings were suspended without imposition of sentence and probation was granted. Defendant appealed. The Appellate Department of the Superior Court held that where police officer, the only witness for prosecution, refreshed his memory in courtroom, just before he took witness stand, by reading his police report, and on cross-examination the court denied the defendant the right to inspect the report and to cross-examine the officer as to its contents, there was prejudicial error.

Order granting probation reversed and cause remanded for new trial.

Bishop, P. J., dissented.

1. Criminal Law ⇐1023(12), 1081

Where defendant was convicted and proceedings were suspended without imposition of sentence and probation was granted and defendant appealed "from the judgment and sentence", there was no "judgment" because no sentence was pronounced, but since an order granting probation has been made appealable such notice of appeal would be treated as a notice of appeal from the order granting probation and the proceedings at the trial would be reviewed in like manner as on appeal from a judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment".

2. Criminal Law ⇐1170½(1)
Witnesses ⇐256

Where police officer, the only witness for prosecution, refreshed his memory in courtroom, just before he took witness stand, by reading his police report, and on cross-examination the court denied the defendant the right to inspect the report and to cross-examine the officer as to its contents, there was prejudicial error. West's Ann.Pen.Code, § 1102; West's Ann.Code Civ.Proc. § 2047.

3. Criminal Law ⇐726, 730(16)

Where defendant commented on prosecution's failure to call a police officer as a witness, prosecuting attorney's statement in reply that he deeply resented inference that he was keeping officer away because perhaps officer's testimony might weaken the case and that under no circumstances would he withhold evidence was in nature of personal testimony and was improper argument, and error was prejudicial in view of closeness of case and seriousness of charge of being lewd person or loitering in or about public toilets in public parks. West's Ann.Pen.Code, § 647, subd. 5; West's Ann.Const. art. 6, § 4½.

Louis Licht and Paul P. Selvin, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., William E. Doran, Deputy City Atty., Los Angeles, for respondent.

Before BISHOP, P. J., and SWAIN and DAVID, JJ.

BY THE COURT.

[1] The defendant was convicted of violating Penal Code, sec. 647, subsec. 5. Proceedings were suspended without imposition of sentence and probation was granted. The defendant appeals "from the judgment and sentence". There was no "judgment" because no sentence was pronounced, but since an order granting probation has been made appealable it has been our practice to treat a notice of appeal such as the one before us as a notice of appeal from the order granting probation and to review the proceedings at the trial in like manner as on appeal from a judgment. People v. Minter, 1955, 135 Cal.App.2d Supp. 838, 287 P.2d 196.

[2] A police officer was the only witness for the prosecution. His testimony, although in sharp conflict with that of the defendant, would be sufficient to sustain the judgment were it not for two errors which require a reversal. The prosecution witness refreshed his memory in the court room, just before he took the witness stand, by reading his police report. On cross-examination of this witness, the court denied the defendant the right to inspect the report and to cross-examine the officer as to its contents. This error was prejudicial.

People v. Gallardo, 1953, 41 Cal.2d 57, at page 67, 257 P.2d 29, at page 35, holds that when a prosecution witness refers to a document before taking the stand, and the defense makes a showing that the document is in the possession of the People, that it was made by the witness, and is material, and that it contains inconsistent statements, the defendant is entitled to inspect it, whether or not it is to refresh his recollection. The opinion states (41 Cal.2d at page 67, 257 P.2d at page 36): "No such showing has been made in the present case." This rule paraphrases Gordon v. U. S., 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447. The Gordon case significantly has been reinterpreted by its parents in Jencks v. U. S., 1957, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, 1111. Code Civ.Proc. sec. 2047 reads in part: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury, * * *". Penal Code, sec. 1102 provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code."

The Gallardo case does not deny the defendant inspection of the written statement made by a prosecution witness, whether used by that witness on or off the stand. People v. Riser, 1956, 47 Cal.2d 566, 305 P.2d 1, distinguishes the Gallardo case on the ground that the conditions of production held to be necessary had not been met by Gallardo's counsel. But People v. Riser radically revises, and in fact gives the *coup de grace* to the holding of what is necessary for inspection announced in the Gallardo case. First, People v. Riser, supra, 47 Cal. 2d at page 587, 305 P.2d at page 14: "In the present case the court denied production on the ground that the statements could not be used to impeach the witnesses. We are at a loss to understand how the court could have reached his conclusion without even seeing the statements. Whether they were in writing or signed by the witnesses the record does not show, and it is safe to say that no one but the prosecution knew. * * * Obviously a defendant cannot show conclusively that a document is admissible without seeing it, and yet in order to see it

he is told that he must show that it is admissible. The proper test for determining whether production must be granted is not whether the evidence has been conclusively proved admissible, but whether * * * 'there is good reason to believe that the document, when produced, would be admissible in evidence for some purpose in the case * * *.'" Compare Powell v. Superior Court, 1957, 48 Cal.2d 704, 708–709, 312 P.2d 698; Walker v. Superior Court, 1957, 155 Cal.App.2d 134, 317 P.2d 130. The court then states that the chance that the document may turn out not to be available for impeachment should not "block production at the threshold." At page 588 of 47 Cal.2d, at page 14 of 305 P.2d: "As in the case before us, the court was faced with a record that showed no reason why the statements once produced could not be used for impeachment."

This is entirely consistent with C.C.P. sec. 2047, as written, which may be invoked when each of the elements set forth therein is established preliminary to the demand. The right of inspection does not rest alone on C.C.P. sec. 2047. Cf. Powell v. Superior Court, supra, 48 Cal.2d 704, 706–708, 312 P.2d 698.

It is appropriate to quote from People v. Riser, supra, 47 Cal.2d 566, at page 586, 305 P.2d 1, at page 13: "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts."

The right to inspect a document in the circumstances of this case is different from the right to introduce it in evidence and the right to inspect cannot be denied although its admission in evidence may be refused if inspection reveals that its contents are immaterial. In addition, it hardly seems proper and may have been prejudicial, for the prosecution, while withholding the document, to offer to release it if defendant would introduce it, and then to argue its contents before the jury when it was not in evidence at all.

[3] Another error was committed by the prosecuting attorney in his closing argument. Counsel for the defendant, in his argument asked the jury to draw inferences unfavorable to the prosecution from the fact that another police officer who was present at the trial and present at the time the crime was supposed to have been committed was not called as a prosecution witness. In reply the prosecuting attorney said: "* * * he infers that I am keeping an officer away because perhaps the officer's testimony might weaken the case. I deeply resent it. I would never—anyway, that is an opinion that you have to base your decision on. I can only assure you that under no circumstances would I withhold evidence which would be in conflict with what you have heard here." This was in the nature of personal testimony, and improper argument. People v. Beal, 1953, 116 Cal.App.2d 475, 477, 479, 254 P.2d 100.

The charge under Penal Code, sec. 647, subsec. 5 is serious, and the case was so close that the errors disclosed cannot be excused under Cal.Const. Art. VI sec. 4½.

The order granting probation is reversed, and the cause is remanded for a new trial.

BISHOP, Presiding Judge.

I dissent. Let us note clearly that which People v. Gallardo, 1953, 41 Cal.2d 57, 67, 257 P.2d 29, 35–36, does hold. The situation there presented was of a witness who, before she took the stand, had refreshed her memory by examining notes which she had made earlier. It was held, first of all, squarely, with a citation of authorities, that section 2047, C.C.P., does not apply to such a situation, but that it authorizes an inspec-

tion by an adverse party only if the writing is made use of by the witness while on the stand. One may wonder what real difference it makes where the witness sits while he reads his own writings, but our Supreme Court, fortified by authorities, said that it does, and its decision has been followed in People v. Williams, 1954, 123 Cal.App.2d 226, 230, 266 P.2d 599, 602; Smith v. Smith, 1955, 135 Cal.App.2d 100, 105, 286 P.2d 1009, 1012; and see People v. Humphries, 1954, 127 Cal.App.2d 131, 134–135, 273 P.2d 562, 564.

People v. Gallardo [41 Cal.2d 57, 257 P.2d 35] then recognized that an "exception has been made [to the rule just announced] in cases where a government witness refers to documents before taking the stand and the party demanding the right of inspection lays a foundation by showing that the documents * * * are contradictory of his present testimony as to relevant and important matters," but went on to hold that no such showing had been made in the case before it, and concluded that the trial court had properly denied the request for an inspection. The Gallardo case did, therefore, deny the defendant an inspection of the written statement of a prosecution witness.

I find in People v. Riser, 1956, 47 Cal.2d 566, 305 P.2d 1, nothing that casts even a doubt upon either of the holdings in the Gallardo case. Certainly the Riser case does not undermine the conclusion that section 2047 does not authorize an inspection under the facts of this case, for that section was not mentioned in it, and there was no suggestion that the witnesses, in People v. Riser, had used the writings, sought to be inspected, to refresh their memory, either on or off the witness stand. The Gallardo case is cited, in People v. Riser, 47 Cal.2d 566, 586, 305 P.2d 1, 13 as one of several cases in which it had been held that production of evidence in the possession of the prosecution was denied "because the requirements justifying production had not been met." No criticism is made of the holding, nor any doubt cast upon the fact that a showing justifying production is required. Indeed, in People v. Riser the court states what is, and what is not required. The requirement is not that the defendant show *conclusively* that the document sought would, if produced, be admissible in evidence. The word we have underscored was used three times in the discussion, once in this summation (47 Cal.2d 587, 305 P.2d 14): "The proper test for determining whether production must be granted is not whether the evidence has been conclusively proved admissible but whether, as stated in People v. Glaze, supra, 139 Cal. [154] at page 158, 72 P. [965] at page 967, 'there is good reason to believe that the document when produced would be admissible in evidence for some purpose in the case * * *.' There must be more than a mere possibility that the statements when produced will contain contradictory matter and be in such a form that they can be used to impeach * * *." The conclusion then reached was that the "defendant sustained the burden imposed on him" for he had shown that "it was probable" that the witnesses' written statements were inconsistent with their testimony. Where in this is there a death sentence to the holding in the Gallardo case that a writing is inadmissible if neither used by the witness while on the stand nor shown to be useful for impeachment?

The most that is claimed for the writing sought in the present case is that it fails to contain, in its page and a half, all of the details related by the officer-witness in a lengthy cross-examination. There is entirely lacking a showing of any probability that the officer's written report contained anything that was in conflict with his testimony, or anything that would warrant the defendant's use of it. The ruling was not error, certainly not of so prejudicial a nature that it warrants a reversal of the order granting probation. Nor do any of the other "errors" warrant a reversal. I would affirm it.

50 Cal.2d 182

The COUNTY OF PLACER, a Political Subdivision of the State of California, Plaintiff and Respondent,

v.

AETNA CASUALTY AND SURETY COMPANY (a corporation), United Pacific Insurance Company (a corporation) and Leonard M. Layton, Defendants and Appellants.

Sac. 6894.

Supreme Court of California,
In Bank.
April 8, 1958.

Action by county against judge and sureties on his bond and clerk, based on clerk's alleged embezzlement of county funds. The Superior Court, Placer County, James Snell, J., entered judgment against defendants who appealed. The Supreme Court, Carter, J., held that judge was not absolutely liable without fault for clerk's embezzlement under statute providing that no officer of city or judicial district is liable for moneys stolen from official custody, unless loss was sustained because officer failed to exercise due care.

Reversed with directions.

Spence, J., dissented.

Opinion, 317 P.2d 639, vacated.

1. Officers ⇐129

The terms of statutes dealing with official bonds and fixing obligation of surety within penal sum specified, are read into bond and become a part of it.

2. Judges ⇐36

Where judicial district was created, and employment of clerk was authorized, by county board of supervisors which set the salary and gave judge right to hire the person concerned, person hired as clerk was a servant of the government, and judge was not responsible for her conduct unless he directed it, participated therein, or countenanced it.

3. Statutes ⇐223.2(1)

Statutes relating to the same subject matter are to be construed together and harmonized if possible.

4. Statutes ⇐223.4

Where terms of a later specific statute apply to a situation covered by an earlier general one, later specific statute controls.

5. Judges ⇐36

Where earlier statute imposed absolute liability for any and all breaches of conditions of official bond executed by any principal officer, his deputy or clerk, but subsequent statute imposed liability for moneys stolen from a judicial district officer's official custody only when officer failed to exercise due care, subsequent statute was applicable when court clerk embezzled funds belonging to judicial district. West's Ann.Gov.Code, §§ 1504, 1953.5.

6. Judges ⇐36

Under statute imposing liability for moneys stolen from judicial district officer's official custody only when public officer fails to exercise due care, and under Penal Code statute which provides that word "stolen" includes embezzlement, judge of judicial district was not liable for embezzlement of district funds by clerk thereof in absence of showing of lack of due care. West's Ann.Gov.Code, §§ 1504, 1953.5; West's Ann.Pen.Code, §§ 484, 490a.

Robinson & Robinson and D. R. Robinson, Auburn, for appellants.

Alexandria B. Broyer, Dist. Atty., Roseville, for respondent.

CARTER, Justice.

This is an appeal by defendants, Aetna Casualty and Surety Company, United Pacific Insurance Company, and Leonard M. Layton, from a judgment entered upon a verdict by a jury. The verdict was directed by the court in favor of the plaintiff.

The facts are not in dispute. Defendant Sherlie Bennett (who defaulted) was the Clerk of the Roseville Judicial District Court in Placer County and had been appointed to that position by defendant Leonard M. Layton, judge of said court. On January 1, 1952, the Roseville Justice's Court was consolidated with the Roseville

City Court whereby the Roseville Judicial District Court came into being. Judge Layton had been judge of the Roseville Justice's Court for many years prior to the consolidation and thereafter became judge of the Roseville Judicial District Court. After the consolidation the Placer County Board of Supervisors authorized the employment of a clerk and Sherlie Bennett was hired to fill the position at that time. She served until her arrest in November, 1954. In 1951, defendant Aetna Casualty and Surety Company bonded Judge Layton, as principal, with itself as surety, in the sum of $1,000 for Judge Layton's four year term which began on January 8, 1951. Defendant United Pacific executed a similar suretyship bond in the sum of $5,000 for Judge Layton's term which began on January 5, 1953. Both of these bonds were executed by Judge Layton. The county of Placer purchased a blanket employees' bond which became effective on February 1, 1954, and which covered Sherlie Bennett. The total amount of money stolen by Sherlie Bennett was set at $11,807.75, of which the blanket employees' bond paid off all but $4,548.50 and the prayer of the complaint was amended to conform to that figure.

On July 1, 1953, the county's auditors found a shortage of $1,647.25 which was called to the attention of the Placer County auditor who called it to the attention of the chairman of the board of supervisors who was also the supervisor from the Roseville District. The shortage was formally called to the attention of the board of supervisors on November 16, 1953. Sherlie Bennett had been allowed to make up the shortage and the formal written audit filed on November 16, 1953, carried a notation that the deficit had been substantially made up.

When the county's auditors began their fiscal year audit in July, 1954, more shortages in the Roseville Court were discovered and a special audit was requested of the board of supervisors. The special audit, as heretofore noted, disclosed a total deficiency of $11,807.75.

The chairman of the board of supervisors testified that he called Judge Layton's attention to the $1,647.25 shortage indicated in the audit report of November 16, 1953. Judge Layton testified that he knew nothing about the $1,647.25 shortage until the day after Sherlie Bennett was arrested. The record shows that during the time of the 1953 audit Judge Layton, a man 70 years of age, was seriously ill in the hospital and did not sit on the bench during September and October while he was recuperating from his illness.

The record shows that Sherlie Bennett used many different methods in embezzling the funds turned over to her in her official capacity as clerk of the court. As examples, she would alter the official receipts by changing one from $250 to $2.50; she would void receipts or issue no receipts at all; she also obtained for her personal use official receipt books which she kept in her own possession and which were never turned in to the proper authorities. Other methods used by her are too detailed to repeat here and it is unnecessary to do so since the conclusion is inescapable that she was guilty of the crime of embezzlement.

The primary question involved here is whether Judge Layton is absolutely liable under section 1504 of the Government Code, or whether he is liable only if negligent as provided for in section 1953.5 of the same code.

Section 1504, which was enacted in 1872 (Pol.Code, §§ 959 and 960) and as it read prior to the 1955 amendment, provides: "Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein for:

"(a) Any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk.

"(b) The faithful discharge of all duties which may be required of such officer

by any law enacted subsequently to the execution of the bond."

Section 1953.5 which was enacted in 1949, and amended in 1951, provides: "No officer of the State, or of any district, county, city and county, city, or judicial district, is liable for moneys stolen from his official custody unless the loss was sustained because the officer failed to exercise due care."

[1] It is defendants' position that the 1927 amendments to Penal Code, sections 484 and 490a brought embezzlement and larceny within the word "theft"; that the word "stolen" includes embezzlement. Section 490a of the Penal Code, as amended in 1927, provides: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." It is plaintiff's position that the elements of the various crimes remain the same despite the amendment (People v. Tullos, 57 Cal.App.2d 233, 237, 134 P.2d 280) and that section 1953.5 of the Government Code applies where larceny, and not embezzlement, is involved. Plaintiff also relies upon the case of Union Bank & Trust Co. v. Los Angeles County, 11 Cal.2d 675, 81 P.2d 919, decided by this court in 1938, where the county clerk was held absolutely liable for the embezzlement of a deputy county clerk under the bonds required by sections 958 and 959 of the Political Code (Govt.Code, §§ 1500, 1503 and 1504). Defendants argue that the "harsh rule" of the Union Bank case was changed by the Legislature when, in 1949, Government Code section 1953.5 was enacted. In the Union Bank case, the court said (11 Cal.2d at page 679, 81 P.2d at page 921): "'It may be conceded that in the absence of statute the modern view is opposed to making public officers civilly liable for torts of deputies, where the latter are themselves statutory officers and not under the superior's unrestricted control or right of hiring and discharging. See Michel v. Smith, 188 Cal. 199, 205 P. 113 [municipal police officer]; Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772 [deputy marshal of municipal court]; Pavish v. Meyers, 129 Wash. 605, 225 P. 633, 34 A.L.R. 561 [police officer]; note, 43 Harv.L.Rev. 327. The other view is usually grounded upon the identity of the officer and his deputy or the unrestricted right of control. See Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St.Rep. 123; City of Duluth v. Ross, 140 Minn. 161, 167 N.W. 485; City of New York v. Fox, 232 N.Y. 167, 133 N.E. 434. *In the instant case the clerk's deputies are independent statutory officers within the rule of such cases as Michel v. Smith, supra, and Van Vorce v. Thomas, supra. But this does not dispose of our problem.* We are satisfied that defendant Lampton and his sureties are not liable under common-law principles of tort or agency. *But liability may exist by reason of the language of the statute and the surety bond.* See Grays Harbor Const. Co. v. Paulk, 179 Wash. 300, 37 P.2d 584; City of Chicago v. Southern Surety Co., 239 Ill. App. 628, 640. And upon an examination of the statute and the bond, it becomes clear that defendants are liable under their terms. * * *'" (Emphasis added.) Section 1504 of the Government Code provides for breaches committed "by the principal officer, his deputy, or clerk." The bonds executed by Judge Layton make no mention of any deputy or clerk as did the bonds involved in the Union Bank case. While in the Union Bank case the court specifically noted that the deputy who embezzled the funds was an independent statutory officer, the county clerk was held liable because of the language of the statute and the bond. The case is very like the one before us except for the terms of the bonds involved and except that after the Union Bank case was decided the Legislature enacted section 1953.5 of the Government Code. Insofar as the failure of the bonds to include clerks and deputies in the case at bar is concerned, the matter is covered by the case of Hartford Accident & Indemnity Co. v. City of Tulare, 30 Cal. 2d 832, 837, 186 P.2d 121, 124, where we said that "The terms of a statute dealing

with official bonds fixing the obligation of the surety within the penal sum specified are read into the bond and become a part of it."

The rule stated in Michel v. Smith, 188 Cal. 199, at pages 201, 202, 205 P. 113, at page 114, is that "A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated therein. 23 Am. & Eng. Ency. of Law, 382; Story on Agency, 319; Robertson v. Sichel, 127 U.S. 507–515, 8 S.Ct. 1286, 32 L.Ed. 203 [see, also, Rose's U.S. Notes]. See, also, note to 12 Ann. Cas. 184. In opposition to this principle of law we are cited to those instances in which a sheriff has been held responsible for the acts of his deputies, but the respondent loses sight of the distinction between the two situations, which is recognized in the decisions. A sheriff is responsible for the acts of his deputies, for they are acting in his private service and in his name and stead, and are only public officers through him. The deputy is not the agent or servant of the sheriff, but is his representative, and the sheriff is liable for his acts as if they had been done by himself. Foley v. Martin, 142 Cal. 256–260, 71 P. 165, 75 P. 842, 100 Am. St.Rep. 123. A different rule prevails in the case of the chief of a municipal police department. He may even be charged with the duty of selecting the members of the force, but he is not responsible for their acts, unless he has directed such acts to be done, or has personally co-operated in the offense, for each policeman is, like himself, a public servant. Casey v. Scott, 82 Ark. 362, 101 S.W. 1152, 118 Am.St.Rep. 80, 12 Ann.Cas. 184. The question was squarely presented and considered in this last case. An ordinance of the city of Texarkana provided for a dog tax and the manner of collecting the same. It contained a provision that the chief of police of the city should employ a dog catcher whose duty it should be to enforce the ordinance. The action was one brought against the chief of police, the dog catcher appointed by him, and the city for the negligence of the dog catcher. On an appeal by the chief of police from a verdict directed against him and the dog catcher, the court said that, in so far as the relation of the appellant to the action was concerned, the dog catcher was a public servant selected by the chief of police, just as a patrolman would be selected by him or a mayor, or other appointing power, and held 'there is no liability in such case, unless the appointing officer fails to exercise reasonable care in the selection of the appointee, a question not presented.' See, also, a case somewhat in point, Baisley v. Henry [55 Cal.App. 760], 204 P. 399." The rule announced in the Michel case, heretofore quoted, has been followed in Kangieser v. Zink, 134 Cal.App.2d 559, 560, 285 P. 2d 950; Sarafini v. City & County of San Francisco, 143 Cal.App.2d 570, 575, 300 P. 2d 44; Reed v. Molony, 38 Cal.App.2d 405, 410, 101 P.2d 175; People v. Standard Accident Ins. Co., 42 Cal.App.2d 409, 411, 108 P.2d 923. In the latter case which was decided in 1941 it was said that (42 Cal.App. 2d at page 411, 108 P.2d at page 925): "'The modern view adopted in this state is that public officers are not civilly liable for torts of deputies, when the latter are themselves statutory officers or not under the superior's unrestricted control or right of hiring and discharging. Michel v. Smith, 188 Cal. 199, 205 P. 113; Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772; Union Bank & Trust Co. v. Los Angeles County, Cal., 74 P.2d 240. [A rehearing was granted in the Union Bank & Trust Company case and the opinion modified and reported in 11 Cal.2d 675, 81 P.2d 919.]'"

[2] In the case at bar the position of clerk of the Roseville Judicial District was created, and the employment of the clerk was authorized, by the Placer County Board of Supervisors. Judge Layton testified that "The office of Clerk was created and I was informed to that effect before the new court system went into effect, I think, in December." When asked who filled the

office and how it was done, he replied: "I was informed by,—I don't remember whether it was by a letter from the Board of Supervisors or by one of the members of the Board personally, that I was allowed a Clerk, and just what wording was used I cannot remember but it was apparently left to me to find somebody to fill that position." The chairman of the board of supervisors testified that "The position was created by the Board of Supervisors and under the rule that we used in Placer County we created the position, set the salary and the department head hired his own help." Under the rules of the cases heretofore cited and discussed it appears that Sherlie Bennett was herself "a servant of the government." In such an event, Judge Layton is not responsible for her conduct unless he directed it, participated therein, or, as one of the cases brought out, "countenanced" it. The record shows, without conflict, that Judge Layton cannot be held liable for the embezzlement of Sherlie Bennett under the rule stated in Michel v. Smith, 188 Cal. 199, 205 P. 113, and the subsequent cases following the same rule, since he neither directed, participated in, nor countenanced the clerk's embezzlement of the moneys entrusted to his custody.

[3–6] It has long been the rule in this state that statutes relating to the same subject matter are to be construed together and harmonized if possible (In re Estate of Wedemeyer, 109 Cal.App.2d 67, 240 P.2d 8; In re Petraeus, 12 Cal.2d 579, 582, 86 P.2d 343; People v. Trieber, 28 Cal.2d 657, 661, 171 P.2d 1; Lucas v. City of Los Angeles, 10 Cal.2d 476, 483, 75 P.2d 599; Pierce v. Riley, 21 Cal.App.2d 513, 518, 70 P.2d 206). Section 1504 imposes absolute liability for "any and all breaches" of the conditions of the official bond executed by any principal officer, his deputy or clerk; section 1953.5 imposes liability for "moneys stolen" from a judicial district officer's official custody only when the public officer fails to exercise due care. Under the Penal Code statutes heretofore cited and quoted the term "moneys stolen" most certainly includes the crime of embezzlement even though the elements of the crime itself remain unchanged. While section 1504 covers the situation here involved in a general way, section 1953.5 refers specifically to a "judicial district" and the liability of an officer for "moneys stolen" from his official custody. Section 1953.5 was added to the Government Code in 1949 (Stats.1949, c. 1598, p. 2845, § 1) and amended in 1951 (Stats.1951, c. 1553, p. 3537, § 15) by substituting the words "judicial district" for the word "township." Where the terms of a later specific statute apply to a situation covered by an earlier general one, the later specific statute controls (People v. Haydon, 106 Cal.App.2d 105, 111, 234 P.2d 720). As we held in Rose v. State of California, 19 Cal.2d 713, 723, 724, 123 P.2d 505, 512: "It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (See, also, People v. Moroney, 24 Cal.2d 638, 644, 150 P.2d 888; Coker v. Superior Court, 70 Cal.App.2d 199, 201, 160 P.2d 885; Whittemore v. Seydel, 74 Cal.App.2d 109, 120, 168 P.2d 212.)

Inasmuch as the Union Bank case, supra, 11 Cal.2d 675, 81 P.2d 919, 921, was decided in 1938 and prior to the enactment in 1949 of section 1953.5 of the Government Code and its amendment in 1951, and since this court there specifically held that absolute liability existed because "of the language of the statute" it is not controlling here.

Defendants also complain that the trial court erred in directing a verdict and thus removing from the case the issue of whether or not Judge Layton exercised due care. This contention is meritorious because of our conclusion that section 1953.5 of the Government Code is controlling in the case at bar rather than section 1504 of the same code.

The judgment is reversed with directions to the trial court to retry the case on the

issue of the exercise, or lack thereof, of due care on the part of Judge Layton.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

SPENCE, Justice.

I dissent. For the reasons stated by the District Court of Appeal, Third Appellate District, when this cause was decided by that court (County of Placer v. Aetna Casualty and Surety Co., 317 P.2d 639), I would affirm the judgment.



50 Cal.2d 174

WOODS IRRIGATION COMPANY (a nonprofit corporation), Plaintiff and Respondent,

v.

The DEPARTMENT OF EMPLOYMENT of the State of California, and James G. Bryant (Harry W. Stewart) as Director of the Department of Employment of the State of California, Defendants and Appellants.

Sac. 6748.

Supreme Court of California, In Bank.

April 8, 1958.

Action by corporation to recover unemployment insurance contributions assessed and paid under protest. The Superior Court, Sacramento County, Malcolm C. Glenn, J., rendered judgment for corporation, and Department of Employment and its director appealed. The Supreme Court, Spence, J., held that where nonprofit corporation engaged in furnishing irrigation and drainage services to land owned by its farmer shareholders, owned no land or water rights of its own but maintained its facilities on property of its shareholders from whom it received grants of easements in perpetuity, corporation's employees in tending ditches and maintaining irrigation and drainage system were doing work essentially agricultural in nature and their services constituted agricultural labor so as to exempt corporation from unemployment contributions.

Affirmed.

McComb, J., Gibson, C. J., and Traynor, J., dissented.

Opinion, 316 P.2d 1003, vacated.

1. Taxation ⇐111.22

Where nonprofit corporation engaged in furnishing irrigation and drainage services to land owned by its farmer shareholders, owned no land or water rights of its own but maintained its facilities on property of its shareholders from whom it received grants of easements in perpetuity, corporation's employees including skilled laborers, in tending ditches and maintaining irrigation and drainage system were doing work essentially agricultural in nature and their services constituted "agricultural labor" so as to exempt corporation from unemployment contributions. West's Ann.Unempl.Ins.Code, §§ 1 et seq., 625, 626, 627, 628.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Agricultural Labor".

2. Taxation ⇐111.22

Where nonprofit corporation's irrigation and drainage facilities were constructed on easements granted by farmer shareholders for purpose of irrigation and drainage of their farms, and fees underlying easements and land surrounding easements were farmlands, corporation's employees working on easements were working on "farms" within section of Unemployment Insurance Code requiring services to be performed on farm in order to exempt employer from unemployment contributions. West's Ann.Unempl.Ins.Code, §§ 1 et seq., 625, 626, 627, 628.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Farms".

3. Taxation ⇐111.22

Employee's services which are essentially agricultural because they are performed on a farm in connection with cultivation of soil constitute "agricultural labor" so as to exempt employer from unemployment contributions, regardless of who might be the employer. West's Ann. Unempl.Ins.Code, §§ 1 et seq., 625, 626, 627, 628.5.

4. Taxation ⇐111.22

Where nonprofit corporation was engaged only in furnishing irrigation and drainage services to land owned by farmer shareholders of corporation, fact that corporation articles permitted it to perform services for persons other than its farmer members did not change nature of essentially agricultural activities of its employees with respect to statute exempting employer of agricultural labor from unemployment contributions. West's Ann. Unempl.Ins.Code, §§ 1 et seq., 625, 626, 627, 628.5.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., and William L. Shaw, Deputy Atty. Gen., for appellants.

Jones, Lane, Weaver & Daley, Stockton, and Neal W. McCrory, Santa Rosa, for respondent.

SPENCE, Justice.

Plaintiff sought to recover certain unemployment insurance contributions assessed and paid under protest pursuant to the Unemployment Insurance Act. Stats.1935, ch. 352, p. 1226, as amended; Deering's Gen. Laws 1937, Act 8780d, Unemployment Insurance Code, § 1 et seq. The assessments covered the period from January 1, 1946, through June 30, 1951. Plaintiff pursued all prescribed administrative remedies before bringing this action. Its claim of refund is based upon the ground that the irrigating and drainage services performed by its employees constitute "agricultural labor" and so are exempt from the coverage of the act. The court signed findings of fact and conclusions of law sustaining plaintiff's claims; and defendants appeal from the ensuing judgment entered in plaintiff's favor.

Plaintiff is a nonprofit California corporation, engaged in furnishing irrigating and drainage services to land owned by its farmer shareholders. It owns no land or water rights of its own but instead maintains its pumping stations, canals and coordinating irrigating and drainage facilities on the property of its shareholders, from whom it has received grants of easements in perpetuity. Although plaintiff's articles of incorporation also permit it to furnish its services to persons other than its shareholders, it has never done so.

It thus appears that plaintiff is not a mere water company supplying water to the public for general purposes but that it is an "irrigation company," engaged in performing irrigating and drainage services solely for its farmer stockholders and operating solely upon the farms of said farmer stockholders. In other words, the only services which it is performing are services in line with its purposes stated in its articles of incorporation "of constructing, operating and maintaining ditches for the irrigation of the lands of the stockholders" and "for the construction, operation and maintenance of ditches for the drainage of lands owned by the stockholders." Its agreement made with each individual stockholder, which agreement is to "run with the land," provides for the prorating of plaintiff's costs of operation on an acreage basis with the amount of water limited to the irrigation needs of the farm of the particular stockholders as such farm is described in the agreement. The trial court therefore found that "plaintiff's only activity has been to furnish irrigation water and drainage service to the farms of its stockholders on a non-profit basis."

Plaintiff's services follow a definite pattern. It pumps water from the Middle River of the San Joaquin River adjacent to the lands of its shareholders and distributes this water to its shareholders through its canals and control gates. At the request of the individual farmer shareholder, plain-

tiff's ditch tenders release water through the distribution canals for the farmer's irrigation needs. Likewise, when necessary, seepage and other excess ground waters are drained into feeder or lateral ditches and thence into plaintiff's drainage canals, from where the waters are pumped into a stream known as the Burns cutoff and returned to the San Joaquin River. Plaintiff has installed a large number of electrically operated pumps and has built many miles of canals throughout the lands of its shareholders for the effective performance of both its irrigating and drainage services.

Plaintiff's employees maintain and operate all its facilities. Their services include the cleaning, servicing and repairing of plaintiff's irrigation canals as well as its drainage canals. They clean the ditches, ditch the banks, cut willows bordering the ditches, and do other similar general maintenance work. Their work is confined in the main to plaintiff's operating facilities, and they ordinarily are neither required to go, or do they go, on lands outside the area of plaintiff's easements. Each farmer digs his own irrigation furrows. When a farmer needs water, he notifies the superintendent of the land division within which his land is located; and the superintendent, in turn, orders the release from the central ditches of a sheet of water which flows through the farmer's land. The farmer takes such water as he may need by controlling the flow of water from the central ditches into his irrigation furrows. The flow of water from plaintiff's control gates, however, is regulated by plaintiff. There is some supply to the shareholders' lands of subirrigation water from plaintiff's main canals and from its lateral and sublateral canals.

"Agricultural labor" is excluded in express terms from the operation of the Unemployment Insurance Act. Unempl.Ins. Code, § 625, formerly § 7(a) of the Unempl. Ins.Act, Stats.1935, p. 1226. The administrative agency created by the act, under its power to adopt rules and regulations, promulgated a rule defining the term "agricultural labor" as including services performed on a farm in connection with the cultivation of the soil and the raising of crops, including the "irrigating" which "may be necessary and incident thereto." Cal.Admin.Code, Tit. 22, § 43; see Stivers v. Department of Employment, 42 Cal.2d 486, 489, 267 P.2d 792. Substantially, these same provisions were applicable during the tax period here involved. In 1951, the rule so promulgated and as amended was made subject of statute. Stats.1951, ch. 1758, § 1, p. 4185. It was later codified as section 626 of the Unemployment Insurance Code. The question to be determined is whether the trial court properly classified the services of plaintiff's employees as "agricultural labor" within the meaning of the statutory exemption.

[1] The activities of its employees, as plaintiff claims, are performed as a necessary incident to the growing of the crops and the preparation of the soil for such growth by drainage. The labor employed in such activities is as essentially "agricultural labor" as is labor employed in the activity of plowing the soil and planting the crops. This fundamental proposition was recognized in Irvine Co. v. California Employment Comm., 27 Cal.2d 570, 165 P.2d 908. There similar services of the employees of the owner of a farm were held to constitute an essential factor in the efficient cultivation of the land and crops thereon so as to come within the statutory exemption of "agricultural labor."

The parties have not cited nor has independent research disclosed any California case covering labor engaged in irrigating or drainage activities where the employees were employed by a third person rather than by the farmer. However, persuasive authority in support of plaintiff's position is found in Big Wood Canal Co. v. Unemployment Compensation Division of the Industrial Accident Board, 61 Idaho 247, 100 P.2d 49. There the claimant for a refund was a canal company organized and operated as a mutual nonprofit corporation. Its only function was to maintain and operate a system for the distribution of water for domestic and irrigation purposes

to its members, who were assessed pro rata for the expense of such service. The Supreme Court of Idaho held that the employees of the canal company were performing "agricultural labor" and therefore were within the statutory exemption of that state. In so deciding, that court stated at page 50 of 100 P.2d: "Irrigating the land is as much 'agricultural labor' as is the plowing, grading, and cultivating the land. * * *" See, also, Big Wood Canal Co. v. Unemployment Compensation Division of the Industrial Accident Board, 63 Idaho 785, 126 P.2d 15. In passing, it should be noted that in the Big Wood Canal Co. case some of the services were performed on reservoirs and connecting canals many miles distant from the farms being irrigated. The court there relied upon the definition by Congress of "agricultural labor" as including labor "in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes." 100 P.2d 49, 51. It is unnecessary here, however, to consider the broader question of the classification of labor employed for such purposes at places other than on the farms, for here all the labor is performed on the farms of plaintiff's shareholders.

[2] Defendants seek to apply principles of property law in segregating plaintiff's easements from the farm lands of plaintiff's shareholders and so conclude that plaintiff's services are not performed "on a farm" as required by the former administrative rule defining "agricultural labor," which rule is now embodied in section 626 of the Unemployment Insurance Code. But this tenuous distinction cannot be deemed controlling. While plaintiff's irrigating and drainage facilities are constructed on easements, such easements are merely rights of way across the farms of the shareholders, granted for the purpose of the irrigation and drainage of those farms. The fees underlying the easements and the lands surrounding the easements are farm lands owned by the farmers whom plaintiff serves. In tending the ditches and maintaining the necessary irrigation and drainage systems for the farm lands, plaintiff's employees are doing work which is essentially agricultural in nature, as it is a necessary incident of the cultivation of the land and crops thereon. Though technically working on the easements overlying farm lands, plaintiff's employees are working on the farms within the meaning of the applicable administrative regulations.

[3] Nor does it matter that the labor here involved is done by employees of plaintiff, a corporate entity as distinguished from its farmer members. Services which are essentially agricultural under all circumstances because they are performed "on a farm, in connection with the cultivation of the soil, * * * constitute 'agricultural labor' regardless of who may be the employer of the person performing such services." California Employment Comm. v. Kovacevich, 27 Cal.2d 546, 552–553, 165 P.2d 917, 921. In classifying such labor employed in services performed on the farm as a necessary incident to the cultivation of the land and the crops up to and including the harvest, it is the nature of the work performed and its locale, not the status of the employer as a farmer, which determine that the labor so employed is within the meaning of the "agricultural labor" exemption. Latimer v. United States, D.C., 52 F.Supp. 228; Stuart v. Kleck, 9 Cir., 129 F.2d 400; Chester C. Fosgate Co. v. United States, 5 Cir., 125 F.2d 775.

There are other types of services, however, which are not essentially agricultural under all circumstances. These consist of post-harvest services rather than pre-harvest services "in connection with the cultivation of the soil" or the crops. Such post-harvest services may or may not be performed "on a farm" and may or may not be performed by employees of the farmer. In classifying the labor engaged in the post-harvest services such as in hay baling (Dias v. California Employment Stabilization Comm., 113 Cal.App.2d 374, 248 P.2d 427; Enos v. California Employment Stabilization Comm., 101 Cal.App.2d 606, 225 P.2d 641; People v. Giesbrecht, 90

Cal.App.2d 569, 203 P.2d 101; California Employment Comm. v. Rose, 67 Cal.App. 2d 864, 155 P.2d 702), in packing-houses (Stivers v. Department of Employment, supra, 42 Cal.2d 486, 267 P.2d 792), or in warehouses (California Employment Comm. v. Butte County, etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892), it has been heretofore held that it is the "nature of the work, modified by the custom of doing it," which determines whether the labor so employed is to be classified as "agricultural or industrial." (California Employment Comm. v. Kovacevich, supra, 27 Cal.2d 546, 560, 165 P.2d 917, 925.)

Thus, under the cited authorities dealing with such post-harvest activities, if the employees were employed by the farmer himself rather than by a third person, and if their work was done as an incident of the employer's own farming operation, their labor was generally classified as "agricultural labor." But if the employees were employed by a third person conducting a commercial operation in such post-harvest activities, the labor of the employee was not classified as "agricultural labor." It is true that the recent amendments to the Unemployment Insurance Code have expanded the meaning of "agricultural labor" to include some post-harvest activities not theretofore held to fall within the exemption. Unempl.Ins.Code, §§ 626–627, Stats. 1953, ch. 728, § 1, p. 1992, amended by Stats. 1955, ch. 608, § 2, p. 1100; § 628.5, Stats. 1953, ch. 308, p. 1473, repealed by Stats. 1955, ch. 608, § 1, p. 1100. There is nothing, however, in these amendments which would indicate that labor performed on the farm, as a necessary incident to the cultivation of the lands and crops up to and including the harvest, should not continue to be classified as essentially agricultural regardless of who may be the employer of the persons performing such labor. It should be noted that the above cited amendments, enacted since the expiration of the assessment period here in question, specifically exempt as "agricultural labor" persons engaged in pre-harvest "service performed on a farm in the employ of any person"; and that this particular portion of the statutory amendments substantially adopted the rules which had previously been embodied in administrative regulations. (See California Employment Comm. v. Kovacevich, supra, 27 Cal.2d 546, 550–553, 165 P.2d 917; Stivers v. Department of Employment, supra, 42 Cal.2d 486, 489, 267 P.2d 792.)

[4] It therefore is of no avail to defendants to argue that while plaintiff, a nonprofit corporation, has never performed services for persons other than its farmer members, its articles of incorporation permit it to do so and thereby its business would have a "commercial aspect." Stivers v. Department of Employment, supra, 42 Cal.2d 486, 490, 267 P.2d 792. Such factor cannot change the nature of essentially agricultural activities here, which are performed on the farm and as a necessary incident to the cultivation of the lands, as contrasted with a post-harvest activity such as the packing-house enterprise involved in the Stivers case. (Id., 42 Cal.2d at page 492, 267 P.2d at page 796.)

Defendants seek to isolate plaintiff's employees from the overall activity in which they play a significant part, and argue that they are merely skilled laborers engaged in the repair, maintenance, and operation of plaintiff's pumps, canals, ditches, and allied facilities. However, it is not the particular trade or skill of plaintiff's employees that controls, but rather it is the work that they are doing and the circumstances under which they are doing it that determine whether it is exempt employment. Here the services in question, performed on farm lands as a necessary incident to the cultivation of the agricultural land and the crops produced thereon, must be classed as "agricultural labor," though somewhat similar services might not be so classed if performed under different circumstances. Irvine Co. v. California Employment Comm., supra, 27 Cal.2d 570, 582, 165 P.2d 908.

The judgment is affirmed.

SHENK, CARTER, and SCHAUER, JJ., concur.

McCOMB, Justice.

I dissent, for the reasons stated by Mr. Presiding Justice Van Dyke in the opinion prepared by him for the District Court of Appeal in Woods Irrigation Company v. Department of Employment, Cal.App. 316 P.2d 1003 [hearing granted].

GIBSON, C. J., and TRAYNOR, J., concur.



159 Cal.App.2d 216

In the Matter of the ESTATE OF Merrill Coburn CLANCY, etc., Deceased.

Frank CLANCY, Louise Clancy and Marion Atherton, Contestants and Appellants,

v.

Estelle W. CLANCY, Leslie M. Clancy and Donald Clancy, Petitioners and Respondents,

Security-First National Bank of Los Angeles and Frank B. Clancy, Co-Trustees and Respondents

Civ. 22627.

District Court of Appeal, Second District, Division 1, California.

April 8, 1958.

Rehearing Denied April 30, 1958.

Hearing Denied June 4, 1958.

Proceedings for order instructing testamentary trustees to distribute corpus of a trust. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered judgment which permitted an adopted child of testator's son to take under provisions of trust and testator's natural children appealed. The District Court of Appeal, Fourt, J., held that evidence established that adopted child was person intended by testator to take share of trust that would have gone to testator's son, had son survived, under trust instrument providing that in case of death of any of testator's children before time of final distribution, leaving lawful issue surviving, such issue shall take share of trust estate, which parent would have taken, if parent had survived.

Judgment affirmed.

1. Wills ⇐439

A holographic will executed by domiciliary of California is to be construed according to intention of testator. West's Ann.Prob.Code, § 101.

2. Wills ⇐489(1)

Where an Illinois court had construed the words "lawful issue," in an inter vivos trust created by testator in 1928 as not including individual who had been adopted by testator's son but that construction had not been made at time testator executed a California will, Illinois' construction could not be considered for purpose of ascertaining testator's intention with respect to the use of the words "lawful issue," in the California will. West's Ann.Prob.Code, § 101.

3. Executors and Administrators ⇐315(5)

Where decree of distribution repeats terminology used by decedent in his holographic will, it is duty of court, in construing decree, to look to will.

4. Wills ⇐440, 441

Where uncertainty arises upon face of a will, testator's intention is to be ascertained from words of will, taking into view circumstances under which will was made. West's Ann.Prob.Code, § 105.

5. Wills ⇐497(5)

In construing wills, there is a public policy to treat adopted children the same as blood children in absence of some indication by testator that an adopted child was to be excluded.

6. Wills ⇐497(5)

Uncertainty as to compliance with formalities required to effect a legal adoption did not preclude adopted child from taking share of adoptive father under testator's will.

7. Wills ⇐497(5)

In proceeding for an order instructing testamentary trustees to distribute corpus of a trust, evidence established that testator knew that adopted child of testator's son was not natural child of son, that testator was vitally interested and concerned about custody of child and was willing to make provision for him when his son was involved in divorce proceedings, that testator referred to adopted child as his grandson and treated him the same as natural children of his other children, and at all times up to testator's death an affectionate and close relationship existed between adopted child and testator.

8. Wills ⇐703

In proceedings for order instructing testamentary trustees to distribute corpus of trust, evidence supported finding that adopted child of testator's son was person intended by testator to take son's share of trust, had son survived, under will providing that upon death of any of testator's children before time of final distribution of trust, leaving lawful issue surviving, such issue shall take share of trust estate, which parent would have taken, if parent had survived. West's Ann.Prob.Code, §§ 101, 105.

Colvin & Schnider, Andrew E. Colvin, Jack Schnider, and F. Walter French, Santa Monica, for appellants.

Fogel, McInerny & Taft, Moe M. Fogel, Cornelius W. McInerny, Jr., and William J. Taft, Santa Monica, for respondent Donald Clancy.

FOURT, Justice.

This is an appeal from an order instructing the testamentary trustees to distribute the corpus of a trust to appellants Frank Clancy, Louise Clancy and Marion Atherton (hereinafter referred to as appellants), who are the surviving children of the trustor, Merrill Coburn Clancy, and to Donald Clancy, as the "lawful issue" of Leslie M. Clancy, a child of Merrill Coburn Clancy, who survived him but died prior to distribution of the trust.

The decedent Merrill Coburn Clancy died in 1949, and his holographic will dated January 9, 1947, contained the following provisions:

"Third: I give and bequeath to *my grand children* Marjorie, Sister, Bob, *Don* and my wife's grandchildren Jean and Peggy, each the sum of One Thousand ($1000.00) in cash or securities to be selected by my Executors." (Emphasis added.)

"Eighth: * * * *C* Upon the death of my said wife, said Trustees shall pay deliver and convey all of the remainder of said trust estate in equal parts to my children Leslie, Marion, Frank and Louise.

"*D* In case of the death of any of my said children before the time of final distribution of my said trust estate leaving lawful issue surviving, such issue shall take the share of my said trust estate, which the parent would have taken, if the parent had survived.

"*E* In case of the death of any of my said children before the time of final distribution of my said trust estate leaving no lawful issue surviving, the share which one of my children so dying would have received, if he or she had survived shall go to enhance and increase the shares of the survivors of my said children and the lawful issue if any of my said children who may have died leaving lawful issue surviving, in equal shares per stirpes and not per capita."

This will was admitted to probate and the decree of distribution establishing the trust which was to continue for the period of the natural life of Estelle W. Clancy, decedent's widow, was signed by Judge Stanley Mosk on April 22, 1952. The decree of distribution contained the following provisions:

"*D.* Upon the death of the said Estelle W. Clancy, the entire remainder of said trust estate shall be divided in four equal shares, one share each for Leslie M. Clancy, Marion C. Atherton, Frank Clancy and

Louise Clancy, and said shares are to be conveyed and distributed to said persons.

"*E.* In the event that any of said persons shall be deceased at the time of said final distribution of said trust estate, leaving lawful issue surviving them, such issue shall take the share of said trust estate which the parent would have taken had the said parent survived.

"*F.* In the event of the death of any of the four named persons: Leslie M. Clancy, Marion C. Atherton, Frank Clancy and Louise Clancy, before the time of final distribution of said estate, and their leaving no lawful issue surviving them, then the share which said deceased person would have received if he or she had survived, shall go to enhance and increase the shares of the survivors of said persons, and the lawful issue of any of said persons, who may have died leaving lawful issues surviving, in equal shares per stirpes and not per capita."

Leslie M. Clancy died June 29, 1954, and Estelle W. Clancy died August 25, 1955.

The "Third and Final Account * * * Petition for Distribution of Trust Estate * * *," signed by Frank B. Clancy and The Security-First National Bank of Los Angeles, as Trustees, was filed January 20, 1956, and contained the following provisions:

"That Leslie M. Clancy predeceased the life tenant, Estelle W. Clancy, and that in accordance with the last Will and Testament of the decedent and the decree establishing the trust therein the share which he would have taken shall go to his lawful issue surviving him and otherwise it shall go to increase proportionately the shares of the said Frank B. Clancy, Louise Clancy and Marian C. Atherton; that petitioners are informed and believe and therefore allege that Leslie M. Clancy left no blood issue surviving him but that one Donald Clancy represents and claims to be the adopted son of the said Leslie M. Clancy and entitled to take and receive the distributive share of the said Leslie M. Clancy.

"That by reason of the claim of the said Donald Clancy to the share of the said Leslie M. Clancy a controversy has arisen between him and the other remaindermen and that petitioners are unable to determine to whom distribution of the share of Leslie M. Clancy should be made."

Donald Clancy, (hereinafter called respondent) filed an answer thereto, and also filed a petition on February 15, 1956, alleging as follows:

"VI

Your petitioner, Donald Clancy is the person designated by the said Will, Exhibit 'A' hereof, and the Decree of Distribution, Exhibit 'B' hereof, to receive the share of the trust estate which would have gone to Leslie M. Clancy, son of said decedent, had he survived Estelle W. Clancy."

Respondent prayed for distribution to him of one-fourth of the trust properties, together with one-fourth of the undistributed income, after payment of proper expenses and fees.

Appellants filed an answer to the affirmative statements in respondent's answer, and also filed an answer on April 25, 1956, to respondent's petition, which contained the following:

"I

"In answer to paragraph VI of said petition, these answering parties, deny that Donald Clancy is the person designated by the said Will or Decree of Distribution to receive the share of the trust estate which would have gone to Leslie M. Clancy, son of said decedent, had he survived Estelle W. Clancy.

"II

"Your petitioners further allege that upon the death of Leslie M. Clancy, he did not leave surviving him any 'lawful issue', that there is therefore no 'lawful issue' surviving Leslie M. Clancy to take the share which he would have taken under the Will of the late Merrill Coburn Clancy.

"III

"Your petitioners, Frank Clancy, Louise Clancy and Marion Atherton, named in the Will and Decree of Distribution of the estate of Merrill Coburn Clancy do in effect dispute and contest the right of Donald Clancy to take any portion of said trust estate."

The matter was heard, and the following findings of fact were made by the trial court:

"9. That said deceased Leslie M. Clancy left surviving him no natural children or other issue of his body.

"10. That Leslie M. Clancy left surviving him Donald Clancy whom Leslie M. Clancy believed to be his duly and lawfully adopted child. That Donald Clancy was reared by Leslie M. Clancy as his child and at all times said Leslie M. Clancy and Donald Clancy bore toward each other the relationship of father and son respectively.

"11. That said Merrill Coburn Clancy, deceased, in his lifetime and at the time of making his will, believed that Donald Clancy was the duly and lawfully adopted child of his son, Leslie M. Clancy.

"12. That said Merrill Coburn Clancy, at all times, showed the same love and affection towards said Donald Clancy as if he were the natural child of his son, Leslie M. Clancy, and said Merrill Coburn Clancy in his will designated said Donald Clancy as his grandchild.

"13. That Estelle W. Clancy died on or about the 25th day of August, 1955.

"14. That Donald Clancy is the person intended by said Merrill Coburn Clancy, and is the person who by the terms of the said will of said Merrill Coburn Clancy, deceased, was intended by said Merrill Coburn Clancy, to take the share of the trust estate of said Merrill Coburn Clancy that would have gone to Leslie M. Clancy, son of said Merrill Coburn Clancy, had said Leslie M. Clancy survived distribution of said trust.

"15. That said Donald Clancy is the person designated by the will of said Merrill Coburn Clancy, deceased, and the Order of Distribution in the estate of said deceased, as the lawful issue of Leslie M. Clancy, deceased.

"16. That at the date of death of said Estelle W. Clancy, the beneficiaries of the trust estate of Merrill Coburn Clancy, deceased, and their respective interests in said trust estate at said time were as follows:

"a. Frank B. Clancy	one-fourth (¼) interest
"b. Louise Clancy	one-fourth (¼) interest
"c. Marion C. Atherton	one-fourth (¼) interest
"d. Donald Clancy	one-fourth (¼) interest"

and on January 4, 1957, an order was made for distribution of the trust estate, as follows:

"It is further ordered, adjudged and decreed that the life tenant having died on August 25, 1955, the said trust terminated and the net estate upon such termination vested as follows:

"One-fourth thereof to Frank B. Clancy;
"One-fourth thereof to Louise Clancy;
"One-fourth thereof to Marion C. Atherton; and
"One-fourth thereof to Donald Clancy."

In this appeal it is contended that the decree of distribution and the will are clear and unambiguous; that it was error to permit extrinsic evidence to be introduced to disclose the intention of decedent; that the evidence was insufficient to support the findings of fact; and that respondent, in order to qualify under the will as the "lawful issue" of Leslie M. Clancy had the burden of proving every element of a formal adoption.

Appellants argue that "To reach the conclusion of the trial court that Merrill Coburn Clancy 'intended' and 'designated' Donald Clancy to take the share of the trust that would have gone to Leslie, it is necessary to impeach the decree of distribution which provides in plain language that a deceased 'parent's' share shall go to his or her 'lawful issue,' which under many decided cases would not have included an adopted child, if an adoption had been established."

[1, 2] This argument assumes, as appellants contend, that the words "lawful issue" are clear and unambiguous, and include only actual physical offspring. Appellants have also set forth in their reply brief that "lawful issue" was recently construed by an Illinois court in an inter vivos trust created in 1928 by the decedent Merrill Coburn Clancy as not to include respondent. Suffice it to say that a holographic will executed in California in 1947 by a domiciliary of California is to be construed according to the intention of the testator. Probate Code, § 101. Inasmuch as the determination of the Illinois court had not been made at the time the will in question was executed, it cannot be considered for the purpose of ascertaining his intention.

[3] The decree of distribution repeats the terminology used by decedent in his holographic will. Under such circumstances, it has been held to be the duty of the court, in construing the decree, to look to the will. See In re Estate of Lockhart, 21 Cal.App.2d 574, 579, 69 P.2d 1001, and cases cited thereat.

[4] It is fundamental in interpreting wills in California that when an uncertainty arises upon the face of a will, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Probate Code, § 105. That the use of the words "lawful issue" may create such an uncertainty was established in Re Estate of Pierce, 32 Cal.2d 265, 196 P.2d 1. It was stated therein (32 Cal.2d at page 273, 196 P.2d at page 6): "As a layman using the words 'lawful issue' in a holographic will he may have intended to distinguish legitimate from illegitimate children, adopted from natural children, legitimate children of the blood of the testator from adopted or illegitimate children, or he may have intended to include children of his legatees that they regard as their lawful issue. In view of the uncertainty appearing on the face of the will, it was proper for the trial court to admit evidence of the circumstances preceding the execution of the instrument to determine what the testator meant by 'children (*lawful issue*)' in the first provision quoted above, and by 'grandchildren being the *lawful issue*' in the second provision quoted above." In the same case, with reference to the inclusion of an adopted child within the meaning of "lawful issue," it was stated (32 Cal.2d at page 271, 196 P.2d at page 5), "Moreover, the meaning of the term has frequently been determined by the circumstances surrounding the execution of the will, such as the testator's knowledge of the adoption and his approval or disapproval thereof (citing cases and authorities), or the testator's knowledge of the inability of persons, whose 'issue' are provided for in the will to bear children."

[5] In considering whether adoption statutes may be considered in ascertaining whether "lawful issue" includes adopted children, and in deciding recently in Re Estate of Heard, 49 Cal.2d 514, 319 P.2d 637, that "issue" or "lawful issue" may include adopted children, the court stressed the public policy to treat adopted children the same as blood children in the absence of some indication by the testator that an adopted child was to be excluded. In this case, the court, speaking through Mr. Justice Carter, discussed the genetic theory and the theory that "natural inclinations and affection" derive from family experience and contact, and stated (49 Cal.2d at page 521, 319 P.2d at page 642), "On the family experience and contact theory, the relatives of the adoptive parents, lineal and collateral, become the relatives of the adopted child. Normally, they are the only grandparents, uncles, aunts, brothers, sisters and cousins he knows. His genetic grandparents, uncles, aunts, brothers, sisters and other relatives in a sizeable percentage of cases of illegitimate birth will not even have been aware of his existence; and in many other instances will have known him only very briefly prior to his surrender for adoption as a very young infant."

[6] In view of the uncertainty as to compliance by Leslie M. Clancy and Bea-

trice Clancy with the formalities required to effect a legal adoption of Donald Clancy, the problem of whether respondent could qualify for inclusion within the term "lawful issue" is simplified by the recent decision of the Supreme Court in Re Estate of Stanford, 49 Cal.2d 120, 315 P.2d 681.

In this case, speaking through Mr. Justice Carter, the Supreme Court stated (49 Cal.2d at page 135, 315 P.2d at page 689), "It has been the policy of this state, at least since the adoption of the Civil Code, to accord to adopted children the same status as natural children." The effect of compliance or non-compliance with the statutory formalities pertaining to adoption was also considered, the court stating (49 Cal.2d at page 142, 315 P.2d at page 694), "While there may have been some irregularities in the proceeding they are not of sufficient importance upon which to base a collateral attack. * * * The adoption has stood for many years, since 1924, without attack by anyone. See In re Estate of Smith, 86 Cal.App.2d 456, 195 P.2d 842. *Standford University has not established that the adoption was void and it must be presumed to have been valid.* In re Estate of Smith, supra, 86 Cal.App.2d 456, 195 P.2d 842. The effect of adoption under the New York law and construction of the will is not important. We are not here concerned with a question of inheritance but with the construction of a will, and whether 'child or children' includes adopted persons. The construction of the will is governed by California law (see Prob.Code, § 100; Rest., Conflicts, Sec. 308)." (Emphasis added.)

[7] The evidence presented in this case indicates that at all times decedent knew that respondent was not the natural child of his son Leslie M. Clancy; that decedent was vitally interested and concerned about the custody of the child and was willing to make provision for him in 1929 when his son Leslie M. Clancy and his then wife were involved in divorce proceedings; that decedent referred to respondent as his grandson and treated him the same as the natural children of his other children; and that at all times up to decedent's death an affectionate and close relationship existed between decedent and respondent.

[8] The trial court heard the testimony and made express findings as to what decedent intended. There is substantial evidence to support the findings.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



159 Cal.App.2d 294

DYNAMIC INDUSTRIES COMPANY, a corporation, Plaintiff and Appellant,

v.

CITY OF LONG BEACH, a municipal corporation, Defendant and Respondent.

Civ. 22507.

District Court of Appeal, Second District, Division 3, California.

April 9, 1958.

Rehearing Denied April 28, 1958.

Hearing Denied June 4, 1958.

Action against city for declaratory relief under a purported oil production agreement. The Superior Court, Los Angeles County, Charles T. Smith, J., entered judgment for city and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where charter of City of Long Beach provided that city should not be bound by any contract unless in writing, by order of the council, and signed by the city manager and an alleged contract granting plaintiff right to drill for oil on certain tidelands owned by the city in trust was not signed by the city manager, such contract was not binding upon the city, notwithstanding fact that such contract was allegedly made by it as trustee.

Judgment affirmed.

1. Municipal Corporations ⇐244(2)

When a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contracts executed in accordance with such charter provisions, and such rule applies equally to contracts made by the city in a governmental or proprietary function.

2. Estoppel ⇐62(6)
Municipal Corporations ⇐249

When a charter provision containing an express limitation upon the mode in which the city may contract has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the contract.

3. Municipal Corporations ⇐243

Where charter of City of Long Beach provided that city should not be bound by any contract unless in writing, by order of the council, and signed by the city manager and an alleged contract granting plaintiff rights to drill for oil on certain tidelands owned by the city in trust was not signed by city manager, such contract was not binding upon the city, notwithstanding fact that such contract was allegedly made by it as trustee. St.1911, p. 1304; St.1925, p. 235 as amended by St.1935, p. 793; Submerged Lands Act, § 3(c), 43 U.S.C.A. § 1311(c); West's Ann.Const. art. 11, § 6.

4. Municipal Corporations ⇐243

Fact that a party expended a substantial sum in reliance upon action of city council in approving a contemplated contract with such party, was immaterial in determining whether a valid contract had been entered into by the city, in view of city charter limitation providing that contracts shall not be binding upon the city unless signed by the city manager.

5. Declaratory Judgment ⇐316

An action for declaratory relief does not lie when a complaint alleges no facts showing an enforcible, contractual right in the plaintiff and only a judgment for the defendant can be entered, notwithstanding fact general allegations of such complaint might state grounds for declaratory relief.

John W. Preston, Jr., Warner, Peracca & Cowan, Los Angeles, for appellant.

Walhfred Jacobson, City Atty., Joseph B. Lamb, Asst. City Atty., Long Beach, for respondent.

SHINN, Presiding Justice.

The present action is against the City of Long Beach for declaratory relief under a purported oil production agreement. Plaintiff Dynamic Industries appeals from a judgment based upon an order sustaining, without leave to amend, a general demurrer to its amended complaint, hereinafter referred to as the complaint. The facts alleged therein are as follows: By a statute enacted in 1911, St.1911, p. 1304 and amended in 1925 and 1935, St.1925, p. 235, St.1935, p. 793, the State of California granted to defendant all the tidelands and submerged lands located within the municipal boundaries, subject to a public trust for the improvement of commerce, navigation and fisheries. At all times thereafter, defendant has been the owner in fee simple of its tidelands and submerged lands in trust for the purposes named in the statutes and the city has had the authority to lease said lands and to enter into contracts for the recovery of oil, gas and other hydrocarbons therefrom.

The complaint alleges that on June 9, 1941, plaintiff made a written offer to the city to recover the oil and gas from its tidelands over a period of 35 years; the offer was submitted in the form of a detailed agreement under which the company was to be engaged by defendant as an independent contractor. Upon communication of the offer to the city council, a resolution was adopted authorizing the employment of two independent consultants in geology and petroleum engineering to examine the proposal; their compensation, amounting to $1,200, was

paid by the company at defendant's request. The report of the consultants was favorable and the council directed the municipal authorities to negotiate with plaintiff, using the offer as a basis. After conferring with representatives of the company, defendant's city attorney and city manager agreed upon the terms of a draft contract which the latter submitted to the council on March 16, 1942, with his recommendation that it be approved. The draft was verbally identical to the offer of the preceding June; each paragraph was typed on a separate sheet of paper to facilitate revision and many of the pages were left partially blank. An unexecuted copy, with space for the signatures of plaintiff's president and defendant's city manager, is attached to the complaint as an exhibit. The draft was read at a regular meeting of the Long Beach City Council held March 17th, and approved, paragraph by paragraph, as so read. The council adopted a resolution which reads in part: "Now, Therefore, Be It Resolved that the City of Long Beach accept said proposal and the City Attorney be, and he is hereby authorized and directed to prepare a proper form of contract conforming to the plan and methods proposed by Dynamic Industries Company for the development of said submerged lands. The City Attorney is further authorized and directed to prepare said contract and submit the same to the City Council as soon as possible after this adoption date of this resolution." Plaintiff alleges that "the directive given to the City Attorney, as set forth in the last quoted language, meant only that the City Attorney was required to have said contract re-typed so that there would be no blank spaces or parts of pages therein * * * the City Attorney was not thereby authorized to make any changes in the wording of said contract."

It is next alleged that the city attorney attempted to settle the exact boundaries of the lands to be developed under the contract, which he was directed to do by the city council. The city attorney reported to the council from time to time, and as late as August 1945, that he had been unable to solve the boundary questions submitted to him in 1942. And, in October 1945, the United States brought an original suit against the State of California in the Supreme Court of the United States, claiming paramount title to all tidelands underlying the state's Pacific boundaries. That action was determined in favor of the United States in 1947. [332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889; 332 U.S. 804, 68 S.Ct. 20, 92 L.Ed. 382; 334 U.S. 855, 68 S.Ct. 1517, 92 L.Ed. 1776]. In 1950, Congress enacted the so-called "Submerged Lands Act," whereby the United States relinquished to the several states the ownership of their respective tidelands and submerged lands. One section of the statute provides: "The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease * * *." 43 U.S.C.A. § 1311(c). The constitutionality of the act was challenged by the States of Alabama and Rhode Island and was upheld by the Supreme Court on April 26, 1954, State of Alabama v. State of Texas, 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689.

It is further alleged that defendant could not place the company in possession of its tidelands and submerged lands, as provided by the contract, until April 26, 1954, and that the company could not begin its drilling operations until that date, although it has been ready, willing and able to do so at all times since March 17, 1942. However, in reliance upon the council's resolution, plaintiff incurred and paid liabilities in the amount of $9,125 which, it alleges, were "incident and necessary to the performance of its duties and obligations in relation to the contract."

There follow allegations as to an actual controversy between the parties, to wit, that plaintiff claims it entered into a binding agreement with defendant, which defendant denies. The prayer is for a declaration that the alleged contract is valid and subsisting and that the city is obligated to place Dynamic Industries in possession of its tidelands and submerged lands so that it may construct its facilities and proceed with drilling operations pursuant to its contract.

The question for decision is whether the complaint states a cause of action on any theory.

In urging a reversal of the judgment, plaintiff contends that the city council accepted its offer by adopting the resolution of March 17, 1942, and that the offer and acceptance created a binding agreement. Defendant contends, on the other hand, that the proposed contract was never signed by the city manager, as its charter requires, hence the action taken by the council was not binding upon the city. We agree with defendant's contention.

Under Article XI, Section 6 of the California Constitution, as amended in 1914, chartered cities are empowered "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

Long Beach is a chartered city. Section 293 of its charter provides, in material part, as follows: "The City of Long Beach shall not be and is not bound by any contract, except as otherwise provided herein, unless the same is made in writing, by order of the City Council, and signed by the City Manager or by some person in behalf of the City authorized so to do by the City Manager; provided, that the approval of the form of the contract by the City Attorney shall be endorsed thereon before the same shall be signed on behalf of the City * * *."

An exception is provided in Section 294, which empowers the city manager, upon the submission of bids, to enter into contracts on behalf of the city or one of its departments with the lowest responsible bidder; where actual emergency work is required, the city council may authorize him, by majority vote, to enter into contracts for labor and materials either orally or in writing. It is not claimed that this exception applies to the present case.

[1, 2] The contract whose validity plaintiff seeks to establish was not signed by the city manager, as the charter requires. It could not have been signed since the area to be included was never defined nor approved by the city attorney or the council. It is well settled that when a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contracts executed in accordance with the charter provisions; in other words, where the statute provides the only mode by which the power to contract shall be exercised, the mode is the measure of the power. Reams v. Cooley, 171 Cal. 150, 152 P. 293; Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 P. 465. The rule applies equally to contracts made by the city in a governmental or a proprietary function. City of Pasadena v. Estrin, 212 Cal. 231, 298 P. 14. When the charter provision has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the contract. Reams v. Cooley, supra, 171 Cal. 150, 153, 152 P. 293; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 353, 291 P. 839, 71 A.L.R. 161.

[3] Plaintiff makes the point that the city may enforce its own regulations only as to municipal affairs, and that the ownership of tidelands under a trust for the benefit of the people of the state is not a municipal affair, citing Mallon v. City of Long Beach, 44 Cal.2d 199, 282 P.2d 481. Therefore, it is argued, defendant's power to contract with respect to its tidelands is to be measured by the general law of contracts as enforced in the state, under which the council resolution was effective an an

acceptance of plaintiff's offer. The argument cannot be maintained.

Defendant's charter does not distinguish between contracts made by the city in the ordinary course of business and contracts made by it as trustee. Whatever the subject matter of a municipal contract, it is manifest that the mode in which a city chooses to contract is a municipal affair, and we see no basis for reading into Section 293 an implied exception, or for disregarding its prohibitory language.

[4] The fact that plaintiff expended a substantial sum in reliance upon the 1942 resolution is immaterial in view of the charter limitation. As Chief Justice Field said in Zottman v. City and County of San Francisco, 20 Cal. 96, at pages 104–105, quoting from a New York decision: "It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard."

[5] Plaintiff contends that the complaint stated grounds for a declaration of his rights. But the general allegations are controlled by the specific facts alleged as the basis of the rights sought to be established. An action for declaratory relief does not lie when a complaint alleges no facts showing an enforcible contractual right in the plaintiff and only a judgment for the defendant can be entered. International Brotherhood of Teamsters, etc., v. Bekins Van & Storage Co., 135 Cal.App.2d 692, 697, 288 P.2d 181; Gillies v. La Mesa, etc., Irr. Dist., 54 Cal.App.2d 756, 129 P.2d 941. Those facts would not have justified granting Dynamic Industries the relief sought, or any relief, and the complaint clearly could not have been further amended to state a cause of action for declaratory relief.

The demurrer was properly sustained without leave to amend.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



159 Cal.App.2d 265

Alice C. ROCRAY, Plaintiff and Respondent,

v.

PASADENA CITY LINES, Inc., Defendant and Appellant.

Civ. 22649.

District Court of Appeal, Second District, Division 1, California.

April 9, 1958.

Action for injuries sustained by the plaintiff while boarding a bus. From a judgment of the Superior Court, Los Angeles County, and an order denying a motion for a new trial, Walter R. Evans, J., the defendant appealed. The District Court of Appeal, Lillie, J., held that the order denying the motion for new trial was not appealable, that the evidence sustained findings as to bus driver's negligence and that plaintiff's injuries were a result of the accident and that alleged error in counsel's references to a casualty company claims manager as being connected with the bus company were not prejudicial.

Judgment affirmed and the attempted appeal from the order denying the motion for a new trial dismissed.

1. Appeal and Error ⇐110

An order denying motion for new trial is not appealable. West's Ann.Code Civ. Proc. § 963.

2. Carriers ⇐280(1)

A bus company as a common carrier is not an insurer of absolute safety of its passengers but has duty to provide utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose and exercise to that end a reasonable degree of skill. West's Ann.Civ. Code, § 2100.

3. Carriers ⇐318(8)

In action against bus company for injuries sustained by passenger from premature closing of bus doors while passenger was boarding bus, evidence of circumstances sustained finding that bus driver was negligent.

4. Appeal and Error ⇐930(1)

On appeal, evidence and reasonable inferences therefrom are construed most strongly in favor of the respondent.

5. Appeal and Error ⇐996

When two or more inferences can reasonably be deduced from facts, reviewing court may not substitute its deductions for those of jury or trial court.

6. Damages ⇐185(1)

In action against bus company for injuries sustained by passenger as result of premature closing of bus doors as she was boarding bus, evidence, although referring principally to left hand and left side of passenger's body, sustained finding that the accident was proximate cause of injuries to passenger's right hand and wrist.

7. Damages ⇐134(3)

$2,721.50 for injuries to woman in boarding bus which required medical treatment for a year and nine months and surgery on her right hand, with permanent impairment of earning capacity, was not excessive.

8. Trial ⇐133(6)

In action against bus company for injuries sustained by passenger, reference by plaintiff's counsel in opening statement and direct examination to a person, who was actually claims manager for a casualty company, as being connected with the bus company was not prejudicial, in view of trial court's instruction to disregard reference to such person and in view of absence of evidence that he was with the bus company.

9. Appeal and Error ⇐1170(6)

In action against bus company for injuries sustained by passenger, references by plaintiff's counsel to person who contacted plaintiff several days after accident and sent her to a doctor as being connected with the bus company, although he was actually connected with a casualty company, was not prejudicial error where record did not indicate that such references affected the final result. West's Ann.Const. art. 6, § 4½.

Ronald A. Burford, Los Angeles, for appellant.

Elmer Low and Lester V. Peterman, Pasadena, for respondent.

LILLIE, Justice.

Defendant Pasadena City Lines, Inc., appeals from a $2,721.50 judgment in favor of plaintiff in her action for damages arising out of a bus accident. It is alleged in the complaint that she was a passenger waiting to board the defendant's bus; that the driver negligently failed to operate the motor bus in a careful and prudent manner with due regard to her safety and welfare as she boarded the vehicle, by causing the doors to open and close several times striking her body; and that, as a proximate result of the defendant's negligence, she suffered injury to her right hand, wrist and arm. In addition to a general denial, defendant, in its answer, set out an affirmative defense, that plaintiff so negligently conducted herself while attempting to board the bus that the injuries, if any, she suffered were proximately caused by her own negligence.

The matter was tried before a jury, and based on its verdict, judgment was entered against the defendant in the sum of $2,721.50. The trial court subsequently denied defendant's motion for a new trial. From such judgment and the order denying

its motion for new trial, defendant has appealed.

[1] Since the order denying the motion for new trial is not appealable (Code Civ. Proc. § 963; Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515; Toshio Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910) plaintiff's appeal therefrom must be dismissed.

On August 13, 1954, plaintiff, a prospective passenger, was waiting at a bus stop for defendant's motor bus. She testified that the bus stopped directly in front of her body with the doors facing her. The driver opened the doors and as five or six passengers alighted she took one step to the right to let them pass. As soon as they had descended she stepped back to the bus and faced the open doors. Standing directly in front of them, she reached out with her left hand to the partition on the left edge of the door to aid her in pulling herself onto the bus. As she stepped onto the first step and started to move her body into the bus the doors closed on her, striking the left side of her head and left arm. Immediately, the driver opened them and, as he did so, the folds of the door caught her left hand. She yelled, "My hand, my hand", and the driver, in order to release her hand, closed the door a second time, again striking the left side of her head. Quickly he opened the door and plaintiff's left hand was again caught in the door. A third time the driver closed the doors and reopened them, at which time plaintiff stepped into the bus. She said that it all happened so suddenly that she did not remember whether the doors had been in contact with the right side of her body. She does remember that her left hand was caught twice in the same place in the folds of the door, and that the edge of the door hit the left side of her head and arm. At the trial she testified that she did not remember too clearly about her right side or what she did with her right hand, but certain prior testimony by way of deposition was read to the jury, wherein she gave the following responses to the following questions:

"Q. Was your (left) hand caught in approximately the same position each time? A. Yes.

"Q. * * * Were any other parts of your body injured, other than your left hand and your head, where it was struck by the door? A. Yes.

"Q. What other parts of your body? A. My right arm, my right hand.

"Q. And what struck or injured your right hand? A. My right hand, trying to help my left hand; the only way I can figure it out."

Plaintiff testified that the closing and opening of the doors occurred very suddenly, and so quickly that her body was struck in approximately the same place each time. She was so stunned and nervous she could not recall going home. She further testified that when she reached her home she was suffering from shock and was so "shaky" that she had to go to bed.

Before the accident plaintiff had no trouble with her right wrist, hand, elbow or shoulder. Within one-half hour after the accident she noticed swelling and felt pain in her right hand. The next day she developed pain in the right wrist, elbow and shoulder. Seven days after the accident, Mr. Burt Strain called her and at his request she went to his office to talk with him about the accident. She explained how it had occurred, complained of the pain and swelling in the right hand, and showed him her right hand and wrist. Mr. Strain sent her to Dr. Charles W. Rasmussen, whom she consulted the next day. He treated her right wrist and hand and put a splint on it. After three weeks he removed the splint and placed her entire right hand and wrist in a cast extending to the elbow, which he left on the arm for eight weeks. Subsequently, he treated her right hand, wrist, elbow and shoulder with injections and heat for nearly a year, after which he sent her to his assistant, Dr. Adolph A. Erickson, who performed surgery on the right wrist.

Plaintiff's left hand sustained only a small scratch, for which she did not seek

recovery, nor does she claim any injury to the left side of her head or body.

Dr. Erickson, an orthopedic specialist, testified that he saw plaintiff about a year after the accident; that from her history and his examination he diagnosed the condition of the right hand as epicondylitis, an irritation to the covering of the bone in the area where the extensor muscles of the hand and wrist originate; and traumatic neuritis; and that shortly after examining her he found a rupture of the extensor carpal sheaths of the right wrist and recommended surgical repair. On October 7, 1955, Dr. Erickson operated on plaintiff's right wrist. At the trial, he testified that it was his opinion that plaintiff sustained injuries to the lateral epicondylar region of the elbow, at the right elbow, and to the extensor tendon and sheaths at the dorsum of the right wrist, as a proximate result of traumatic force arising out of the accident. He further testified that no permanent disability would result from the epicondylitis, although he believed plaintiff would probably need more treatment. As to the back of the right hand, it was Dr. Erickson's opinion that the lack of sensation and pain would be permanent, impairing her future earning capacity.

Plaintiff, at the trial, complained of pain in the right elbow and a numbness through the back of the right hand and wrist. She testified to a loss of wages before trial, and the manner in which she is now disabled in her employment as a waitress.

Defendant at no time denied that the driver opened and closed the doors several times and that plaintiff's left hand was caught in the folds of the door. The driver, however, testified that when he stopped the bus, passengers alighted, and that although he looked through the open doors after the passengers had left, he did not observe the plaintiff. He shut the doors and prepared to leave, but looking up, he saw plaintiff approach. He then opened the door to allow her to enter. He did not remember seeing her run to the bus or hearing her knock on the closed door, although defendant's witness, Virginia Stapelton, who was seated on the bus, testified she heard plaintiff bang on the door.

Defendant, appellant herein, contends that the evidence was insufficient to justify the jury's finding of liability against it, and that the injuries complained of were the proximate result of the accident.

[2] At the outset, it is conceded by appellant that it is a common carrier operating busses for the transportation of paying passengers. Although as a common carrier appellant is not an insurer of the absolute safety of its passengers, by law it has the duty to provide the utmost care and diligence for the safe carriage of its passengers, must provide everything necessary for that purpose, and exercise to that end a reasonable degree of skill (Civil Code, sec. 2100).

[3] There is no evidence in the record that there existed any obstruction to the bus driver's view. Considering the entire record it was entirely reasonable for the jury to believe that the driver was negligent in not observing the presence of Mrs. Rocray as she was about to board the bus; or that he was negligent in closing the door on a portion of her body while she was not yet completely aboard or while she was outside standing on the first step with her hand up about to get on the bus; or that the driver was negligent in failing to observe her as she boarded the bus to see that she was safely aboard before the doors were closed; or if he did look in her direction he was negligently inattentive in not seeing her. From all of the circumstances surrounding the happening of the accident it was just as reasonable for the jury to have inferred negligence on the part of the defendant as it was for it to have inferred that through lack of ordinary care, the plaintiff alone proximately caused the injuries of which she complains.

[4, 5] This is a case in which the jury determined substantial questions of fact in favor of the plaintiff. It believed that the bus driver was negligent and there is ample evidence in the record to justify such a finding. On Appeal, evidence and the rea-

sonable inferences therefrom should be construed most strongly in favor of the respondent. When two or more inferences can reasonably be deduced from the facts the reviewing court is without power to substitute its deductions for those of the jury or trial court. Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 280 P.2d 187.

[6] The same must be said concerning the issue of proximate cause and damages. Although plaintiff has no clear memory of the door coming in contact with her right side, the evidence shows that the incident occurred suddenly and within a very short period of time. It is reasonable to believe that in the excitement of trying to free her left hand, the plaintiff did not clearly remember what she did with her right hand, which she thinks she used to aid her in freeing the left one. This most certainly would have been a normal reaction. If she used her right hand in such a manner, then it may be inferred that her right hand was either near the door when it closed or in the folds of the door when it opened, which explains the manner in which the right hand received the injury which in Dr. Erickson's opinion was the probable result of traumatic force caused by the accident.

[7] Having found from the record that the jury might reasonably infer from all of the evidence that the injuries to her right hand, wrist, arm and elbow, and the medical treatment rendered therefor were the proximate result of the accident, it can hardly be said that a judgment for $2,721.50 was excessive. Taking into account the evidence relating to plaintiff's pain and suffering, her extensive medical treatment for approximately a year and nine months, surgery on her right hand, her loss of wages, the injuries to her right hand, wrist, arm and elbow, and the permanent impairment of her earning capacity, it appears that the sum awarded by the jury was not only moderate but wholly justified.

[8] Appellant's next contention arises out of counsel's reference to one Burt Strain in both direct examination and argument. It complains that the mention of Mr. Strain by counsel for plaintiff constituted misconduct prejudicial to the rights of appellant. Because appellant cites instances throughout the trial, we have carefully examined the trial record in this regard.

Mr. Burt Strain was Claims Manager for the Pasadena office of the Transit Casualty Company. Shortly after the accident he contacted the plaintiff and asked her to come to see him. She went to his office and told him how the accident occurred, showed him the swelling in her right hand, and complained to him of pain in the right hand, wrist and arm. He sent her to Dr. Charles Rasmussen who treated her and subsequently sent her to his assistant, Dr. Adolph A. Erickson, for surgery. She remained under Dr. Rasmussen's care for a little over a year. Mr. Strain arranged for the casualty company to pay for Dr. Rasmussen's services. Dr. Rasmussen was not called as a witness at the trial. At all times Mrs. Rocray was under the impression that Mr. Strain was an agent of the defendant Pasadena City Lines, Inc. Her counsel also believed that he was an employee of the defendant until he had proceeded with his opening statement to the jury.

Reference to Mr. Strain related only to his observation of plaintiff's condition seven days after the accident, his recommendation to her that she see Dr. Rasmussen, plaintiff's visit to the doctor and subsequent treatment by him, and her failure to seek recovery for the charge made by Dr. Rasmussen for his services. At no time was Mr. Strain identified as having any connection with the Transit Casualty Company, and although he was present in the court room during the trial he was not called as a witness.

Appellant's chief complaint concerns counsel's references to Mr. Strain in his opening statement to the jury, during his direct examination of Mrs. Rocray, and in his closing argument.

In his opening statement, plaintiff's attorney advised the jury that within a short

time after the accident Mr. Burt Strain "of Pasadena City Lines" got in touch with the plaintiff and asked her to come to his office; that she did so, and he told her to see Dr. Rasmussen; that she remained under Dr. Rasmussen's care for a little over a year; that during that period of time she had been in communication with Mr. Strain and did not obtain a lawyer until shortly before the one year statute of limitations had run. He further stated that payment for the services of Dr. Rasmussen were arranged and paid for by Mr. Strain, and that plaintiff was making no claim for medical expenses for services rendered by Dr. Rasmussen for that year. Objection to this statement was overruled by the court.

On direct examination, plaintiff's attorney asked her:

> "Q. Before you went to Dr. Rasmussen, did you see anybody from the Pasadena City Lines? A. Yes, I got a call to come to see Mr. Strain."

Defendant's motion to strike was denied and objection to the question was overruled. Plaintiff then testified that she saw Mr. Strain; had certain dealings with him, and received treatment for her right hand and arm for about a year from Dr. Rasmussen; and explained to the jury in detail the kind of treatment given by him, including the splint on her right hand and subsequent cast on the right hand and elbow.

Mr. Strain's name was thereafter mentioned on several occasions by plaintiff, but without further identification, and then only to point up time and other instances. Later Mr. Strain, who was seated in the court room, was asked by counsel for the plaintiff to stand for identification only, when counsel, on cross-examination asked defendant's witness, Virginia Stapelton if she had talked to him before testifying. No evidence was submitted by either side as to the status of Mr. Strain.

In his closing argument, plaintiff's attorney commented to the jury: "There is sitting in the court room a Mr. Strain of the bus company * * *." This statement was objected to and a motion to strike was made. In sustaining the objection and granting the motion, the trial court said: "I know of no evidence that Mr. Strain is with the bus company. The jury will be admonished to disregard it."

Appellant now complains that these references to Mr. Strain throughout the trial, together with other unrelated comments of counsel, were prejudicial to its rights and prevented it from having a fair trial.

The record discloses that at the time plaintiff's counsel first mentioned Mr. Strain in his opening statement to the jury, he believed that he was an employee and agent of the defendant and intended to prove it during the trial. He told the trial judge at the bench, outside the presence of the jury, that Mrs. Rocray had told him Mr. Strain was employed by the Pasadena City Lines. Counsel for the defendant told him this was not so and that he was actually an agent of the Transit Casualty Company.

However, in addition to giving plaintiff's counsel an opportunity during the trial to prove agency if he could, the trial court permitted reference to Mr. Strain in the opening statement on the theory that the jury had a right to an explanation of the reason she consulted Dr. Rasmussen, the complaints and symptons she gave him within a week of the accident and for a year thereafter, the treatment he gave her, and the reason she was claiming no recovery for medical expenses for his services.

It can not be denied that plaintiff's counsel hoped the jury would realize that the reason he was not calling Dr. Rasmussen as a witness was that he had been retained and paid by the adverse party. No mention or inference was made concerning insurance, or to Mr. Strain's connection with insurance, and when counsel was told that Mr. Strain was with the casualty

company, he followed the court's admonition and did not call him to identify him as its agent.

Perhaps under the circumstances the several references to Mr. Strain as being with the Pasadena City Lines, Inc. were not only unwise but wholly unnecessary, but in consideration of the entire record it cannot be said that any actual prejudice resulted to the defendant, particularly in light of the substantial evidence pointing to the liability of the defendant, and in view of the court's admonition to the jury to disregard counsel's reference to Mr. Strain as being with the bus line, on the ground that there was no evidence in the record to that effect. This does not appear to be such an extreme case that the final admonition and instruction by the court did not sufficiently remove the prejudicial effect, if any, of counsel's reference.

[9] All of these matters were considered at length by the trial court on defendant's motion for a new trial, which it denied after a hearing. In addition, the record discloses that from plaintiff's opening statement through his closing argument to the jury, the matter regarding Mr. Strain was brought to the court's attention innumerable times, most of which resulted in extensive colloquy between counsel and the court outside of the hearing of the jury. At all times during the trial the judge was aware of the nature of these matters and the defendant's claim of prejudice. It is obvious from his rulings and several refusals to declare a mistrial, that the trial judge did not feel that any prejudice resulted. Nor can we say after an examination of the entire record that the result would have differed in any way had not Mr. Strain's purported connection with the defendant been mentioned. Calif.Constitution, Art. VI, sec. 4½.

The court in Music v. Southern Pacific Co., 91 Cal.App.2d 93, at page 98, 204 P.2d 422, 425, reiterated the general rule followed on review of these matters: "It is the well established rule that a trial judge, who has witnessed all of the circumstances surrounding the alleged misconduct, is in a better position than an appellate court to determine whether or not the jury was prejudicially influenced, and its verdict the result of the asserted misconduct of counsel, and 'his conclusion in the matter will not be disturbed unless, under all of the circumstances, it is plainly wrong.'"

In Brown v. McCuan, 56 Cal.App.2d 35, at page 41, 132 P.2d 838, 841, the court pointed out: "Whether counsel's references to compensation insurance, where the jury was admonished to disregard it each time, constituted prejudicial misconduct preventing a fair trial is a question of fact. The trial judge is in a much better position to know whether a miscarriage of justice has taken place and his opinion is entitled to great weight in the absence of a clearly erroneous decision. The trial judge's determination must also be considered to be an adjudication of counsel's good faith. * * * when the case comes to us after the trial judge has denied a new trial urged upon these grounds and has thus found that the claimed misconduct was not prejudicial, the judgment must be affirmed unless there is no reasonable basis for such finding."

Even conceding that counsel's references to Mr. Strain constituted misconduct, they still would not be cause for a reversal unless they had the effect of preventing the complaining party from having a fair trial. From the state of the evidence, we cannot say that they constituted such a situation during the trial as to materially affect the substantial rights of the party allegedly aggrieved.

The judgment is affirmed.

The attempted appeal from the order denying motion for a new trial is dismissed.

WHITE, P. J., and FOURT, J., concur.

159 Cal.App.2d 231

Hall HUGHEY and Yvonne Hughey, Husband and Wife, Plaintiffs and Respondents,

v.

Conte CANDOLI, Defendant and Appellant (two cases).

Civ. 22619.

District Court of Appeal, Second District, Division 2, California.

April 8, 1958.

Action by husband and wife arising out of collision of wife's left-turning automobile with defendant's approaching automobile, and action by husband and wife for wrongful death of their child, who lived only one day after delivery through Caesarean section. The verdict was for the defendant. The Superior Court of Los Angeles County, Wallace L. Ware, J., entered order granting new trial, and defendant appealed. The District Court of Appeal, Ashburn, Acting P. J., held that the new trial was properly awarded on ground of insufficiency of evidence.

Order affirmed.

1. Appeal and Error ⇐933(1)

On defendant's appeal from order granting new trial after verdict for defendant, District Court of Appeal accepted testimony and inferences favorable to plaintiffs.

2. New Trial ⇐70

In action arising out of collision of plaintiff's left-turning automobile with defendant's approaching automobile, evidence presented substantial question as to whether plaintiff was contributorily negligent and afforded proper basis for granting plaintiff new trial after verdict for defendant.

3. Death ⇐103(2)
New Trial ⇐70

In action by father and mother for wrongful death of child, who lived only one day after its delivery through Caesarean section, evidence presented substantial question as to whether injuries received by mother, who was eight months pregnant at time her automobile collided with defendant's automobile, were proximate cause of death of child who was delivered four to six weeks premature, on day after accident, and who died within 24 hours, and afforded proper basis for granting father and mother new trial after verdict for defendant.

Crider, Tilson & Ruppé, Los Angeles, for appellant.

Mabel Walker Willebrandt and W. Alan Thody, Los Angeles, for respondents.

ASHBURN, Acting Presiding Justice.

Defendant appeals from an order granting a new trial upon the ground of insufficiency of the evidence. The order applies to two actions growing out of an automobile collision.

Plaintiff Yvonne Hughey was eight months pregnant at the time of the accident. She and her husband brought one action to recover for personal injuries to her, the husband's loss of her services and damage to the automobile which she was driving at the time of the accident. Another action brought by both sought damages for wrongful death of the child, which lived only one day after its delivery through Caesarean section. The two cases were tried together and it was stipulated that a single verdict should be rendered for or against the plaintiffs. Verdict having gone for defendant, the court granted a new trial in due course. Counsel for both sides devote their arguments wholly to the question of the sufficiency of the evidence.

Appellant argues two points, (1) that plaintiff Yvonne Hughey was contributorily negligent as matter of law, and (2) that the death of the child was not proximately caused by negligence of the defendant.

The applicable rule of review is stated in Brown v. Guy, 144 Cal.App.2d 659, 661, 301 P.2d 413, 414: "Upon the consideration of a motion for a new trial the court must make an independent appraisal of the

evidence, including all presumptions and reasonable inferences, and must judicially determine whether the judgment effects a miscarriage of justice. In considering such motion the trial court is not bound by a conflict in the evidence but may be governed by any substantial proof that would reasonably warrant a judgment for the moving party even though such evidence consists of nothing more than inferences from established facts. On appeal from the order it will not be reversed unless the reviewing court concludes that as a matter of law there is no substantial evidence to support a contrary judgment." Quoting from a Supreme Court case Thomas v. Moore, 146 Cal.App.2d 59, 61, 303 P.2d 624, 626, says: "'The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. [Citations.] The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." [Citations.]'"

[1, 2] The question of contributory negligence goes to liability in each case and will be first considered. The accident occurred on November 29, 1954, about 7:00 p. m., at the well-lighted intersection of Sunset Boulevard and Wilcox Avenue in Los Angeles. Sunset runs east and west and Wilcox north and south. On the northeast corner is the showroom of Mercedes-Benz automobile agency. Two impartial witnesses saw the accident from that vantage point. We accept for purposes of the following statement testimony and inferences favorable to plaintiffs, as we must do.

Mrs. Hughey was driving a white Jaguar convertible automobile in an easterly direction, and the top was down. As she came to Wilcox she stopped with the traffic, then moved into the intersection with the green light of the traffic signal in her favor. She gave a signal for a left turn, intending to go to her home which was to the north, but she had to stop again to let westbound cars pass in front of her. As she indicated this intention a westbound vehicle gave a left turn signal and started turning to the south. The driver of that car waved with his hand, indicating that she should go ahead with her turn. Each car was in a lane next to the double line, designated in the evidence as lane 1. Having looked to the east for westbound traffic, plaintiff saw that all was clear and gradually started her turn, proceeding very slowly, "literally crawling" as defendant expressed it, and continuing to make her left turn signal. When entering westbound lane 1 she looked again and all was clear. As she crossed lane 2 (the center one of the three westbound lanes) defendant's Cadillac appeared out of the nowhere and struck her Jaguar in the right side. According to Mr. Bruno Hahn, who was watching the Jaguar from the Mercedes-Benz showroom, that car "seemed to bounce, say, a matter of, oh, six inches or a foot and a half, somewhere within that distance. It gave a sort of a shudder. * * * it was pushed, as I said, somewhere between six inches to a foot or foot and a half." Mrs. Hughey was thrown against the side of her car, to the left and back. She was helped into the Mercedes-Benz agency, being then greatly shaken, sore and nervous. While there for an hour or less she was faint and dizzy and had some pain in her life side, in the lower left quadrant of the abdomen. The sequelae will be reviewed in the discussion of responsibility for the baby's death.

Defendant Candoli did not see the Jaguar until he was almost upon it. The attention of Mr. Hahn and his wife was drawn to the Cadillac by the screech of its

brakes. That car left 43 feet of straight skid mark which began, as computation and defendant's own testimony show, at the easterly line of the crosswalk on the east side of Wilcox; the accident occurred 26 feet west of the crosswalk, which was 17 feet wide. Defendant testified that he put on his brake as soon as he saw plaintiff. Obviously he was going too fast. He further said that he had been following for two blocks or more the car that made the left turn to the south when arriving at Wilcox, but insisted that he was in lane 2 all that time and the other car in lane 1. If he had been in lane 2, Mrs. Hughey would have seen him when she looked to the east on Sunset.

The trial judge, when disposing of the motion for new trial, said in part: "I would say that a moving picture of what took place out there that evening would disclose him coming from behind that automobile that was parked there making a left turn and coming fast, and not too close behind that vehicle, because he had to get out there in that lane where those skid marks were long enough to have delineated a course of direction. I didn't think his testimony was persuasive. I felt that it was nonconvincing and shaky. The lady told a very forthright story. She was consummately careful." Also, "As I took notes and harkened to the testimony of the various witnesses on the question of liability, I gained the impression that Candoli was rattled, not only at the time of the accident, but he was confused, and confessed that he was in a state of confusion as he testified in the courtroom. * * * I was completely convinced when I heard this evidence that the plaintiff had made a case of liability against this defendant, and when that jury came in with a verdict unanimous for the defendant, I was almost shocked to the point where I could not speak. * * * Then, when I analyze that evidence in the light of the testimony and the clear picture that the Hahns gave, I thought it added up to an overwhelming case of liability."

Appellant's counsel argue that the Jaguar top was down, the body very low, some three feet from the ground to the top of the door, that the south turning car obscured plaintiff's vision of the westbound Cadillac, and vice versa; that she went into lane 2 without looking after she got into position to do so, and therefore was negligent as a matter of law. These were doubtless permissible factual inferences but they are in conflict with plaintiff's testimony that the turning car did not interfere with her vision of westbound lanes 2 and 3, that she did look down those lanes as she started the turn, and as she pulled into westbound lane 1; that those lanes were clear before and at the time she started her turn. Moreover, the driver of the south turning car waved her on. She was in low gear, signaling a left turn and proceeding very slowly. It is difficult to see what more she could have done to protect herself and her baby. She could hardly have anticipated that a car would dart out from behind the turning car and plow into any object that was crossing to the north. She had stopped for several westbound cars to pass her and was entitled to assume that any others going in the same direction would exercise ordinary care, could properly act upon that assumption until alerted to the contrary by some fact or circumstance.

"It is an elementary principle that negligence is gauged by the ability to anticipate danger. '[R]easonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence. * * * On the other hand, one is not bound to foresee every possible injury which might occur, or every possible eventuality, but only those which were reasonably foreseeable; and one is not required to anticipate against dangers which it is not his duty to avoid.' 65 C.J.S. Negligence § 5c(2) (a), pp. 354–359." Tucker v. Lombardo, 47 Cal.2d 457, 464, 303 P.2d 1041, 1046. Moreover, "[d]efendant was entitled to assume that others would exercise reasonable care in the management of their own property and could

properly continue to do so until apprised in some manner that such reliance was no longer reasonably safe." Rodela v. Southern Cal. Edison Co., 148 Cal.App.2d 708, 716, 307 P.2d 436, 441. See, also, Bogner v. Eubanks, 137 Cal.App.2d 181, 183–184, 289 P.2d 875, and cases therein cited and quoted.

Upon appellant's own theory of the evidence there was at least a substantial question whether plaintiff was guilty of contributory negligence; certainly there would be no justification for declaring her so as a matter of law.

[3] The above evidence not only sustains the granting of the motion in the personal injury case, but it also supports the ruling in the wrongful death case unless it can be said as matter of law that the injuries received by the mother in the accident were not a proximate cause of the death of the child.

Mr. Hahn drove Mrs. Hughey home from the Mercedes-Benz agency, a short distance, arriving about 8:00 o'clock. She went to bed at once and took a sedative, seconal; her husband arrived in a half hour. She then had a "dreadful" pain in her abdomen; was crying, and he called the doctor. She was not then taken to the hospital and was not bleeding externally at that time. She slept until about 3:00 a. m., awakening with a "terrible" pain and was hemorrhaging freely. The husband heard her cry and went to her where she lay in a pool of blood. She was then rushed to the hospital where Dr. Aaberg, obstetrician, and Dr. Brooks, pediatrician, were awaiting her. An immediate Caesarean section was essential and was performed, delivering a five pound two ounce boy who was four to six weeks premature. The mother, a professional ballerina, was so built that she could make normal delivery of a large child and had no evidence of any disease or disorder which would cause premature birth or require a Caesarean delivery.

While in the womb a baby's lungs are collapsed and it is furnished oxygen by the mother through the placenta. Immediately upon delivery, with the first cry, the lungs normally begin to expand and perform their proper function. This is more difficult for a premature baby because of lack of strength. In this instance the little boy had undergone fetal distress and was cyanotic due to lack of oxygen, did not benefit much from administration of oxygen, and died within 24 hours with his lungs still collapsed to a large extent. This condition is known as atelectasis and is a continuation after birth of the normal collapse of the lungs while in utero. According to the attending obstetrician plaintiff, having been thrown to the side of the door, suffered internal bleeding (as evidenced by organized clots found by him at the time of the Caesarean operation), which increased until it appeared externally about 3:00 a. m. This bleeding evidenced a partial separation of the placenta from the womb, to the extent of not less than one-fourth and almost one-half of its area. This caused intra-uterine asphyxia of the baby, as indicated by his condition immediately after delivery. Though there are several possible causes of placental separation, none of them was present in this case except one,—trauma, a jar, wrench or twist received by the mother. Trauma to her is a recognized cause of such separations. In this case, according to the expert testimony of the obstetrician, the separation was due to the automobile accident. Dr. Aaberg testified: "That this placenta in Mrs. Yvonne Hughey separated due to the automobile accident, which— * * * Q. In other words, Doctor, you have said, I believe, that the placenta separation was caused by the accident, in your opinion? A. In my opinion, absolutely. * * * As I said, approximately one-fourth of the placenta was separated. In another hour or two maybe all of it could have been, with a dead baby, and deeper shock for her, profound shock; in some cases, in fact, irreversible shock. We cannot bring them out despite ten or fifteen transfusions." On cross-examination: "Q. Doctor, I gather from your testimony that you feel very positive that the accident was responsible

for the placental separation in this case which led to the Caesarean and so on? A. That is right."

To an extent, defendant's experts corroborated Dr. Aaberg's testimony as to basic facts and the opinion predicated thereon. Dr. Harry L. Deutsch, who performed an autopsy upon the little boy, expressed the opinion that death was caused by "congenital pulmonary atelectasis and congenital heart disease." Those are the words that he used in the death certificate also. Of course, the atelectasis was congenital, for that word merely means existing at the time of birth, and there is no other time for atelectasis to occur. The word "congenital" adds nothing to the term "atelectasis."

The congenital heart disease which he said he found consisted of a large opening in the interventricular septum, "which is a partition which separates the right and left ventricles. * * * A defect of this size would permit a substantial amount of blood to be shunted from the right ventricle into the left ventricle so that this blood which has been shunted doesn't have an opportunity to circulate through the lungs. Therefore, there is a lesser amount of oxygen in the blood that is forced out of the left ventricle into the general systemic circulation, because of this defect." This asserted cause of death was developed in the defense evidence and plaintiffs did not recall their experts to refute it directly. But they had the autopsy report before them and anticipated the Deutsch testimony. All the experts expressly or tacitly agreed that the heart is completely formed and functioning after 19 weeks. Dr. Brooks testified that the heart tones were good at and after birth; that he found no congenital heart defect, and that the phrase "intraventricular septal defect" means the same thing as congenital heart defect. Dr. Aaberg testified that the baby had a good fetal heart rate, very normal during pregnancy; that the heart tones were good; that a congenital heart would show loud murmurs. Dr. William B. Thompson, obstetrician, testified for the defense after reading all the depositions and transcripts of testimony (a new ultimate in expressing an expert opinion upon the ultimate question for the jury). He said: "Q. And if I understand what you are saying, then, it is that you ascribed your findings to this condition in the interventricular septum that you have described? A. I felt that that was the primary cause of the baby's failure to behave normally."

If it were conceded that defendant had established as matter of law that congenital heart disease was a cause of death of this baby, that did not preclude a recovery by plaintiffs, for defendant's proof showed two concurring causes, atelectasis and heart disease. Assuming that the heart defect was prenatal and in no wise affected by the accident, it nevertheless appears that that was not true of the atelectasis. We have then concurring proximate causes, one of which flowed directly from the negligence of defendant. In this situation the concurrence of the non-tortious cause does not absolve defendant from liability for the tortious one. In Brown v. Guy, supra, 144 Cal.App.2d 659, 666, 301 P.2d 413, 418, we said: "It is the law of this state that each of several joint tort feasors or independent wrongdoers who inflict simultaneous, or practically simultaneous, injuries upon a plaintiff must carry the burden of establishing that his own wrong did not contribute to the damages, or the extent to which it did so. See Copley v. Putter, 93 Cal.App.2d 453, 457, 207 P.2d 876; Cummings v. Kendall, 41 Cal.App.2d 549, 558, 107 P.2d 282; Finnegan v. Royal Realty Co., 35 Cal.2d 409, 433, 218 P.2d 17; Prosser on Torts, 2d ed., § 45, p. 226. The Finnegan case says 35 Cal.2d at page 433, 218 P.2d at page 32: 'Where several persons act in concert and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established. Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole. Death, burning of a building or the sinking of a boat are such indivisible results. The reason for

imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result. 15 So.Cal.L.Rev. 439.'" Prosser on Torts, 2nd Ed., § 45, p. 226, says: "Certain results, by their very nature, are obviously incapable of any practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each may be charged with all of it. * * * Such entire liability is imposed both where some of the causes are innocent, as where a fire set by the defendant is carried by a wind, and where two or more of the causes are culpable." Footnote 63 on that page adds this: "Obviously only culpable causes will be held responsible. Thus where a negligent automobile driver collides with an innocent one and injures a third person, only the negligent driver is liable." No attempt at apportionment was made here and of course none could be effected.

Appellant's contention that the heart defect would ultimately have caused death independently of the atelectasis cannot be sustained. Assuming that that would have happened, defendant is nevertheless liable for any negligence which operated as a precipitating or accelerating cause of death. Kerby v. Elk Grove Union H. S. Dist., 1 Cal.App.2d 246, 251, 36 P.2d 431, 433, 94 A.L.R. 1502: "But even though a latent chronic aneurism of the cerebral artery may have ultimately caused his death without the intervention of violent exercise or traumatic injury, if the blow from the ball did in fact accelerate or aggravate the chronic defect of the artery so as to cause a rupture thereof resulting in death, that blow may be deemed to have been the proximate cause of death so as to create a liability therefor under proper circumstances. Knock v. Industrial Acc. Com., 200 Cal. 456, 253 P. 712; Quail v. Industrial Acc. Com. [138 Cal.App. 412], 32 P.2d 402." To the same effect are, Deevy v. Tassi, 21 Cal.2d 109, 123, 130 P.2d 389; Knock v. Industrial Acc. Com., 200 Cal. 456, 460, 461, 253 P. 712; Lumbermen's Mutual Casualty Co. v. Industrial Acc. Com., 29 Cal.2d 492, 496, 175 P.2d 823; Firestone Tire & Rubber Co. v. Industrial Acc. Com., 93 Cal.App.2d 23, 26, 208 P.2d 44; 8 Cal.Jur. § 21, p. 962; 35 Cal.Jur.2d § 57, p. 555, § 59, p. 557; 25 C.J.S. Death § 25, pp. 1093–1094.

The order granting a new trial in each case is well supported by the record and we find no error therein.

Order affirmed.

HERNDON, J., and KINCAID, J. pro tem., concur.



159 Cal.App.2d 318

Stanley N. KRAUSE, Plaintiff and Appellant,

v.

Maurice J. BERTRAND, also known as Hobo Bertrand, Defendant and Respondent.

Civ. 22368.

District Court of Appeal, Second District, Division 3, California.

April 11, 1958.

Libel action based upon alleged false and defamatory publications and statements made within ranks of labor union in course of campaign for union election. The Superior Court of Los Angeles County, Bayard Rhone, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Shinn, P. J.,

held that statements which were published and uttered in good faith, without malice, in belief that they were true, based upon reasonable grounds for believing them to be true and which related to supposed qualifications or lack of qualifications of a member to serve on committee of union, were privileged.

Affirmed.

1. Libel and Slander ⇐101(3)

In slander action, plaintiff had burden of proving that slanderous words were spoken as alleged.

2. Appeal and Error ⇐989, 994(3)

It is not function of reviewing court to judge credibility of witnesses or weight of their testimony.

3. Libel and Slander ⇐112(1)

In slander action based upon alleged statements by defendant that plaintiff was a Communist, evidence sustained finding that defendant did not utter the slanderous statements as alleged.

4. Libel and Slander ⇐112(2)

In libel action based upon alleged false and defamatory publication made within ranks of labor union in course of campaign for union election, evidence sustained finding that all statements were published and uttered in good faith, without malice, in belief that they were true based upon reasonable grounds for believing them to be true. West's Ann.Civ.Code, § 47.

5. Libel and Slander ⇐45(1)

Statements which were published and uttered in good faith, without malice, in belief that they were true, based upon reasonable grounds for believing them to be true, within ranks of labor union in course of campaign for union election and which related to supposed qualifications or lack of qualifications of a member to serve on committee of union, were privileged. West's Ann.Civ.Code, § 47.

Neil N. Werb, Beverly Hills, and I. Robert Mednik, San Jose, for appellant.

Maurice J. Bertrand, in pro. per.

SHINN, Presiding Justice.

The complaint in this action contained one count accusing defendant Bertrand of libel and in the second count, slander, for which plaintiff sought damages.

It was alleged that on or about April 5, 1955, at South Gate, California, defendant distributed to Union members of Local 216 of United Auto Workers of the Congress of Industrial Organization a circular concerning the plaintiff reading: "All about his schooling and his experience attending Committeemens' School. I wonder what school he means. Joe Stalin's School at Watts, and the Great Commissar Goonfelte's teachings how to overthrow the U. S. Government? I wonder how much dues he has cheated Stalin out of for the last 7 years?" It was alleged that the publication was false and defamatory and that plaintiff was thereby damaged in his reputation in the sum of $10,000. It was alleged in the second cause of action that at the same time defendant spoke in the hearing of members of said Union "the false and scandalous words that plaintiff is a Communist" to plaintiff's damage.

Defendant answered, admitting the publication of the printed circulars and that the same were distributed to members of the Union. It was denied that the statements were false or defamatory or that plaintiff had suffered damage. The answer denied the allegations of the second cause of action of the complaint. It was alleged on information and belief and as separate defenses that the statements in the pamphlets and also any defamatory words spoken by defendant were true; at the times of said publications, plaintiff and defendant were engaged in a political campaign for election as committeemen for the Union; plaintiff was making inflammatory and derogatory remarks respecting the defendant; the statements in the pamphlet and those allegedly spoken were in retaliation of plaintiff's attack upon defendant; all statements made by defendant were made in good faith without malice and to members of the Union to

whom they were of interest and importance. It was alleged that the words spoken of plaintiff by defendant were materially different from those alleged in the second cause of action and that they were uttered in response to a request for such information received from an interested person and in response to a request for such information made by an agent of plaintiff for the express purpose of laying the foundation for a claim of slander. In the trial the court received the testimony of the parties and of ten other witnesses. The reporter's transcript consists of 176 pages.

The court found that the pamphlet was published by defendant; the parties were members of the Union and candidates for committeemen; the pamphlet was published during the campaign; it was of common interest to the members of the Union; it concerned Union matters as they related to plaintiff and "the occasion was not abused"; defendant at all times had reasonable grounds to believe the matter set forth was true; he published and distributed the circular in good faith and without malice and that the publication was qualifiedly privileged. As to the second cause of action it was found that the allegation that defendant was accused of being a Communist was not true. The court concluded that the publication by means of the circular was qualifiedly privileged and that plaintiff was not entitled to judgment. Plaintiff appeals.

It is contended on the appeal: (1) The evidence does not sustain the finding that defendant did not utter the slanderous statements as alleged in the second cause of action; (2) The statements in the circular were not privileged; (3) Defendant had no reasonable belief that the statements made concerning plaintiff were true.

[1–3] Upon the first point plaintiff refers us to six widely separated pages of the reporter's transcript in support of his contention that there was evidence that defendant stated that plaintiff was "poison and a subversive." We are referred to no evidence that defendant accused plaintiff of being a Communist. Plaintiff has not seen fit to quote any of the evidence. We have considered the testimony to which plaintiff's references relate and find that it supports the statement of the trial court that "the witnesses produced by the plaintiff weren't really very satisfactory. Their testimony wasn't satisfactory. Several of them I discounted pretty much entirely." Plaintiff had the burden of convincing the trial court that the slanderous words were spoken as alleged. He did not establish the allegations of his complaint as a matter of law and, of course, it is not our function to judge of the credibility of the witnesses or the weight of their testimony. The finding as to the second cause of action was justified by the failure of plaintiff's proof.

[4] The evidence amply supports the findings that all statements of defendant were published and uttered in good faith, without malice, in the belief that they were true based upon reasonable grounds for believing them to be true. Admittedly, all statements were made within the ranks of the labor union in the course of a compaign for election. They related to matters of common interest to members, namely, the supposed qualifications or lack of qualifications of a member to serve on a committee of the union. They were privileged communications made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent." Civ.Code, § 47.

[5] Statements made without malice, wholly within the ranks of a labor union, during a dispute between contending factions over union policies and administration, and pertinent thereto, should be regarded as privileged. De Mott v. Amalgamated Meat Cutters, 157 Cal.App.2d 13, 320 P.2d 50; Emde v. San Joaquin County Central Labor Council, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916; Campbell v. Jewish Committee for Personal Service, 125 Cal.App.2d 771, 271 P.2d 185; see, also, Hall, Proof in Libel Actions in

California, So.Cal.L.Rev. Volume 24, No. 4, pages 350, 373, 374. There could scarcely be more appropriate occasions for the exercise of the right of uninhibited free speech.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



159 Cal.App.2d 357

MARSALLI'S BLUE RIBBON COFFEE CO., Inc., Plaintiff, Cross-Defendant and Appellant,

v.

BLUE RIBBON PRODUCTS CO., Inc., Defendant, Cross-Complainant and Respondent,

Charles Marsalli, Cross-Defendant and Appellant.

Civ. No. 17770.

District Court of Appeal, First District, Division 2, California.

April 15, 1958.

Action by corporation for declaratory relief respecting right to use of term "Blue Ribbon" for prospective sales of coffee. Coffee seller answered and cross-complained for an injunction. The Superior Court, City & County of San Francisco, William T. Sweigert, J., enjoined corporation and it appealed. The District Court of Appeal, Brazil, J. pro tem., held that where corporation had used trade name "Blue Ribbon" in marketing its premium coffee to hotel and restaurant trade in area for over 40 years and had built up extensive advertising prestige based on such name, it was entitled to enjoin corporation from commencing to sell coffee in same general marketing area under the identical name.

Affirmed.

1. Appeal and Error ⇐842(7)

Where evidence had been produced by both sides even though it produced practically no factual controversy, there were still inferences to be drawn, interpretations to be made and witnesses to be believed or disbelieved, so rule providing that where there is no conflict in evidence only a question of law is presented to appellate court which is not required to give weight to decision of trial court, was not applicable.

2. Appeal and Error ⇐931(1), 989, 1010(1)

An appellate court will review the evidence in the light most favorable to the respondent, will not weigh the evidence, will indulge in all intendments and reasonable inferences which favor sustaining of trier of fact, and will not disturb finding of trier of fact if there is substantial evidence in the record in support thereof.

3. Trade-Marks and Trade-Names and Unfair Competition ⇐70(3)

Where corporation had used trade name "Blue Ribbon" in marketing its premium coffee to the hotel and restaurant trade in area for 40 years and had built up extensive advertising prestige based on use of such name, it was entitled to enjoin company from commencing to sell coffee in the same general marketing area under the identical name. West's Ann. Bus. & Prof.Code, § 14242(e).

4. Trade-Marks and Trade-Names and Unfair Competition ⇐3(1)

While words which are not fanciful expression unrelated to quality of product sold cannot be qualified as a trade-mark, they can, if facts warrant, be appropriated as a trade name if a secondary meaning has been acquired. West's Ann.Bus. & Prof.Code, § 14242(e).

5. Injunction ⇐1

An injunction is an extraordinary remedy to be issued with great caution and only on clear showing.

Robert E. Hatch, Leighton Hatch, San Francisco, for appellant.

Raymond J. O'Connor, Charles E. Townsend, Jr., San Francisco, Townsend & Townsend, Stephen S. Townsend, San Francisco, of counsel, for respondent.

BRAZIL, Justice pro tem.

The respondent is a corporation whose main business is coffee manufacturing and the selling and distribution of high grade coffee to restaurants, hotels and institutions. Its principal office is in San Francisco, and it has branches in Oakland, Santa Rosa, Sacramento, San Jose, Chico and Reno, Nevada. Its general marketing area includes Washington, Oregon, Nevada and California, with the major portion of its business being centered in Northern California. Up until ten years ago, the company also engaged in retail selling on a house to house delivery plan, but now it has practically no retail trade. Once in a while some one remembers the house to house sales and makes a purchase from a delivery truck. Its coffee products, which make up 90% of its sales, have always been sold under the trade name of Blue Ribbon Coffee.

The appellant Charles Marsalli has for many years operated a well known restaurant under his name, on Kearny Street in San Francisco. For more than five years before he incorporated Marsalli's Blue Ribbon Coffee Co., Inc. in March 1956, he was a regular customer of respondent, buying coffee from that company under the name Blue Ribbon Coffee. Mr. Marsalli testified he had not done business with any other company in the area using or featuring the name Blue Ribbon Coffee, and that he did not know of any one else who ever used that name in the sale of coffee.

The corporate appellant was organized by Mr. Marsalli for the express purpose of selling coffee to restaurants, hotels and institutions in and about Northern California. The business office of this corporation was the same as that of Marsalli's Restaurant. The officers are Mr. Marsalli, his attorney and the attorney's secretary. No stock has yet been issued or sold, and the corporation has not actually engaged in selling or distributing coffee under the name of Marsalli's Blue Ribbon or any other name. Before the formation of the corporation, Mr. Marsalli attempted to buy stock in respondent corporation, but was unable to make any such purchase or to acquire any interest in Blue Ribbon Products Company, Inc.

The respondent sells coffee in one and five pound packages, either directly or through distributors in the general marketing area. It deals in top-grade coffee for which it commands the highest prices. For a great many years, it has featured the trade name in an extensive advertising campaign. Its average yearly sales of coffee for the last six years has been between one and a half million to two million pounds. The name Blue Ribbon appears on all packages, on leased equipment such as urns and stoves, on its twenty-one delivery trucks, on calendars, on give away restaurant checks, and it is the name under which the company sponsors cocktail parties and the like for the trade.

Shortly after the incorporation of the appellant company, it filed this action for declaratory relief by which it requested a declaration of its right to the use of the term Blue Ribbon for its prospective sale of coffee. The respondent answered and cross-complained for an injunction to prevent Mr. Marsalli and Marsalli's Blue Ribbon Coffee Co., Inc. from using the expression Blue Ribbon in any manner dealing with the sale of coffee in its general marketing area. From a judgment in favor of defendant and cross-complainant, the plaintiff and cross-defendants have appealed. The appellants were enjoined from transacting business under the name of Marsalli's Blue Ribbon Coffee Co., Inc., from using Blue Ribbon or Blue Ribbon Coffee in any manner whatsoever in California, Oregon, Washington, Nevada or Arizona, and they are required to destroy all material such as labels, stencils, packages, etc., which incorporated the words Blue Ribbon or Blue Ribbon Coffee. The appellants do not complain of the wide scope

of the injunction (e. g., the State of Arizona is not once mentioned in the evidence), but are insistent that they have a right to use the prohibited words in their prospective coffee sales, and that no injunction at all is justified by the facts and the law of this case.

[1] Appellants assert that, as there is no conflict in the evidence, only a question of law is presented; that in such a situation the appellate court proceeds anew without being required to give any weight to the decision of the trial court. In support thereof, they cite Moore v. Wood, 26 Cal. 2d 621, 160 P.2d 772, 776. The situation is not the same for here there was evidence produced by both sides even though it produced practically no factual controversy. In the Moore case, it is said: "The record includes no evidence offered or received for the purpose of showing the intention of the parties as to their agreement. The construction of the contract by the trial court, therefore, presents a question of law which this court must determine." In re Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299; In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825, and Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910, also cited by appellants in support of their contention, hold only that an appellate court is not bound by a construction of a will, contract or document which is based solely on its terms without the aid of evidence. The appellants have evidently overlooked the fact that even with uncontradicted evidence there are inferences to be drawn, interpretations to be made and witnesses to be believed or disbelieved. An appeal of a case, where evidence is received in the trial court, would not become one solely of law just because the appellant refused to cross-examine a witness or call one of his own.

[2] The approach to the problems involved must therefore be according to the rule as stated in Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557, 561, that "an appellate court (1) will review the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof."

[3] Appellants claim there is no distinction between this case and Applebaum v. Senior, 154 Cal.App.2d 371, 316 P.2d 410 (decided by this court in October 1957) and that "Inasmuch as your opinion in Applebaum, supra, notes there was no evidentiary conflict, your decision in that case should be applied—without reservation or distinction—to the present one, regardless of the injunction having been denied by the trial court in one instance and granted in the other." The law of the two cases being the same, the results should be alike unless the facts be different. And they are. All of appellants' remaining contentions can be reviewed by a consideration of the differences in the two cases, as well they might by considering the similarities between this case and either H. Moffat Co. v. Koftinow, 104 Cal.App.2d 560, 232 P.2d 15 or Del Monte Special Food Co. v. California Packing Corp., 9 Cir., 34 F.2d 774.

In the Applebaum case, the plaintiff sought to enjoin the use of the words Junior Boot Shop, which defendant Senior used in connection with his own name in the conduct of a retail children's shoe store in Walnut Creek. The plaintiff operated two retail children's shoe stores in San Francisco and one in San Anselmo under the name of Junior Boot Shop. He and one Mullany had earlier operated a store of children's shoes in San Francisco under the name Junior Boot Shop with a branch store using the same name in San Mateo County. Mr. Applebaum had bought all the stock in the operating corporation from Mullany and his wife under an agreement by which the Mullanys received the San Mateo store with the right to use the name Junior Boot Shop in San Mateo County. Mr. Senior started his business in 1951 in Walnut Creek and called his store Senior's Junior Boot Shop at the suggestion of his former employer, Mr. Mullany, who thought the

paradoxical title would be a catchy name for the store. The plaintiff knew all along that defendant was using this name, and he made no objection until several years later; in fact there were occasions when plaintiff and defendant exchanged shoes when one or the other did not have a particular shoe in stock. It is a reasonable inference from such conduct that even plaintiff did not believe that confusion of the public resulted, or that Mr. Senior was guilty of any unfair business practice.

Here the court found that there was a secondary meaning in the coffee trade to the words Blue Ribbon, while in the Applebaum case the court held that no such meaning in the words Junior Boot Shop had been acquired in Contra Costa County. The cases are first distinguishable because of the trial court's finding of fact. Mr. Marsalli and his corporation propose to sell their coffee in the same trading areas as that occupied by respondent. The area of appellants' trade would necessarily be embraced within the general marketing area in which respondent's products were well and favorably known under the trade name of Blue Ribbon Coffee. In the other case the court held that there was support in the record for the finding that the term Junior Boot Shop had not acquired a secondary meaning in Contra Costa County in which place respondent's activities were generally confined. The cited case deals with two similar retail businesses (and a third one exists close by in San Mateo County) in different counties, each with limited trading areas. It is quite apparent also that there is essentially a difference between a wholesale or semi-wholesale business and a retail business, for in the latter the personality of the operator of the store has far more significance than is found in the former which necessarily operates in a much larger territory.

While not a deciding factor, the two cases are further distinguished in that there is more than mere coincidence to justify the name Senior's Junior Boot Shop. There appears no good reason for using the words Blue Ribbon in a contemplated competing business operating in the very same area. The English language affords many other apt expressions for the use of appellants in their new enterprise. In the Applebaum case, the respondent was using his own name to make an interesting and appealing combination of words; he was not in direct competition with the appellant; and the court found that his conduct was not an unfair business practice and that it was not likely to cause confusion in the minds of the public dealing with these two business adversaries.

> "The question of unfair competition is one of fact for the trial court and depends in the last analysis on whether the public is likely to be deceived [citations] * * * Since the court could properly conclude that the name 'Junior Boot Shop' was not generally identified with plaintiffs' business among the public of Contra Costa County its findings above summarized are supported by the evidence and the inferences properly to be drawn therefrom." Applebaum v. Senior, supra, 154 Cal.App.2d at page 375, 316 P.2d at page 413.

The same rule applied to this case results in a different conclusion by the trial court, because the findings of fact are not the same. In each case there is substantial evidence to support the finding of fact.

Three witnesses, familiar with the situation, testified that the use of the words Blue Ribbon in the sale and distribution of coffee by the appellants would lead to confusion in the trading area long serviced by the Blue Ribbon Products Co. The appellants did not object to the questions as calling for the conclusion of a witness, move to strike the answers nor cross-examine the witnesses on the subject of their expressed opinions. It is reasonable to assume that these omissions on appellants' part were purposeful and not from oversight. The appellants, while claiming no confusion can arise from the use of a term like Blue Ribbon, which anybody knows relates to something top-grade or to a prize winner, are themselves apparently a bit confused. In their briefs they refer to the

respondent as the Blue Ribbon Coffee Co., Inc., instead of Blue Ribbon Products Co., Inc. It is but another indication that Blue Ribbon is the respondent's trade name; that people dealing with coffee believe that Blue Ribbon Coffee is the respondent's product without being much concerned with any other word that may appear in the company's name.

[4] In H. Moffat Co. v. Koftinow, supra, the court affirmed a judgment enjoining the defendant, who had for several years before operated as the Manteca Veal Co., from using the word Manteca in the sale of meat products, because the word had gotten a secondary meaning as a trade name. Like Blue Ribbon, the word Manteca is not a fanciful expression unrelated to the quality of the product sold. While neither expression could qualify as a trade mark (Bus. & Prof.Code, § 14242e), they can, if the facts warrant, be appropriated as a trade name if a secondary meaning has been acquired. The Moffat case in at least two particulars is less favorable to the prevailing party than the instant case. There the party enjoined was actually in business and had been using the word Manteca in its name, and, secondly, Moffat & Co. was alleged to have been guilty of laches in that it waited such a long time after knowledge before it did anything about it.

The fact that appellant intends always to preface the term Blue Ribbon with his own name, Marsalli, does not require a finding that confusion and unfair competition is thereby eliminated. "It is obvious that the requirement that subject matter be added to the words in question to the effect that there was no connection between the two businesses would be ineffective. It would be fraught with the practical danger of abuse in the many and varied ways that the words are used in a business such as advertising, answering telephone calls and the like." Eastern Columbia, Inc., v. Waldman, 30 Cal.2d 268, 271, 181 P.2d 865, 867.

In this case we find the appellants, having bought coffee under the name of Blue Ribbon from respondent for many years, trying unsuccessfully to buy into the respondent company, having never heard of anybody other than respondent using the term in the coffee business and who must certainly have known of respondent's reputation for high quality coffee, suddenly deciding to go into direct competition with the respondent and using the very two words that respondent had for more than forty years used to favorably identify its product. The choice of these two words must surely be attributable to something more than sheer coincidence. Under the circumstances it is difficult to find any justification for permitting appellants to use those words at all in their proposed business whether alone or in conjunction with other words.

[5] While injunction may in many cases be an extraordinary remedy, to be issued with great caution and only on a clear showing (Wilkins v. Oken, 157 Cal.App.2d 603, 321 P.2d 876), the admonition is scarcely applicable here for the appellants have not as yet started business; the respondent asks for no damages—all it asks is for the court to prevent the use of just two words. This leaves appellants with a myriad choice of words, equally as effective as the two they want to use, except perhaps for the unjustified purpose of confusing the public, the coffee trade or the respondent's customers. It is unlikely that appellants would be so insistent if respondent had over the years somehow created an impression in the coffee trade that Blue Ribbon stood for poor rather than good quality.

> "This thought that a newcomer has an 'infinity' of other names to choose from without infringing upon a senior appropriation runs through the decisions." Stork Restaurant v. Sahati, 9 Cir., 166 F.2d 348, 361.

For an elaborate discussion of about every contention an appellant can make to upset an injunction preventing the use of a

trade name, reference is made to the case last cited.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.



159 Cal.App.2d 322

Rossie M. DORAN, Individually and Rossie M. Doran, Administratrix of the Estate of Coral E. Doran, deceased, Plaintiffs and Respondents,

v.

MILLAND DEVELOPMENT COMPANY, a corporation, Defendant and Appellant.

Civ. 17604.

District Court of Appeal, First District, Division 2, California.

April 14, 1958.

Rehearing Denied May 14, 1958.

Hearing Denied June 11, 1958.

Widow, individually and as administratrix of estate of her deceased husband, brought action against vendor to recover damages because foundation of home purchased by widow and her husband from vendor was infested with wood-destroying fungus, on ground that vendor's salesman allegedly made false representation that foundation was properly built, when in fact construction of foundation did not comply with building ordinance of city. The Superior Court, Marin County, Jordan L. Martinelli, J., entered judgment against the vendor, and the vendor appealed. The District Court of Appeal, Dooling, J., held that positive representation by vendor that foundation had been properly built, when vendor had not ascertained whether building laws had been complied with, fell within rule that fraud may consist in positive assertion, in manner not warranted by information of person making it, of that which is not true, though he believes it to be true.

Judgment affirmed.

1. Fraud ⇐16

Even though there may be no duty of disclosure, in absence of some express representation, one who does speak must speak the whole truth, and not by partial suppression or concealment make utterance untruthful or misleading.

2. Fraud ⇐17, 20

Where salesman of vendor expressly represented to purchasers of home that foundation was properly constructed, though actually it was not because air vents required by city ordinance had not been placed in the foundation, and foundation was vulnerable to attack of wood-destroying fungus, vendor, having undertaken to make a representation on the subject, was bound not to conceal any relevant circumstances, and purchasers were entitled to believe that all applicable building laws had been complied with in foundation, and therefore vendor was liable for damages in action sounding in fraud, when foundation became infested with wood-destroying fungus.

3. Fraud ⇐13(3)

Positive representation by vendor that foundation of home was properly built, when vendor had not ascertained whether building ordinance of city had been complied with with respect to foundation, fell within rule that fraud may consist in positive assertion, in a manner not warranted by information of person making it, of that which is not true, though he believes it to be true. West's Ann.Civ. Code, § 1572, subd. 2

4. Fraud ⇐11(1)

Representation by vendor of home that foundation was properly built was not a mere expression of "opinion" by vendor, in view of rule that where one making representation is in a position to have superior knowledge or special information concerning subject matter, representation is regarded as one of "fact".

See publication Words and Phrases, for other judicial constructions and definitions of "Fact" and "Opinion".

5. Fraud ⇐58(4)

In action by widow individually and as administratrix of her deceased hus-

band against vendor to recover damages because foundation of home purchased by widow and husband from vendor was infested with wood-destroying fungus, on ground that vendor's salesman allegedly made false representation that foundation was properly built, testimony of widow that, if she had known that foundation was not properly vented as required by city ordinance, she would not have bought the house, was sufficient to establish reliance by widow on salesman's representation.

Morton R. Colvin, San Rafael, Reynold H. Colvin, San Francisco, for appellant.

Nelson, Boyd & Menary, D. K. MacDonald, Jr., San Rafael, for respondents.

DOOLING, Justice.

Appellant is a corporation engaged in the construction of new homes and the sale of such homes to members of the public. In 1947 appellant sold a new home so built by it in the City of Mill Valley to respondent Rossie M. Doran and her husband, who died in 1949. In April of 1953 by reason of the fact that a portion of the bedroom floor collapsed under the weight of a bed Mrs. Doran first discovered that the foundations of the house were infested with a wood-destroying fungus and was obliged to pay $2,309.51 for necessary repairs. Suing on her own behalf and as administratrix of her husband's estate she recovered judgment. The action sounded in fraud.

The evidence most favorable to the judgment showed that the fungus infestation was caused by insufficient ventilation of the sub-floor area, that the house as built had eight air-vents of the louvre type which were insufficient for the purpose, whereas the building ordinance of the City of Mill Valley required seventeen vents covered with galvanized wire. The evidence further showed that appellant's salesman represented to Mr. and Mrs. Doran that "the foundation was properly built"; that neither appellant's officers nor its contractor, who built the house for it, was familiar with the Mill Valley building ordinance or its requirements as to sub-floor ventilation although they knew that there was such an ordinance; that they relied on the building inspector of the city to call their attention to any deviations in the plans from the requirements of the ordinance; that the inadequacy of the vents to comply with the ordinance was not called to their attention and that they believed because of this that the house as constructed complied with the ordinance. The Dorans were not informed that appellant was not familiar with the requirements of the building ordinance. Mrs. Doran testified that she would not have purchased the property if she had known that it was not properly vented.

The trial court found that appellant's salesman made the representation "that the foundation was properly built"; that appellant failed to inspect the Mill Valley building ordinances, that appellant concealed this fact from the Dorans, but that appellant honestly believed at the time that it had complied with said ordinances. The court further found that the Dorans would not have bought the property if they had known of the defective construction.

Appellant argues the case as if the express representation that the foundation was properly built and the concealment of its failure to familiarize itself with the Mill Valley building ordinance could be "compartmentalized" and insulated from one another. In this fashion appellant first argues "that there is a total failure of proof regarding any impropriety in the construction of the foundations per se, and that in the absence of an express representation regarding compliance with the city ordinances regulating * * * ventilating vents, no false representation has been proven." Having thus, to its own satisfaction, disposed of the express representation it turns to the concealment of its failure to familiarize itself with the building ordinances and argues that be-

cause it had the good faith belief that it had not violated any ordinance such concealment could not be fraudulent, citing Watt v. Patterson, 125 Cal.App.2d 788, 271 P.2d 200.

[1, 2] Appellant cannot thus divorce the express representation from the concealment and treat each separately as if the other did not exist. Under the decisions even though there may be no duty of disclosure in the absence of some express representation, "one who does speak must speak the whole truth, and not by partial suppression or concealment make the utterance untruthful or misleading." 23 Cal.Jur.2d, Fraud and Deceit, § 46, p. 112. Here the representation was expressly made that the foundation was properly constructed. Actually it was not, in that the vents required by the ordinance had not been placed in the building. The foundation was vulnerable to the attack of wood-destroying fungus by reason of that fact. The Dorans were entitled to believe that all applicable building laws had been complied with in this respect and having undertaken to make a representation on that subject appellant was bound not to conceal any relevant circumstance.

[3] Appellant's argument is equally vulnerable from another point of view. Fraud may consist in "(t)he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Civ.Code, § 1572, subd. 2; Gagne v. Bertran, 43 Cal.2d 481, 487, 275 P.2d 15. The positive representation that the foundation was properly built, when it had not been ascertained whether the building laws had been complied with in this respect, falls well within this rule, although appellant believed it to be true. The intent to deceive is not necessary. It is sufficient in this respect if the representation is made with intent to induce the parties to act upon it. Gagne v. Bertran, supra, 43 Cal. 2d 481, 488, 275 P.2d 15.

[4] The claim that the representation that the foundation was properly built was a mere expression of opinion cannot stand in the face of the rule that where the one making the representation is in a position to have "superior knowledge or special information concerning the subject matter" such representation is regarded as one of fact. 23 Cal.Jur.2d, Fraud and Deceit, § 12 p. 30; Union Flower Market v. Southern California Flower Market, 10 Cal.2d 671, 676, 76 P.2d 503; Gagne v. Bertran, supra, 43 Cal.2d 481, 489, 275 P.2d 15.

[5] The reliance of Mrs. Doran upon the representation is established by her testimony that if she had known that the house was not properly vented she would not have bought it. While Mr. Doran's death precluded direct testimony of his reliance the circumstantial evidence sufficiently supports the finding as to him.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



159 Cal.App.2d 143

William G. WILLIAMS et al., Plaintiff, Cross-Defendants and Appellants,

v.

Max MIRANDA, Defendant, Cross-Complainant and Respondent.

William G. WILLIAMS et al., Plaintiff, Cross-Defendants and Respondents,

v.

Max MIRANDA, Defendant, Cross-Complainant and Appellant.

Civ. 22477.

District Court of Appeal, Second District, Division 3, California.

April 3, 1958.

Partition action, wherein defendant filed a cross-complaint. From judgment of

the Superior Court of Los Angeles County, William P. Haughton, J., separate appeals were taken by the plaintiff and cross-defendants upon the one hand, and by the defendant and cross-complainant on the other. The District Court of Appeal, Patrosso, J. pro tem., held that where purchaser at execution sale of divorced wife's interest in house had knowledge of property settlement agreement between divorced spouses which created a trust in the property for support and maintenance of minor children of the parties, purchaser was in no position to assert that he was a bona fide purchaser, even if he did not know exact terms of the trust.

Judgment modified and affirmed.

1. Judgment ⇐747(2)

Judgment in prior partition action by person under whom present plaintiff was claiming that property settlement agreement between spouses who were living apart created valid trust in certain house in favor of minor children of the parties was conclusive on such issue in present partition action.

2. Trusts ⇐11(1)

A property settlement agreement giving wife the exclusive right to occupy family home so long as she should not remarry, but providing that upon her remarriage the property should be sold and funds realized therefrom used for support and maintenance of minor children, created a valid trust for benefit of the minor children.

3. Trusts ⇐1

The essentials of a valid trust are a competent trustor, a property, an indicated intention, a definite disposition of the estate, a trustee and a beneficiary.

4. Trusts ⇐357(2)

Where purchaser at execution sale of divorced wife's alleged interest in house had knowledge of property settlement agreement between spouses which had created a trust in the property for support and maintenance of the minor children of the parties, purchaser was in no position to assert that he was a bona fide purchaser without notice of existence of the trust, even if he did not know the exact terms of the trust.

5. Trusts ⇐227

In view of fact that prior partition action instituted by divorced wife, if successful, would have resulted in a judgment that house owned by divorced parties was not subject to a trust in favor of their minor children, divorced husband was properly awarded expenses incurred by him in the successful defense of the action by which existence of the trust was confirmed out of funds realized upon sale of the house.

6. Trusts ⇐226

Where property settlement agreement by divorced parties created trust in house owned by them for support and maintenance of minor children of the parties, and husband under terms of the agreement was obligated to pay taxes levied against property so long as it remained unsold, husband could not be reimbursed for taxes paid by him upon the property out of proceeds realized upon sale of the house, especially where husband remained inactive and did nothing looking to sale of the property after wife's remarriage.

7. Divorce ⇐308

Independently of terms of property settlement agreement by divorced parties whereby trust in house owned by them was created for support and maintenance of minor children of the parties, husband was obligated to make payments for support of children by virtue of provisions of interlocutory divorce decree and was not entitled to reimbursement for such payments out of proceeds realized from sale of the house.

8. Trusts ⇐183

Where property settlement agreement by divorced parties created trust in house owned by them for support and maintenance of minor children of the parties, and it appeared that rent for house collected by wife was used for support of minor children during period when husband made no payments for their support, husband

was not entitled to reimbursement for one-half of the rent collected.

9. Trusts ⇐183

Where property settlement agreement by divorced parties created trust in house owned by them for support and maintenance of minor children, and it did not appear that husband was entitled to possession of property, husband could not hold either former wife or alleged purchaser of the house at execution sale upon judgment obtained against wife for rents, issues and profits received from the premises, since if there was any accountability therefor, it was to the trust estate and not to husband.

10. Trusts ⇐315(1)

Where property settlement agreement by divorced parties created trust in house owned by them for support and maintenance of minor children of the parties, husband was a trustee under the agreement and entitled to reasonable compensation for services rendered by him as such trustee.

11. Costs ⇐172

Counsel fees are not recoverable in actions either at law or in equity except where expressly allowed by statute.

12. Partition ⇐114(5)

Where services rendered by divorced wife's counsel in action for partition of certain realty instituted against divorced husband by alleged purchaser of wife's interest at execution sale on judgment against wife were in interest of wife alone and not for common benefit, award for attorney's fees of wife's counsel out of proceeds realized from sale of the realty was improper. West's Ann.Code Civ.Proc. § 796.

13. Trusts ⇐227

Attorney, in acting both as counsel for alleged purchaser of divorced wife's interest in certain realty at execution sale and for divorced wife's minor children in partition action wherein it was asserted by divorced husband that realty was being held in trust for support and maintenance of children, undertook to represent conflicting interests, and it would be highly inequitable to impose a charge for his services upon the trust estate which he, in interest of alleged purchaser at execution sale, sought to destroy to the detriment of minor beneficiaries whose interest he purported to represent.

14. Trusts ⇐225

Where it was determined that house owned by divorced parties was subject to trust for support and maintenance of minor children of divorced parties as result of property settlement entered into by them and that alleged purchaser of wife's interest in the house at execution sale was not a bona fide purchaser without knowledge of the trust, alleged purchaser, in making repairs on the house before it was determined that he was not a bona fide purchaser, did not do so as a mere volunteer and was entitled to recover reasonable value of the repairs out of proceeds realized from sale of the house.

R. Norman Wenzell, Los Angeles, for appellant.

C. A. Falconer and William D. Spector, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

We are presented here with separate appeals by the plaintiff and cross-defendants upon the one hand, and by the defendant and cross-complainant on the other, from portions of a decree entered in an action wherein plaintiff sought partition of a parcel of real property.

On September 7, 1943, defendant Max Miranda and cross-defendant Mary Louise Miranda, now Mary Louise Brown, who will hereinafter be referred to as Mrs. Miranda, were husband and wife and the owners as joint tenants of the subject property. On that date a divorce action between them being pending, the parties entered into a property settlement agreement which provided among other things that the title to said property should remain in the names of the parties as joint tenants so long as Mrs. Miranda did not re-

marry and as long as the property was occupied by Mrs. Miranda as a home for herself and the two minor children of the parties, with the proviso that should Mrs. Miranda remarry the property should be sold, both parties agreeing to execute the necessary deeds, and the proceeds derived therefrom should be used for the support and maintenance of said minor children at the rate of $50 per month, and "during the period of time said money is being expended" Mr. Miranda should be relieved from making any further payments for the support of said minor children. Until that time, however, Mr. Miranda agreed to pay $25 per month for the support of the children and further agreed to make the monthly payments of $25 due upon the encumbrance upon said property and to pay when due, all taxes and assessments levied against the property. Thereafter an interlocutory decree was entered in the divorce action followed by an entry of a final decree on October 30, 1944.

On May 2, 1946, Mrs. Miranda instituted an action in the Superior Court of Los Angeles County for the partition of the real property which is the subject of this action. Mr. Miranda appeared in that action, filing an answer and cross-complaint wherein he set forth the terms of the property settlement agreement and prayed a decree that Mr. and Mrs. Miranda held said property in trust for the use and benefit of the minor children in accordance with the terms of the property settlement agreement. In addition, the minor children acting by and through Max Miranda as their guardian ad litem, filed a complaint in intervention wherein they alleged substantially the same facts as those set forth in the cross-complaint of Mr. Miranda and prayed a decree that the said property was held in trust by Mr. and Mrs. Miranda for their use and benefit in accordance with the terms of the property settlement agreement. By its finding the court in that action found the facts to be as alleged in the cross-complaint of Max Miranda and the complaint in intervention of the children; and by its judgment decreed that Mrs. Miranda take nothing by her complaint; and that the property was held in trust pursuant to the provisions of the property settlement agreement. An appeal was taken from this judgment by Mrs. Miranda to the District Court of Appeal where it was affirmed. Miranda v. Miranda, 1947, 81 Cal.App.2d 61, 183 P.2d 61.

Following the affirmance of the judgment last mentioned and on January 27, 1948, Mrs. Miranda married one Kelly Brown and on March 26, 1948, she commenced a new proceeding in the superior court for the partition of the property and the termination of the trust. Process in this action was served upon Mr. Miranda and his default for failure to appear was duly entered therein but no further proceeding was had in said action until it was dismissed on July 6, 1956, following the filing of the instant action.

On February 5, 1954, the interest of Mrs. Miranda in the property was sold to the plaintiff for sum of $1,272.39 at an execution sale upon a judgment obtained against Mrs. Miranda in the Municipal Court of the Los Angeles Judicial District, and on February 14, 1955, the marshal of said court duly issued to plaintiff his deed therefor, following which, on May 5, 1955, plaintiff instituted this action. The only party named as defendant therein is Max Miranda and the complaint is in the customary form of an action in partition alleging that the plaintiff and defendant are the owners as tenants in common of the property in question; that plaintiff has an estate of inheritance therein to the extent of the undivided one-half interest in fee thereof; that the defendant has a similar interest therein; that there are no liens or encumbrances thereon appearing of record and that no person other than the plaintiff and the defendant is interested in said premises as owner or otherwise. The complaint concludes with a prayer for a partition of the property and if partition cannot be had, for a sale thereof and that the proceeds be applied to the payment of the general costs of the action; the payment of reasonable attorney's fees incurred for

the common benefit and that the residue be divided equally between the plaintiff and the defendant. Defendant appeared in the action by filing an answer and cross-complaint and in his answer he denies that the plaintiff and defendant are owners as tenants in common of the property; denies that plaintiff has any interest therein and alleges that the legal title thereto, is held by himself and Mrs. Miranda as trustees under the terms of the express trust created by the property settlement agreement, the terms of which are therein set forth. By way of special defense, defendant pleads the judgment rendered in the first partition action hereinbefore mentioned; that the plaintiff is the successor in interest of Mrs. Miranda as to her interest in the property; that plaintiff is the brother-in-law of the present husband of Mrs. Miranda and that plaintiff and Mrs. Miranda have entered into and are engaged in a conspiracy to defraud the beneficiaries and the defendants of their interest in said property and to circumvent the judgment rendered in the prior partition action; "that to carry out the aforesaid conspiracy the plaintiff herein accepted and received a conveyance of said property, without consideration or with knowledge of the aforesaid trust, and with intent on his part to assist defendant's said former wife in and for said fraudulent purposes, and to hold said property as a secret trust for the use and benefit of defendant's said former wife; that plaintiff has no right, title or interest in and to said property, but holds the same in trust for the use and benefit of the aforesaid express trust; that the within action was brought by plaintiff herein for the purpose of perpetrating the aforesaid fraudulent conspiracy, and in furtherance thereof and for the purpose of harassing defendant and to induce him to agree to sale of said property and a division of the proceeds of said sale between defendant and defendant's former wife and the plaintiff herein in violation of the terms and provisions of the aforesaid express trust."

By way of another special defense it is alleged "that defendant and plaintiff are the record owners as tenants in common of the property described" and that plaintiff is the owner of the undivided one-half interest therein; that plaintiff has collected rents, issues and profits from said property "since defendant acquired an interest therein" and has failed to account therefor to defendant and that the defendant has a lien thereon or on the proceeds from any sale thereof for one-half of any and all such rents, issues and profits so collected. Defendant further alleges that since he became an owner of such undivided one-half interest in the property he has "expended for the common benefit of all the owners of an interest in and to said property" by way of the payment of taxes for the years 1938 to 1954 both inclusive, in the sum of $907.73; the sum of $2,000 paid on account of the purchase price of the property; that from April 1, 1939, to February 1, 1948, defendant paid on account of the encumbrance on said property the sum of $2,232.50 and that in addition, defendant expended the sum of $513 for attorney's fees and the sum of $488.65 as court costs in the defense of the partition action instituted by Mrs. Miranda hereinbefore referred to, for all of which payments defendant alleges that he has a lien against the said property or the proceeds from any sale thereof. The answer concludes with a prayer that plaintiff take nothing; that the respective interest of the parties in and to the property be determined; that plaintiff be adjudged to hold the property in trust for the use and benefit of the defendant and the beneficiaries of said trust; that plaintiff be required to account for any and all rents, issues and profits received from said property; that the defendant have a lien upon the said property or upon the proceeds from any sale thereof for the expenditures made by him as alleged in his answer and for attorney's fees incurred in the action.

The cross-complaint wherein, in addition to the plaintiff, Mrs. Miranda and the minor children are named as defendants, alleges substantially the same facts as set forth in his answer and prays for the

same relief. In addition, however, defendant therein alleges that since the remarriage of Mrs. Miranda she has refused to sell the property as provided in the settlement agreement although defendant has at all times been ready and willing to do so; that since the remarriage of Mrs. Miranda, defendant has paid the sum of $2,500 for the support and maintenance of the minor children and that he is entitled to reimbursement from the trust estate therefor; that by reason of the alleged conspiracy between Mrs. Miranda and plaintiff to defraud the trust estate, Mrs. Miranda should be removed as one of the trustees of the trust; that neither plaintiff nor Mrs. Miranda have any estate, title or interest in or to the said property and that the defendant is the owner in fee and entitled to the possession thereof.

To the cross-complaint a joint answer was filed by the plaintiff and Mrs. Miranda individually and as guardian ad litem for the minor children appearing by the same attorney who represents plaintiff. In this answer the cross-defendants, while admitting the execution of the property settlement agreement previously referred to, deny that a trust was thereby created in favor of the children and that Mr. Miranda was ever a trustee of such trust. Thus, we have the extraordinary situation of counsel purporting to represent minor cross-defendants asserting on behalf another party to the proceeding and adverse interest to such minors, a position which he consistently maintained upon the trial as he continues to do upon this appeal while still appearing and acting as counsel on their behalf. This matter will be adverted to further in a subsequent portion of this opinion.

During the course of the trial and pursuant to stipulation the real property was ordered sold for the sum of $11,187.37, which sum was deposited with the county clerk to abide the judgment in the action.

The trial court's findings comprise some 15 pages in the clerk's transcript. They are couched in the language of the pleadings and as is not unusual in such situation, they are confusing and in many respects contradictory. However, for the present it may be said generally that they find to be true substantially all the allegations contained in the defendant's answer and cross-complaint.

From the facts as found, the court made the following conclusions of law; that Mr. Miranda is entitled to judgment against the cross-defendants "decreeing that he recover and receive from the proceeds of said real property and be reimbursed as follows:

"1. $1,001.65 for attorneys fees and costs incurred and paid in defending the prior action to partition said real property.

"2. $340.58 for one-half of the real property taxes paid by cross complainant on said real property since the remarriage of the co-trustee, cross defendant Mary Louise Miranda.

"3. $2,080.00 as and for one-half of the child support payments paid by Cross Complainant since the said remarriage of the said co-trustee.

"4. $1,290.00 as and for one-half of the rent collected from said real property by Cross Defendants Mary Louise Miranda and William G. Williams since the remarriage of the said co-trustee.

"5. $490.00 for compensation as co-trustee of the express trust created by the co-trustees.

"6. $500.00 for attorneys fees incurred and paid in the defense of the within action and the enforcement of the said express trust.

"7. For removal of the cross defendant Mary Louise Miranda, also known as Mary Louise Brown, as a co-trustee, and the appointment of a new trustee or trustees for the express trust.

"8. For reimbursement for costs of suit incurred and paid herein by Defendant and Cross Complainant.

"9. For the balance of the proceeds of the sale of said real property to be paid over to and held in trust by the new trustee or trustees during the minority of the minor children of the co-trustees; the in-

come and corpus to be used for the support and maintenance of said children during their minority at the rate heretofore fixed by the above entitled Court, subject to modification thereof, and Cross Complainant to be relieved therefrom unless and until the said funds are exhausted, and upon the younger child reaching majority, the then remaining balance to be divided equally between and paid over to Cross Complainant and Cross Defendant William G. Williams.

"Plaintiff and Cross Defendant William G. Williams is entitled to judgment for and reimbursement from the proceeds of said sale of said real property in the sum of $392.00 for repairs on the said real property and for $500.00 for attorneys fees herein."

Judgment was entered accordingly and in addition R. Norman Wenzell and C. A. Falconer were thereby appointed as trustees of the trust until the further or different order of the court.

Appeal of Plaintiff and Cross-Defendant Williams

[1-3] Plaintiff first contends that the trial court erred in determining that by the terms of the property settlement agreement a valid trust was created in favor of the minor children. This question, however, is no longer an open one. It was directly presented and adjudicated adversely to the plaintiff by the judgment in the first partition action instituted by Mrs. Miranda. Nor is plaintiff in a position to argue, as he does, that the trust was not one for the benefit of the children but for the sole benefit of Mr. and Mrs. Miranda. As said by the District Court of Appeal upon the appeal from the judgment in the prior partition action instituted by Mrs. Miranda:

"In contending that the property settlement did not effect a trust appellant argues that 'no statement nor words are contained in the agreement to indicate an intention to create a trust.' In making such contention appellant is forgetful of the essentials of a valid trust, to wit, a competent trustor, a property, an indicated intention, a definite disposition of the estate, a trustee and a beneficiary. 54 Am.Jur., p. 43 sec. 30; 65 C.J. p. 231 et seq.; Lefrooth v. Prentice, 202 Cal. 215, 226, 259 P. 947. In addition to the terms of the traditional valid trust the legislature in 1929 provided that a trust in relation to real or personal property or both may be made for any lawful purpose. Civ.Code, sec. 2220. The language of the agreement in the instant case provides (1) a legal purpose, to wit, maintaining the home for appellant and the minor children; (2) an estate, to wit, the home held by the parties as joint tenants; (3) beneficiaries, to wit, appellant and the minor children; (4) a legal term, to wit, the time during which the children would be entitled to support and maintenance from their parents. With all the elements of a legal trust present, the finding that a valid trust was created by the property settlement was supported by the contract of the parties." Miranda v. Miranda, 81 Cal.App.2d 61, 67–68, 183 P.2d 61, 65.

[4] Plaintiff next contends that the evidence is insufficient to sustain the trial court's finding that plaintiff and Mrs. Miranda entered into a conspiracy to defraud the beneficiaries of their interest in the trust and as a consequence erred in its conclusion that plaintiff was not a bona fide purchaser for value of Mrs. Miranda's interest in the property. We need not, however, pause to consider the validity of the contention with respect to the insufficiency of the evidence to support the finding in question, in view of the further finding that at the time plaintiff became the purchaser of Mrs. Miranda's interest in the property at execution sale, he had knowledge of the existence of the trust thereon in favor of the children and which finding is fully supported by the evidence. The evidence in this regard is to the effect that plaintiff had been on friendly terms with Mrs. Miranda for a number of years and frequently visited her at the home of herself and Mr. Brown. During these visits the trust upon the property was the subject of discussion be-

tween the parties upon various occasions as was also the subject of the judgment rendered in the prior partition action instituted by Mrs. Miranda. In view of this evidence, plaintiff is in no position to assert that he was a bona fide purchaser without notice of the existence of the trust. If he did not know the exact terms of the trust, he had knowledge of the facts sufficient to put a reasonably prudent person upon inquiry which if pursued would have disclosed the true state of Mrs. Miranda's interest in the property.

[5] Plaintiff also complains that the trial court erred in finding that Mr. Miranda was entitled to reimbursement in the sum of $1,001.65, being the amount expended by him for attorney's fees and court costs in defending the prior partition action instituted by Mrs. Miranda because, so it is said, Mr. Miranda was never a trustee of the trust. He argues that since Mr. Miranda "was a trustor and a beneficiary he could not possibly have been a trustee also." No authority is cited in support of this statement and we know of none. On the contrary one may be a beneficiary of a trust as well as the trustee so long, at least, as he is not the sole beneficiary. Cahlan v. Bank of Lassen County, 1909, 11 Cal.App. 533, 541, 105 P. 765. And in Wallace v. Riley, 1937, 23 Cal.App. 2d 654, 666, 74 P.2d 807, 814, it is said: "There is nothing in the law to disqualify a joint tenant from trusteeship of his interest in the joint property." In view of the fact that the action instituted by Mrs. Miranda, if successful, would have resulted in a judgment that the property was not subject to a trust in favor of the children, the trial court properly awarded Mr. Miranda the expense incurred by him in the successful defense of the action by which the existence of the trust was confirmed. Bixby v. Hotchkis, 1943, 58 Cal.App.2d 445, 455, 136 P.2d 597.

[6] Plaintiff also contends that the court erred in awarding Mr. Miranda the sum of $340.58 by way of reimbursement for taxes upon the property paid by him subsequent to Mrs. Miranda's remarriage. This contention is well founded. By the terms of the settlement agreement Mr. Miranda agreed to pay all taxes levied or assessed against the property. This portion of the judgment is sought to be sustained only upon the basis of the finding, which is assailed by the plaintiff as unsupported by the evidence, that Mr. Miranda was at all times subsequent to the remarriage ready and willing to sell the property, but that Mrs. Miranda consistently refused to agree thereto. Mrs. Miranda testified that she repeatedly endeavored to secure Mr. Miranda's consent to sell the property but that he consistently refused to do so. Upon this same subject Mr. Miranda testified as follows:

"Q. Mr. Miranda, did your former wife, Mrs. Brown, after the execution of the property settlement agreement in 1947, often contact you in regard to selling the property and dividing the proceeds between yourself and her? A. She always try, you know. She always hand me a subpoena trying to sell the property and take her share out.

"Q. Mr. Miranda, you refused to sell the property at any time, is that correct? A. You mean sell the property at any time?

"Q. You didn't want to sell it under her terms and conditions, did you? A. And I didn't want to sell it because on account of the kids, because I wanted the kids to have that property.

"Q. In other words, you wanted to carry out the terms of the trust, isn't that right? A. Yes."

The foregoing testimony would hardly seem to support the trial court's finding that Mr. Miranda was at all times willing to sell the property after his former wife's remarriage. On the contrary, Mr. Miranda's testimony indicates that it was his purpose and desire to preserve the property intact for the children. Indeed, at the conclusion of the trial in a discussion which

ensued after the trial judge suggested to the parties the advisability of their agreeing to a private sale of the property as a means of avoiding the added expense incident to a judicial sale, Mr. Miranda stated to the court: "Oh, we might as well. I wanted to save that house for the kids you know." In his brief, defendant argues that, while Mrs. Miranda was at all times desirous of selling the property, she was insistent that she receive one-half of the proceeds derived from any such sale and it was because of this that he was not willing to consent to a sale. However, even if Mrs. Miranda may have been of the view or expected that if the property was sold she would be entitled to one-half of the proceeds, it was at all times within Mr. Miranda's power to compel a sale in accordance with the terms of the settlement agreement, and the fact that he did not undertake to do so, coupled with his testimony quoted above, warrants no other inference than that he did not desire to sell. In any event, under the terms of the agreement he was obligated to pay the taxes levied against the property so long as it remained unsold and if he remained inactive and did nothing looking to the sale of the property after Mrs. Miranda's remarriage, we see no basis for charging the proceeds constituting the trust estate held for the benefit of the children with the payment of an obligation which he in any event was obligated to discharge.

[7] Plaintiff also complains of the court's finding and judgment that the defendant is entitled to be reimbursed from the proceeds of the sale in the sum of $2,080.00 as and for one-half of the payments made by him for the support of his minor children subsequent to the remarriage of Mrs. Miranda. We are of the view that this contention is well taken for various reasons. In the first place, we have searched the record in vain for any evidence to the effect that defendant paid for child support during this period, the sum of $4,160 and counsel for the defendant in his brief has failed to direct our attention to any such evidence. Under the terms of the property settlement agreement defendant was obligated to pay $25 per month or a total during this period, as we compute it, of $2,600, and the testimony of Mrs. Miranda, which is undenied by the defendant, is to the effect that he made no support payments for a period of two years. We are not unmindful of the fact as disclosed by an examination of the file in the divorce action which is in evidence, that on February 24, 1947, the amount which defendant was required to pay for the support of the children was increased to $30 per month effective March 7, 1947, and on April 9, 1954, again increased to $65 per month effective May 8, 1954, but as noted the record does not disclose what payments have been made on account thereof by the defendant. The finding as to the amount of support paid by the defendant is therefore not sustained by the evidence.

Regardless of the amount of child support that the defendant may have paid, however, the judgment insofar as it awards defendant any sum on account thereof, is erroneous. A reading of the property settlement agreement makes clear that what the parties intended thereby was that defendant should pay for the support of his children $25 per month and in the event that the property was sold, $50 per month should be paid from the proceeds of the sale to Mrs. Miranda for this purpose, one-half thereof or $25 representing defendant's interest in the property, being in lieu of the $25 which the defendant was otherwise obligated to pay by the terms of the agreement. If the property had been sold upon Mrs. Miranda's remarriage the result would have been that although defendant was thereby excused from making the monthly payment of $25, he would in effect still be contributing $25 per month for this purpose by virtue of the fact that the trust fund would each month be depleted to the extent of $50, one-half of which would be chargeable to his share. Thus, to the extent that the proceeds of the sale have not been decreased by $50 per month since Mrs. Miranda's remarriage, as would have been the case if the property had then been sold, the amount

which ultimately will come to the defendant when the trust terminates upon the attainment by the children of their majority [1] has been increased.

More important, however, is the fact that independently of the terms of the property settlement agreement, defendant was obligated to make the payments for the support of his children by virtue of the provisions of the interlocutory decree of divorce. We know of no rule of law and none has been called to our attention to the effect that defendant is entitled to reimbursement for such payments.

[8, 9] Plaintiff further complains of the trial court's finding and judgment that defendant is entitled to reimbursement in the sum of $1,290 "as and for one-half of the rent collected from said real property by Cross-Defendants Mary Louise Miranda and William G. Williams since the remarriage" of Mrs. Miranda. This contention also appears to be well taken. Our examination of the record discloses that the only testimony with respect to rental collected from the premises is to the effect that Mrs. Miranda collected rent therefrom in the sum of $85 per month for 11 months and that plaintiff collected rent at the rate of $35 per month for 12 months, or a total of $1,355. Mrs. Miranda testified that the rent so collected by her was used for the support of the minor children during the period when, as she testified and which testimony was not denied by the defendant, the latter made no payments for their support. In this situation plaintiff is not entitled to reimbursement therefor. Moreover the trial court expressly found that the defendant was not entitled to the possession of the property. In the light of this finding there is no basis for its conclusion that either plaintiff or Mrs. Miranda is accountable to defendant for the rents, issues and profits thereof. If there is any accountability therefor, it is to the trust estate and not to the defendant.

[10] Plaintiff also complains of the allowance to the defendant in the sum of $490 as compensation for services rendered by him as trustee. The argument advanced in support of this contention is that the defendant was never a trustee and that he performed no service as such for which he is entitled to be compensated. We have in effect already disposed of this contention by our prior holding that the defendant was such trustee and that he rendered services in the protection of the trust. He was accordingly entitled to reasonable compensation for his services and the amount awarded therefor does not appear to us to be unreasonable.

Appeal of Defendant and Cross-Complainant Max Miranda

In support of his appeal defendant first contends that the court erred in allowing him only one-half of the payments allegedly made by him for the support of the children subsequent to the remarriage of Mrs. Miranda. This contention has already been disposed of in connection with our consideration of the appeal of the plaintiff and wherein we have concluded that defendant was not entitled to be reimbursed for any part of such support payments.

[11, 12] Defendant next complains of the provision of the judgment whereby the plaintiff is awarded the sum of $500 as and for attorney's fees in this action, and we are in agreement with this contention. It is elementary that counsel fees are not recoverable in actions either at law or in equity except where expressly allowed by statute. Miller v. Kehoe, 107 Cal. 340, 343, 40 P. 485. If an allowance therefor was authorized, it is only by virtue of section 796 of the Code of Civil Procedure which in partition actions authorize the allowance of counsel fees incurred by the parties "for the common benefit." Although plaintiff's action purports to be one in partition, from its very inception it developed into a proceeding to establish plaintiff's ownership to an undivided one-half interest in the subject property free and clear of the claims of the minor children under the trust agreement. All of the efforts of

1. The children will attain their majority in July, 1958, and March, 1960, respectively.

plaintiff both in the trial court and upon this appeal were and have been directed to this end. It is therefore clear that such services as were rendered by counsel for the plaintiff were in the interest of plaintiff alone and not for the common benefit. As said in Capuccio v. Caire, 1929, 207 Cal. 200, 208, 277 P. 475, 478, 73 A.L.R. 8: "It is not to be understood that in so holding we are deciding that the cost of litigating purely controversial issues arising in such actions between parties thereto who have their own counsel and are incurring their own costs in the effort to sustain their adverse claims shall be chargeable or recoverable against the losing party or the parties to such controversy. It is evident that such was not the intent of the framers of section 796, Code of Civil Procedure, since it is expressly provided therein that it is only when the costs, including counsel fees entailed in said action, shall be found to have been expended for the common benefit that they shall be chargeable or recoverable by whichever of the parties, plaintiff or defendant, shall have so expended the same."

[13] Furthermore, as previously noted, in acting both as counsel for the plaintiff and for the minor children in this proceeding, the attorney for the plaintiff undertook to represent conflicting interests and it would be highly inequitable to impose a charge for his services upon the very trust estate which he, in the interest of the plaintiff, sought to destroy to the detriment of the minor beneficiaries whose interests he purported to represent.

[14] Finally defendant contends that the court erred in awarding plaintiff reimbursement in the sum of $392 for repairs made by him to the real property. These repairs consisted of a new roof, installation of a new water heater and repainting. There is no contention that the amount expended for the purposes stated is unreasonable, nor that the repairs were not required. The argument is that plaintiff having no interest in the property, was a mere volunteer and hence not entitled to be reimbursed for this expenditure. Plaintiff, however, had an interest in the property and in maintaining it and the trial court was warranted in concluding that by reason of the repairs, the value of the property was increased and that as a consequence it brought a better price upon the sale thereof. The expenditures inuring to the benefit of the trust estate, we see no good reason why the court should not have authorized reimbursement therefor.

The judgment is modified by striking therefrom the provisions directing payment to defendant and cross-complainant from the proceeds of the sale in the possession of the county clerk of the following items: $340.58 for one-half of the general and special real property taxes paid by the cross-complainant; $2,080 as and for one-half of the child support payments paid by cross-complainant; $1,290 as and for one-half of the rents collected by cross-defendants William G. Williams and Mary Louise Miranda; and also striking therefrom the provision directing the payment to plaintiff from the proceeds of the sale the sum of $500 as and for attorney's fees; as so modified the judgment is affirmed; neither party to recover costs.

SHINN, P. J., and VALLÉE, J., concur.

159 Cal.App.2d 82

Eugene B. RAMEY, Jr. and Maude Ramey, Plaintiffs,

v.

Robert M. MYERS, F. J. Buckley, doing business under the firm name and style of F. J. Buckley & Company, F. J. Buckley & Company, Helen M. Catherman, Wilshire Escrow Company, a corporation, Ruth Tarnutzer, Doe One, Doe Two, Doe Three, Roe One, a partnership, and John Doe, a corporation, Defendants.

Robert M. MYERS, Defendant and Respondent,

v.

John C. HEFFERNAN, Judgment Creditor and Appellant.

Civ. 22769.

District Court of Appeal, Second District, Division 2, California.

April 1, 1958.

Rehearing Denied April 28, 1958.

Hearing Denied May 27, 1958.

Proceeding on motion to compel assignee of a money judgment, who allegedly acted as an agent or nominee of movant's codefendant in acquiring title to judgment, to satisfy the judgment. From an adverse order of the Superior Court, Los Angeles County, Arnold Praeger, J., the assignee appealed. The District Court of Appeal, Herndon, J., held that evidence sustained finding that assignee in taking assignment of judgment was acting for and on behalf of the codefendant.

Order affirmed.

1. Judgment ⇐894

Notice of motion to compel satisfaction of judgment which did not specifically state grounds on which it was made but which did state motion was based on an affidavit which contained averments concerning assignments of judgment to assignee, and which made reference to points and authorities stating background of action out of which judgment was entered, gave ample notice of grounds upon which motion was made. West's Ann.Code Civ. Proc. § 675.

2. Judgment ⇐894

In proceeding on motion to compel satisfaction of judgment, affidavit in support of motion specifically alleging that at time assignee took title to judgment he was acting on behalf of movant's codefendant and as his agent, nominee and employee contained sufficient allegations of ultimate facts and adequately apprised assignee of contentions and proofs which movant would offer. West's Ann.Code Civ.Proc. § 675.

3. Action ⇐27(1)

Action predicated upon breach of fiduciary duties and concealment of facts giving rise to right to recover secret profits is an action ex delicto and not ex contractu.

4. Principal and Agent ⇐71

Acts in violation of fiduciary duties of an agent are regarded as fraudulent.

5. Appeal and Error ⇐931(1)

All conflicts must be viewed by reviewing court in light most favorable to prevailing party and a challenged finding is entitled to benefit of every favorable inference that can be reasonably drawn from the evidence.

6. Judgment ⇐894

In proceeding on motion to compel assignee of a money judgment, who allegedly acted as agent or nominee of movant's codefendant in acquiring title to judgment, to satisfy the judgment, evidence sustained finding that assignee in taking assignment of judgment was acting for and on behalf of the codefendant. West's Ann.Code Civ. Proc. § 675.

7. Trial ⇐388(2)

Proceeding to compel satisfaction of judgment was not in nature of action and formal findings of fact and conclusions of law were not necessary. West's Ann.Code Civ.Proc. § 675.

8. Appeal and Error ⇐891

Request on appeal by assignee of judgment from order compelling satisfaction of judgment for permission to offer evidence of alleged agreement between defendants to contribute equally to payment of a judg-

ment allegedly assigned to appellee as agent for one of defendants was tardily and inappropriately made and was disregarded. West's Ann.Code Civ.Proc. § 675.

Hy Schwartz, Beverly Hills, for appellant.

Irmas & Rutter, Beverly Hills, for respondent.

HERNDON, Justice.

Appellant Heffernan is the assignee of a money judgment. He appeals from an order compelling its satisfaction. The order thus brought under review was granted upon motion made by defendant Myers pursuant to section 675 of the Code of Civil Procedure.

The judgment which appellant acquired by assignment was entered upon a jury verdict in favor of plaintiffs Ramey and against the codefendants Myers and Buckley. The theory of the motion to compel satisfaction was as follows: (a) The judgment was recovered upon a cause of action *ex delicto* sounding in fraud; (b) appellant in acquiring title to the judgment by assignment acted as the agent or nominee of codefendant Buckley; (c) acquisition of the judgment by one of two joint tortfeasors resulted in a satisfaction of the judgment, there being no right of contribution under applicable law.[1]

[1] Appelant does not question the validity of the legal proposition that acquisition of a tort judgment by the agent of one of the judgment debtors with money furnished by the principal would operate to satisfy the judgment under applicable law. Appellant, however, attacks the order under review on the following grounds: (1) That the notice of motion to compel satisfaction was defective in that it failed to state the grounds upon which the motion was made; (2) that the affidavits supporting the motion were insufficient, in that they stated conclusions rather than facts; (3) that the action in which the judgment was rendered was *ex contractu* and not *ex delicto;* (4) that there was no substantial evidence to support a finding that in acquiring the judgment appellant acted as Buckley's agent or that Buckley furnished any money for the purchase of the judgment; and (5) that a proceeding under section 675, Code of Civil Procedure, is in the nature of an "action" so that an order therein must be supported by findings of fact and conclusions of law.

It is our conclusion that none of the contentions advanced by appellant is tenable. We shall discuss them seriatim.

Appellant's first contention is that the trial court lacked jurisdiction because respondent's notice of motion did not sufficiently specify the grounds upon which the motion was to be made. While respondent's notice of motion did not specifically state the grounds on which it would be urged, it did state: "Said motion will be based on this notice, points and authorities and an affidavit filed in support of a motion to stay execution filed concurrently herewith, other affidavits to be filed, interrogatories and answers thereto to be taken in New York City, New York, from John C. Heffernan and other depositions and testimony to be introduced at the time of the hearing on this motion."

The affidavit to which reference was made was that of Myers, the moving party. This affidavit contains the following averments: "(1) That he [Myers] is one of the codefendants in the above entitled action and that a judgment was rendered in favor of the plaintiff Ramey and against himself and the codefendant F. J. Buckley on the 10th day of May, 1951, as joint tortfeasors for a civil fraud perpetrated on the plaintiff Ramey; (2) that this judgment was assigned by Ramey to the Continental Casualty Company, who subsequently assigned it to John C. Heffernan of New York City, New York; (3) that in

1. Section 880 of the Code of Civil Procedure declares that sections 875 et seq., enacted in 1957 and making provision for contribution among joint tortfeasors, are effective as to causes of action accruing after January 1, 1958.

paying to and accepting the purported 'assignment' of the judgment from Continental Casualty Company, John C. Heffernan acted on behalf of and as agent, nominee and employee of said codefendant F. J. Buckley and took no interest in said judgment except the purported bare legal title of said judgment."

The points and authorities to which reference was made in the notice of motion contain the following statement, among others: "A review of the previous proceedings in the above-entitled action clearly indicates that the codefendants were held responsible as joint tortfeasors for a civil fraud perpetrated upon the plaintiff, and that the judgment made and entered herein was against them as joint tortfeasors. The affidavits attached hereto and filed herewith, establish that the judgment in this action has been purchased by an individual who is apparently acting as the agent and/or nominee of F. J. Buckley, one of the codefendants." The points and authorities also cited and digested California decisions in support of the rules of law relied upon by the moving party with reference to contribution among joint tortfeasors and the right of a judgment debtor to compel satisfaction where it appears that another judgment debtor has paid the judgment directly or indirectly.

From the foregoing it is apparent that appellant was given ample notice of the grounds upon which the motion would be made. Thus, as stated in Shields v. Shields, 55 Cal.App.2d 579, at page 584, 130 P.2d 982, at page 984, "the purpose of the code provision requiring that the grounds of the motion be set forth was sufficiently served and that is all that the law requires." To the same effect are Savage v. Smith, 170 Cal. 472, 474, 150 P. 353; Giandeini v. Ramirez, 11 Cal.App.2d 469, 475, 54 P.2d 91; Perez v. Perez, 111 Cal.App.2d 827, 830, 245 P.2d 344.

[2] Appellant next attacks the sufficiency of the affidavits by contending that statements therein to the effect that appellant "took no interest in the judgment" and that he was "the agent and nominee of Buckley" were mere conclusions and not statements of fact. It is our view that the affidavits in question sufficiently pleaded the ultimate facts and adequately apprised appellant of the contentions and proofs which the respondent would and did offer. In this connection it is to be noticed that the affidavit in question specifically alleged that at the time appellant took title to the judgment he was "acting on behalf of" Buckley, as his "agent, nominee and employee." We regard such allegations as sufficient to plead the ultimate facts. General Mill and Lumber Company v. Robertson, 126 Cal.App. 118, 120, 14 P.2d 327; Frasch v. London & Lancashire Fire Ins. Co., 213 Cal. 219, 224, 2 P.2d 147.

Moreover, the issue as to the sufficiency of the affidavits from an evidentiary standpoint should be regarded as moot for the reason that the motion to compel satisfaction of the judgment was heard and decided, not only upon the affidavits filed in support and in opposition, but also upon oral and documentary evidence produced at a hearing of some three days' duration. The notice of motion contemplated this form of proof. Since in this case both parties availed themselves of an unrestricted opportunity to present oral testimony and documentary evidence, the affidavits filed in support of the motion and in opposition to it actually served more the office of pleadings than of proof.

[3, 4] The contention that the cause of action upon which the judgment was rendered was *ex contractu* rather than *ex delicto* is without merit. It is immediately apparent from a reading of the decision affirming the judgment on appeal (Ramey v. Myers, 111 Cal.App.2d 679, 245 P.2d 360) that the liability of the defendants was predicated upon a breach of fiduciary duties and a concealment of facts giving rise to the right of plaintiffs to recover secret profits. The delictual character of the action seems manifest. In its affirming opinion, the appellate court concluded (111 Cal. App.2d at pages 685 and 686, 245 P.2d at page 364): "The evidence hereinbefore recited not only established the existence

of agency, but it also tended to prove the concealment of facts vital to the plaintiffs with resultant profit to defendants. In the circumstances presented by the record, the trial court very properly instructed the jury on the issues of agency, fiduciary relationship and the right of plaintiffs to recover secret profits." As stated in Darrow v. Robert A. Klein & Co., Inc., 111 Cal.App. 310, at 316, 295 P. 566, at page 568, "A violation of duty on the part of a trustee is treated as a fraud upon the beneficiary (Civ.Code, § 2234), and a violation of duty on the part of an agent should be treated in the same manner." It is established law that acts in violation of the fiduciary duties of an agent are regarded as fraudulent. 2 Cal.Jur.2d 773, sec. 104; 2 C.J. Agency § 353, p. 692; 3 C.J.S. Agency § 138.

Sufficiency of the Evidence

[5] Since the order under review is based upon an implied finding that Heffernan, in paying off Continental and taking an assignment of the judgment, was acting for and on behalf of Buckley, the question for our decision is whether there is any substantial evidence, contradicted or uncontradicted, which supports this finding. All conflicts must be viewed in the light most favorable to the prevailing party. The challenged finding is entitled to the benefit of every favorable inference that reasonably can be drawn from the evidence. Crogan v. Metz, 47 Cal.2d 398, 403–404, 303 P. 2d 1029; Grainger v. Antoyan, 48 Cal.2d 805, 807, 313 P.2d 848.

[6] We have concluded that the finding of the trial court is amply supported by the record. Since the trial judge was entitled to view the case in the light of all matters appearing in the record before him, we deem it necessary briefly to review the history of the judgment and certain proceedings relating thereto as a background for our summary of the evidence.

The judgment was entered on May 10, 1951. After denial of the motion for a new trial, a notice of appeal in the name of both defendants was filed on July 5, 1951. On the same day defendant Buckley applied to Continental Casualty Company for a bond to stay execution. He posted with his application a cashier's check for $12,000, the proceeds of which were held by Continental as collateral security. Continental executed and filed a stay bond in the amount of $30,152.18. The judgment was affirmed by Division One of this court on June 16, 1952. Hearing by the Supreme Court was denied on July 14, 1952.

On September 3, 1952, Continental paid plaintiffs the sum of $22,255.88 in full payment of the judgment and took an assignment thereof. On September 8, 1952, Continental filed its assignment, along with a substitution of attorneys signed by the plaintiffs, substituting the law firm of Anderson, McPharlin and Conners in the place and stead of plaintiffs' attorneys. On September 19, 1952, Continental filed a document entitled "Nomination of Attorneys" in which Samuel Colby, then attorney for Buckley, was associated as its attorney of record, in addition to Anderson, McPharlin and Conners. There is evidence that Colby was associated at the request of Buckley for the purpose of running execution against respondent Myers and that Colby's fees were paid by Buckley.

On October 14, 1952, Continental withdrew from its trust account the $12,000 which had been deposited by Buckley, and reimbursed itself to that extent for the loss sustained in paying the judgment. No partial satisfaction of judgment was filed.

On November 7, 1952, writ of execution on the judgment was issued in the full amount, that is, in excess of $22,000. On January 7, 1953, defendant Myers and his family were examined by attorney Colby on proceedings supplemental to execution. No such proceedings were had with respect to the defendant Buckley. On January 20, 1954, Continental assigned the judgment to appellant John Heffernan, a stock broker and member of the New York Stock Exchange, New York City. This assignment to appellant Heffernan was not filed with the clerk until October 10, 1956, following the filing by respondent of a motion to compel satisfaction of judgment in which Con-

tinental was named and served as the apparent owner of the judgment.

Thereafter, on October 18, 1956, respondent filed a new notice of motion to compel entry of satisfaction of the judgment naming appellant as the judgment creditor. On June 4, 1956, after a three-day hearing of the issues presented by the motion, the court made the order here appealed from.

Certain undisputed facts immediately appear to be significant: (1) Appellant Heffernan actually claims no beneficial interest in the judgment. In his deposition he testified that one E. Haiss asked him to purchase the judgment, furnished all of the money for its purchase and "has the entire interest" in it. Thus Heffernan admittedly stood before the court as the holder of nothing more than the bare legal title to the judgment. (2) For some wholly unexplained reason, said E. Haiss, who, according to Heffernan, was the true beneficial owner of the judgment, failed to appear as a witness at the hearing or to give any testimony by affidavit, deposition, or otherwise. (3) Buckley and Heffernan are brothers-in-law and, according to Heffernan, said E. Haiss is their sister-in-law. (4) The only affidavit filed in opposition to the motion to compel satisfaction was that of Buckley, codefendant and codebtor under the judgment, who normally would desire to see the judgment satisfied. (5) The only witness called to testify at the hearing on behalf of Heffernan was Elizabeth Buckley, wife of the defendant Buckley. (6) Appellant's only testimony was given in the form of a deposition taken by respondent upon written interrogatories and offered in evidence by respondent.

As above indicated, the evidence shows a close family relationship by marriage between Buckley and Heffernan. It would appear from the combined testimony of Heffernan and Elizabeth Buckley that Heffernan's wife, Buckley's wife and E. Haiss are sisters; that Heffernan and Buckley are brothers-in-law and that E. Haiss is their sister-in-law. However, respondent Myers testified that he had known Mr. and Mrs. Buckley for some eighteen years and that during that period he had seen Mrs. Buckley sign many documents using the name E. Haiss. In the light of all the circumstances the trial court might have disbelieved the testimony of Mrs. Buckley and the deposition testimony of Heffernan that the E. Haiss who furnished the money for the purchase of the judgment was Evelyn Haiss, Buckley's sister-in-law. On the basis of respondent's testimony, the trial judge might reasonably have concluded that the E. Haiss for whom Heffernan purchased the judgment was Buckley's wife, Elizabeth.

However, regardless of its conclusion as to the identity of E. Haiss, the trial court could draw the reasonable inference that she acted for and on behalf of Buckley in purchasing the judgment and in furnishing the money for that purpose. Buckley was the only one of the several parties involved in the transaction who stood any possible chance of benefitting from the purchase of the judgment. It seems most unlikely that any reasonable person would pay full face value for a judgment which, even if collected in full, would allow the purchaser no profit—a judgment which, in view of its history, obviously was of doubtful value.

But there is evidence of other circumstances which tend to support the finding of the court below. According to Heffernan's testimony, he is a stock broker by profession and had never bought any other judgment. Acting for his doubtfully identified principal, he paid full face value for the judgment without making any inquiry concerning the credit or financial responsibility of either of the judgment debtors. Heffernan also stated that he employed attorney Colby, who was also Buckley's attorney, to negotiate the purchase of the judgment on his behalf. In response to the question as to what attempts had been made to collect the judgment, Heffernan testified that Mr. Colby and Mr. Schwartz handled it, and that he did not know what action was taken by them.

Attorney Newton E. Anderson, one of the attorneys for Continental, testified that

following the affirmance of the judgment on appeal and the assignment of the judgment to Continental, Buckley was represented by attorneys L. H. Phillips and Samuel Colby. He further stated that Buckley came in and asked that Colby be associated as an attorney for Continental for the purpose of running an execution against Myers. He understood that Buckley paid Colby's fees. Mr. Anderson said that he had "many, many conferences" with Buckley and Colby with reference to disposition of the judgment. During these discussions, Heffernan's name was mentioned and Colby advised Anderson that Heffernan was going to purchase the judgment. Anderson recalled a conference with Buckley and Phillips in which they indicated a desire to handle the matter by assigning the judgment to Heffernan. Anderson's firm did not handle the proceedings supplemental to execution in which Myers and his family were examined. These proceedings were conducted by Mr. Colby.

It seems significant that prior to the issuance of the writ of execution and the proceedings supplemental thereto, Continental had reimbursed itself to the extent of $12,000 by utilizing the collateral deposited by Buckley, but that no partial satisfaction of judgment ever was filed. Continental assigned the judgment to Heffernan as though it remained wholly unsatisfied. Anderson testified that Heffernan paid slightly over $10,000 for the judgment, but Heffernan testified in his deposition that he had paid the full amount, which was in excess of $22,000.

It seems unnecessary further to extend this opinion by reciting more of the cumulative evidence (with which the record is replete) tending to show that in assigning the judgment to Heffernan, Continental was cooperating with Buckley in an effort to keep it alive so that it might be collected in whole or in part from Myers.

A somewhat comparable situation was presented in Adams v. White Bus Line, 184 Cal. 710, 195 P. 389. There the plaintiff recovered judgment against the defendants White Bus Line and Stiles jointly for injuries caused by the concurrent negligence of said defendants. The defendant bus company's insurance carrier paid plaintiff the full amount of the judgment. At the instance of the carrier, the judgment was not satisfied but instead was assigned to one Powell, who was manager of defendant White Bus Line. After the payment to plaintiff, defendant Stiles moved the lower court for an order directing the entry of satisfaction of judgment on the ground that payment by the insurance carrier satisfied the judgment as to both defendants. The defendant White Bus Line appealed from the order directing satisfaction of the judgment. In affirming the order, the Supreme Court made the following comments which are quite applicable in the case at bar (184 Cal. at page 712, 195 P. at page 389):

"It is apparent from the evidence that the money was paid on account of the White Bus Line, and the assignment was to its manager and for its benefit. * * * The obvious purpose of the assignment was an attempt to keep the judgment alive against the codefendant Stiles. If the case were such that contribution could be enforced between the defendants, the transaction might have proved effective as an assignment. * * * But the generally accepted doctrine is that there is no right of contribution between joint tortfeasors".[2] And at page 713 of 184 Cal., at page 390 of 195 P. the court stated the rule invoked by respondent here: "Where one of several joint wrongdoers pays a judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of a man of straw."

[7] Finally, appellant complains because the order under review was not sup-

2. See Note 1, supra.

ported by formal findings of fact and conclusions of law, contending that a proceeding under section 675, Code of Civil Procedure, is in the nature of an "action". This contention is also without merit.

In Waller v. Weston, 125 Cal. 201, 204, 57 P. 892, 893, the court held that no findings or conclusions need accompany an order upon a motion to set aside a default, the court saying: "[I]t is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings, under section 590 of the Code of Civil Procedure, where the decision of the court following the findings is a judgment. Findings of fact and conclusions of law, therefore, had no proper place in this proceeding." In Waymire v. California Trona Co., 176 Cal. 395, 399–400, 168 P. 563, 565, the court said: "The universal practice in this state is not to require findings on an order made after motion." The foregoing statement is followed and quoted in Parker v. Parker, 107 Cal.App.2d 215, 217, 236 P.2d 828, and in Perez v. Perez, supra, 111 Cal.App.2d 827, 830, 245 P.2d 344. (See also: Wood v. Peterson Farms Co., 132 Cal.App. 233, 22 P.2d 565; Bradley Co. v. Ridgway, 14 Cal.App.2d 326, 58 P.2d 194.)

[8] At the conclusion of his closing brief appellant requests of this court that he be permitted now to offer evidence of an alleged written agreement between Myers and Buckley whereby they agreed to contribute equally to the payment of the Ramey judgment. With reference to the time when this "new evidence" was discovered, we are told only that appellant learned of the agreement "after the conclusion of the trial". Manifestly, this request, made both tardily and inappropriately, should be disregarded.

The order is affirmed.

FOX, P. J., concurs.

ASHBURN, J., deeming himself disqualified, does not participate herein.

159 Cal.App.2d 225

Thelma G. McCLELLAN, Plaintiff and Appellant,

v.

Frank McCLELLAN, Defendant and Respondent.

Civ. 22686.

District Court of Appeal, Second District, Division 1, California.

April 8, 1958.

Rehearing Denied May 6, 1958.

Hearing Denied June 4, 1958.

Action by wife for divorce on ground of cruelty wherein husband also sought divorce on same ground. From a judgment of the Superior Court, Los Angeles County, William E. Fox, J., granting both parties a divorce on ground of extreme cruelty, the wife appealed. The District Court of Appeal, Lillie, J., held that trial court did not abuse its discretion in granting both parties a divorce and in limiting award of alimony to wife to one year.

Judgment affirmed.

1. Appeal and Error ⇐989, 996

Where record discloses substantial evidence in support of findings and judgment, a reviewing court will not re-evaluate credibility of witnesses, re-appraise weight of evidence adduced before trial judge, or draw inferences contrary to those drawn by trial court.

2. Divorce ⇐154, 235

In divorce action, trial court did not abuse its discretion in granting both parties divorce and in limiting award of alimony to wife to one year. West's Ann.Civ.Code, § 139.

3. Divorce ⇐235, 286

Trial court is given broad discretion in determining amount of alimony to be paid and period during which payment shall continue, which discretion ordinarily will not be interfered with on appeal save for manifest abuse thereof. West's Ann.Civ. Code, § 139.

4. Divorce ⇐296

In divorce action, trial court did not abuse its discretion in failing to award wife a sum for support of the parties' 18 year old son, who had graduated from high school and was working part-time earning $110 per month. West's Ann.Civ.Code, § 139.

5. Deeds ⇐208(1)

In divorce action, evidence sustained finding that there was no valid and effectual delivery of a quitclaim deed executed by husband to wife and covering their residence which was held in joint tenancy.

6. Appeal and Error ⇐1010(1)
Deeds ⇐66

Delivery or nondelivery of deed is question of fact to be determined from surrounding circumstances of transaction, and where there is substantial evidence or where inference or presumption may be drawn from evidence to sustain court's finding, it will not be interfered with on appeal.

Norman Berris, Los Angeles, for appellant.

Culver Van Buren, Burbank, for respondent.

LILLIE, Justice.

Plaintiff appeals from a judgment wherein a divorce was granted to both parties on grounds of extreme cruelty; respondent was ordered to pay to appellant wife as alimony the sum of $175 per month for a period of one year only; and custody of the 18-year-old son of the parties was awarded to appellant. No provision was made for the support and maintenance of the minor son, the trial judge having found that he was self-supporting. The court also found that certain real estate, consisting of the family home, was community property and ordered it sold, the proceeds of the sale to be divided equally between the parties.

The appellant herein contends that the trial court abused its discretion (1) in awarding alimony for a period of one year only; (2) in making no provision for the support and maintenance of the 18-year-old son; and (3) in finding that the quitclaim deed executed and handed over by respondent to appellant was inoperative and that the property was in fact community property.

It becomes apparent from appellant's brief that although she complains of an "abuse of discretion" her contentions are actually based upon an alleged insufficiency of the evidence to support the findings and judgment.

[1] The rule is well settled that where the record discloses substantial evidence in support of the findings and judgment a reviewing court will not re-evaluate the credibility of the witnesses, re-appraise the weight of the evidence adduced before the trial judge, or draw inferences contrary to those drawn by the trial court. This principle seems particularly applicable in a "dual divorce" case involving comparative fault, in which the trial court has granted a divorce to each party. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598.

[2] The parties herein were accorded full opportunity to present evidence bearing upon the issues involved. During the trial, which lasted four days, the judge was able to observe the witnesses, their appearance, demeanor and manner of testifying, and to evaluate their credibility. Considerable evidence was received by the trial court with respect to the acts of cruelty committed by both parties; the health and financial circumstances of husband and wife and their minor son; and the circumstances surrounding respondent's delivery of a quitclaim deed to appellant.

The parties were married in 1934, and, after a separation and subsequent reconciliation, finally separated in January, 1956. Appellant is a 45-year-old woman who, although unskilled and without a trade, has worked as a presser. She testified that for the past year she has been under the care of a doctor for endometriosis, which sometimes is painful and requires her to go to bed.

Respondent testified that at the time of the separation appellant appeared to be in very good condition, that she seemed to be able to go out as much as she desired and to do the things she wanted to do, and that she did not appear to be in any way hampered.

The record throughout discloses that appellant frequently went out in the evening, usually did not retire at night until a late hour, and engaged in numerous and various social activities, during both day and night. Although endometriosis is a disease causing bleeding of the tissues, the record is silent as to the extent to which it affects appellant; what if any disability it causes and whether it prevents her from seeking and taking employment; what treatment, if any, she is receiving for this condition; and when and how often she visits her doctor. No medical evidence was offered on behalf of appellant.

[3] In connection with appellant's first contention concerning the award of alimony to her for a period of one year only, the rule is clear that the trial court is given a broad discretion in determining the amount of alimony to be paid and the period during which payment shall continue, which discretion ordinarily will not be interfered with on an appeal save for a manifest abuse thereof. That these matters are within the discretion of the trial court is made plain by Section 139 of the Civil Code which provides that such court may "make such suitable allowance to the wife for her support, during her life, *or for a shorter period, as the Court may deem just,* having regard to the circumstances of the parties respectively". (Italics added.)

Our California courts have consistently voiced approval of this principle. In Fillmore v. Fillmore, 74 Cal.App.2d 418, 421, 168 P.2d 725, 726, the reviewing court said: "The trial court has very broad powers in passing upon questions of fact, including the amount and duration of alimony. Lamborn v. Lamborn, 80 Cal.App. 494, 251 P. 943. The findings of the trial court will not be disturbed on appeal unless a clear abuse of discretion appears from the record. Duffey v. Duffey, 79 Cal.App. 734, 251 P. 218." Similar expression is found in Newbauer v. Newbauer, 95 Cal.App.2d 36, at page 40, 212 P.2d 240, at page 243: "That the members of this court might have been more liberal is not the test. The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorable in support of the trial court's action, no judge could reasonably have made the order that he did. Fillmore v. Fillmore, 74 Cal.App.2d 418, 168 P.2d 725; Cozzi v. Cozzi, 81 Cal.App. 2d 229, 183 P.2d 739; Furniss v. Furniss, 75 Cal.App.2d 138, 170 P.2d 486."

The principle mentioned is not limited to any specific set of facts; in any and all cases the matter of alimony is peculiarly one within the broad discretion of the trial judge. Such is the situation here.

Without recounting the testimony of the respondent it is obvious that the trial court believed the evidence he gave relating to appellant's many acts of cruelty. This is manifest in the court's finding that he was entitled to a divorce. In addition to the evidence relating to her physical condition and her numerous and varied activities, the court no doubt had in mind the comparative fault of the parties in limiting the payments of alimony to one year only. Under the law of this state, we cannot hold on the facts in the instant case that the trial judge abused his discretion in limiting the award of alimony.

[4] The same may be said in answer to the appellant's second contention that there was an abuse of discretion in respect to the trial court's failure to award a sum for the support of the 18-year-old son of the parties. Support for a minor child is also controlled by Section 139 of the Civil Code. The same discretion afforded the court in connection with an award of alimony is found in matters of child support. Although the boy has a past history of illness there was no evidence that he now suffers any physical disability that would prevent him from taking fulltime employment. The record discloses that at the time of the trial

he had graduated from high school, was working part-time earning $110 per month, and had worked continuously since the end of his vacation. By choice he has been residing with the appellant. The boy was not called as a witness and no medical evidence bearing on his condition was offered at the time of the trial. It must be assumed that the trial court fully considered the matter of parental support in the light of all the evidence introduced on the issue. No abuse of discretion is manifest in the record, nor is there any merit to the appellant's contention that there was insufficient evidence to support the trial court's decision.

[5] As to the appellant's third contention, no error is apparent in the trial court's finding that the unrecorded quitclaim deed executed by respondent husband to his wife was not intended to pass a present interest, and that the property covered by the deed was of a community nature rather than the separate property of appellant wife. That the determination of whether the delivery was valid or ineffectual turns upon the question of the grantor's intent and is a question of fact for the trial court, is borne out in the case of Williams v. Kidd, 170 Cal. 631, 151 P. 1. At page 638 of 170 Cal., at page 3 of 151 P., the Supreme Court stated: "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery."

[6] The rule is well established that delivery or non-delivery of a deed is a question of fact to be determined from the surrounding circumstances of the transaction and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain the court's finding, it will not be interfered with on appeal. Chaffee v. Sorensen, 107 Cal. App.2d 284, 236 P.2d 851; Ivancovich v. Sullivan, 149 Cal.App.2d 160, 307 P.2d 989.

There is clear and substantial evidence in the record to the effect that in 1954, prior to the first separation of the parties, respondent offered the deed to the residence, heretofore held in joint tenancy, to the appellant along with a list of his insurance policies with instructions to file claims with the insurance companies and record the deed in the event of his death, in order to avoid the trouble and expense of probate. Appellant at that time made a facetious comment to the respondent, and displaying no interest in the documents, respondent dropped them into a drawer and went outside to work in the yard. He testified that in offering the conveyance to her, he was under the impression that property held in joint tenancy was community property and required probate upon his death. Appellant in this connection testified that when respondent brought the documents to her he mentioned suicide and that she felt he wanted her to believe that he might take his own life. Appellant has never recorded the deed, which was kept in a drawer with the card listing respondent's insurance policies, and the parties resided together in the property as their family home until their separation.

The record is clear that the real property covered by the deed had a community source in that it had been purchased from funds obtained through the sale of real property previously purchased with earnings of respondent, and that, although held in joint tenancy for convenience, the property never lost its community aspect.

The trial court after hearing all of the evidence, rejected the testimony of appellant in connection with the deed and found the circumstances of delivery as related by respondent to be true. The appellant's claim that the court's determination in respect to the execution and delivery of the quitclaim deed and the nature of the property covered by it constitutes an abuse of discretion, cannot be sustained.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Babe Otto BARBERA, Defendant and Appellant.*

Cr. 6084, 6085.

District Court of Appeal, Second District, Division 1, California.

April 7, 1958.

Hearing Granted June 4, 1958.

Prosecution for sale of heroin and possession of marijuana. The Superior Court, Los Angeles County, Le Roy Dawson, J., entered judgment convicting defendant on count charging sale of heroin to minor, revoking probation for prior conviction of possession of marijuana and imposing original sentence for such charge, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence sustained conviction of sale of heroin to minor and finding that defendant was not guilty of possession of marijuana as charged in second count, and in absence or argument, judgment revoking probation for prior conviction of possession of marijuana would be affirmed.

Judgment affirmed.

1. Criminal Law ⇐1159(2, 4)

The District Court of Appeal is in no position to pass upon credibility of witnesses and is not authorized to review the evidence.

2. Criminal Law ⇐1159(3)

Fact that there may have been some inconsistencies and some contradictions in the testimony is not sufficient to reverse judgment.

3. Poisons ⇐9

Evidence sustained conviction of sale of heroin to minor. West's Ann.Health & Safety Code, § 11714.

4. Criminal Law ⇐1178

Where no argument had been presented on appeal from judgment of conviction of narcotic violations with reference to companion case in which probation for prior conviction of possession of marijuana was revoked, judgment would be affirmed. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⇐1202(4)

Where information charging defendant with narcotic violations contains count charging that defendant has been previously convicted of violation of narcotics law, failure of judge to find as to truth or falsity of prior conviction amounts to a finding that charge was not true. West's Ann. Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1158.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOURT, Justice.

There are two appeals before the court in this matter. The first case, Superior Court No. 191311, is an appeal from a judgment wherein the defendant was convicted of a violation of the provisions of section 11714, Health and Safety Code (sale of heroin to a sixteen year old child).

The second case is Superior Court No. 172604, and is an appeal from a judgment wherein the defendant was charged with a violation of the provisions of section 11500, Health and Safety Code (possession of marijuana).

The defendant, in case No. 191311, was charged in count I of the information with having sold heroin on April 5, 1957, to a minor of the age of sixteen years. In count II of the information the defendant was charged with having possession of certain narcotics (marijuana) on May 2, 1957. It was also charged in the same information that the defendant had formerly, namely on May 10, 1955, been convicted of the crime of violation of section 11500, Health and Safety Code.

The defendant pleaded not guilty as to both counts and denied the prior conviction. At the time of trial all parties and counsel

* Opinion vacated 328 P.2d 973.

waived a jury trial and stipulated that the cause be submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, and each side reserved the right to introduce additional evidence. The trial was continued to a day certain, and on that date witnesses were called and testified in behalf of the plaintiff and defendant.

The court found the defendant guilty of count I and not guilty as to count II of the information, and made no finding as to the charge of a prior conviction. The defendant made an application for probation, and the matter was heard on August 6, 1957. Probation was denied in the heroin selling case and the defendant was sentenced to the state prison and such sentence was ordered to run concurrently with the county jail sentence imposed in case No. 172604.

In case numbered 172604, filed May 3, 1955, the defendant was charged, in substance, with having marijuana in his possession in violation of the provisions of section 11500, Health and Safety Code. On May 10, 1955, the defendant caused his plea of guilty to be entered and made an application for probation. On May 31, 1955, the defendant was sentenced to one year in the county jail; execution of the sentence was suspended and defendant was granted probation for three years on condition that he serve the first ninety days in jail and that he not associate with users of narcotics, obey all laws and follow all rules of the probation department.

The facts of the case having to do with the possession of marijuana in 1955 are substantially as follows: The defendant was of the age of about nineteen years, living at the home of his parents. He had in his possession a quantity of marijuana some of which was in the top bureau drawer in his own room. He pleaded guilty to the possession of marijuana and applied for probation, which was granted on May 31, 1955. The probation officer's report set forth that the defendant had admitted to being a user of marijuana for about three years; it was further set forth that the defendant had been a "chronic discipline problem," had defied authority, and further that the defendant could see "nothing wrong" with using narcotics.

In November, 1955, appellant was arrested and charged with being an addict. The officers at the time suspected that narcotics were being furnished to a certain minor and in the course of the investigation thereof they arrested Barbera who, at the time, was with three persons in an automobile and the officers found nine capsules of heroin in the vehicle. All of the persons in the car, including the defendant, had numerous hypodermic marks on their arms, and each of the persons appeared to be under the influence of a narcotic. The associates of the defendant at or about that time were all engaged in criminal activities for which they were either on bail or had been released on probation.

In the case arising in November, 1955 (addiction), the defendant, after originally pleading not guilty, changed his plea to that of guilty after he heard a tape recording which was introduced into evidence. He was sentenced on that charge on January 17, 1956, to "three years summary probation with the first ninety days to be served in the County Jail."

The probation officer thereafter recommended a modification of the probation which had been granted the defendant on May 31, 1955, in case numbered 172604, and the judge, on January 25, 1956, ordered that the defendant serve eighty-three days in jail, such sentence to run concurrently with any other sentence then being served (the addiction sentence), and further that the probation be reinstated and all other conditions remain the same.

After the defendant was released from jail he was again arrested in November, 1956, for certain deliberate violations of the law for which he was convicted and sentenced to ninety days in jail. In one of the instances he escaped from the police as he was being booked, but was later apprehended. His probation as of May 31, 1955 (marijuana possession), was again modified in November, 1956, and the judge ordered that he spend one month in jail, the

sentence to run concurrently with the sentence then being served for the other offenses.

The defendant was then arrested on the offense with which we are here concerned, namely, selling heroin to a sixteen year old high school student on April 5, 1956. Probation was revoked in case numbered 172604 on August 6, 1957, and the original sentence of one year in the county jail (imposed May 31, 1955) was put in force and effect; however, it was ordered that such sentence run concurrently with the prison sentence. The defendant filed his notice of appeal from such judgment.

The facts of the case having to do with the sale of heroin to the minor child are as follows: A high school girl by the name of Miss Schwartz, of the age of sixteen years, first saw the defendant in March or April of 1957 at the house of a mutual friend, Miss Barbara Burns, in Los Angeles county. Babe Otto Barbera was at the house of Miss Burns when Miss Schwartz arrived at about 8:00 or 9:00 o'clock P.M. Others were there also. Miss Schwartz testified that she did not pay too much attention to who was there at the time because people were always there and she did not recall their names. She did recall, however, that she probably asked Miss Burns if she thought Barbera could "get her anything" and that Miss Burns had answered yes. Miss Schwartz talked with Barbera and she inquired of him as to the possibility of getting her some heroin or a "cap." Barbera indicated that he could secure heroin for her and they drove off together in an automobile with Barbera driving. They went a relatively short distance to a house, where Miss Schwartz gave Barbera $5, and Barbera got out of the automobile and went into the house. After about ten minutes Barbera came back to the automobile and they drove back to Miss Burns' house. Barbera gave to Miss Schwartz a "cap" which consisted of a one-half inch capsule with a white powder inside. Before this occasion Miss Schwartz had seen heroin in capsules ten or more times and she had used the substance which she believed to be heroin and was familiar with the effects it produced. She knew the manner of shooting it into a vein with a hypodermic needle and eye dropper. After Miss Schwartz received the "cap" from Barbera she went to the bathroom at Miss Burns' house and "took a fix." She described the sensations she experienced and stated that it was similar to the previous instances when she had taken heroin.

A police officer testified as an expert in the use and effect of narcotics and stated that in his opinion the substance injected into Miss Schwartz was heroin.

Miss Schwartz later signed a police report wherein she listed Barbera as having furnished her with narcotics. The information was relayed to other officers and at about 8:30 o'clock, May 1, 1957, two officers went to Barbera's door. Barbera opened the door and he was placed under arrest. The defendant said he wanted to wash his teeth and get his jacket before leaving with the officers. The officers investigated a room which Barbera said was his and in Barbera's jacket pocket they located a spoon, a piece of cotton, an eye dropper and a hypodermic needle. The room was searched and in a top bureau drawer they found material which later was examined and found to be marijuana.

The defendant testified in his own behalf and stated that he had not sold any heroin to Miss Schwartz; that some of the marijuana he had possessed in 1955 was kept in the top bureau drawer where the officers had found the material which was identified as marijuana in the instant case.

The court asked the question: "Well, at that time, in 1955, the marijuana they found, was any of it in this dresser drawer that we are talking about here? A. *I kept some there, yes.*" (Emphasis added.)

The defendant, on direct examination, was asked by his own attorney: "Now, is it true, or not, that on the 10th day of May of 1955, in the Superior Court of the State of California, County of Los Angeles, that you were convicted of the crime of violation of section 11500 of the Health

& Safety Code of the State, a misdemeanor? Is that true?" The following ensued between the defendant and his counsel:

"A. Would you repeat that, please? Repeat it please; I didn't hear it, I didn't hear the beginning.

"Q. I want to know whether or not, on the 10th day of May of 1955, in the Superior Court of the State of California, here in Los Angeles, whether or not you were convicted of a violation of section 11500 of the Health & Safety Code? A. Yes, I was.

"Q. What did that involve? What kind of narcotics were involved there? A. Cannabis sativa, marijuana.

"Q. Marijuana? A. Yes.

"Q. That is the correct date, May 10, 1955? A. I believe so."

At the oral argument counsel for Barbera stated in effect that it was the defendant's contention at the trial that the marijuana which was found in the bureau drawer in May, 1957, was in fact a part of the marijuana which had been found in May, 1955, and that he had pleaded guilty to possessing that marijuana and had been sentenced therefor, and that he should not be convicted again of having what he contended was a part of the same marijuana. The argument apparently impressed the judge for he found the defendant not guilty of possessing marijuana as charged in the information in count II.

The appellant contends in the present case that the evidence was legally insufficient to sustain the conviction. He asserts that the testimony of Miss Schwartz was impeached by several witnesses and cites People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80, and People v. Graziano, 83 Cal. App.2d 701, 189 P.2d 518, to support his contention. There was no direct evidence in either of the cited cases pointing to the accused as being the perpetrator of the offense charged. The situation was entirely different in the case under consideration.

[1] This court is in no position to pass upon the credit which should be given to the witnesses and we are not authorized to review the evidence under the circumstances existing in the present case. People v. Silva, 119 Cal.App.2d 421, 426, 259 P.2d 74.

[2, 3] The fact that there may have been some inconsistencies and some contradictions in the testimony is not sufficient to reverse the judgment. The testimony of Miss Schwartz was not at all improbable. People v. Thomas, 103 Cal.App. 2d 669, 672, 229 P.2d 836. The circumstances fully support the judgment. People v. Sykes, 44 Cal.2d 166, 280 P.2d 769.

[4] No argument has been presented to us with reference to the case wherein probation was revoked in case number 172604, and in conformity with People v. Yarter, 138 Cal.App.2d 803, 805–806, 292 P.2d 649, the judgment therein should be affirmed.

This case unfortunately is typical of many cases arising in Los Angeles county wherein the trial judge, in the face of uncontradicted evidence to the contrary, either finds that a charged prior conviction is not true, or arbitrarily strikes such prior conviction supposedly "in the interests of justice;" or, as in the instant case, fails entirely to make any finding as to the truth or falsity of the prior conviction: in this case the defendant, under oath, brought out in his own testimony on direct examination that he had been previously convicted of a "violation of section 11500 of the Health & Safety Code."

In most narcotic cases coming before this court within the past few years the record discloses appellant to have had one or more prior convictions of a narcotic offense or of a felony. In the matter of illicit narcotics, the legislature has clearly spelled out the penalty to be imposed in such cases. If the trial judges ignore or strike prior convictions, the very purpose of the legislature in enacting the statutes in question, that is, to eliminate the narcotic peddlers and users as hazards to themselves and to society, is blocked. If judges repeatedly, by one device or another, see fit

to fail in their duties and responsibilities, it is little wonder that law enforcement, in particular with reference to narcotic cases, is falling into disrepute.

[5] Under section 1158, Penal Code, a jury *must* find whether the defendant has suffered a previous conviction when such prior conviction is charged in an information. It would seem that a judge should not fail to do that which a jury *must* do. The separate issue of the prior conviction was presented and the judge in this case failed to act. The failure of the judge to find as to the truth or falsity of the prior conviction amounts to a finding that the charge was not true. In re Daniels, 119 Cal.App. 350, 6 P.2d 549; In re Hall, 88 Cal.App. 212, 263 P. 295; People v. Ysabel, 28 Cal.App.2d 259, 82 P.2d 476. Such a finding, in turn, has the effect of reducing the sentence of the defendant by about one-half. Health & Safety Code, § 11714.

Furthermore, on the face of the judgment in the heroin case, the incongruity of the whole matter is evident—the court in effect found that the prior conviction was not true, and then immediately ordered that the sentence in the prior case, which a judge had theretofore imposed (May 31, 1955), be "placed in full force and effect," however, to run concurrently with the sentence imposed in the heroin selling case. Such practice is not conducive to sustaining the reputation of the courts for integrity.

"* * * the illicit drug traffic has trebled in the United States since World War II * * *." "* * * drug addiction is responsible for approximately 50 per cent of all crimes committed in the larger metropolitan areas * * *." "* * drug addiction is contagious. Addicts spread the habit with cancerous rapidity * * *." "* * * Heroin * * * peddlers are selling murder, robbery * * and should be dealt with accordingly. * * * In truth and in fact, it is 'murder on the installment plan,' leading not only to the final loss of one life, but to others who acquire this contagious infection through association with the original victim." Report of the Committee on the Judiciary, U. S. Senate Report No. 1440 (Pursuant to Senate Resolution 67).

It is not readily apparent why a judge would vitiate the effectiveness of the existing law by failing to observe the clear mandate of the legislature in the treatment of recidivists. (California, however, has repeatedly been referred to as "very weak in legislation." Anslinger, U. S. Commissioner of Narcotics.) "Without exception the illicit traffic continues to flourish in those problem areas where leniency is an established pattern in the courts. * * The most effective weapon against the spread of addiction and the elimination of existing addiction is severe punishment in the form of mandatory sentences which effectively deter traffickers." Report of Subcommittee on Narcotics to the House Committee on Ways & Means 1956.

It appears that if anything would give the peddler of narcotics confidence and an incentive to continue in the illicit traffic, it would be the strong possibility that if he were caught, in any event, he would only receive the lightest sentence possible, and if a recidivist, he might even be fortunate enough to be sentenced as a first offender, as in the instant case. Experience in other states and in the federal government has demonstrated conclusively that the narcotic peddler is gradually going out of business where the penalty is certain and severe. "He cannot stand that five years without probation and without parole." Anslinger, U. S. Commissioner of Narcotics.

Had the appellant in this case been apprehended by federal officers and prosecuted and convicted in the federal court, he would have been subjected to a very different penalty, namely, in accordance with the federal law where it is set forth: "Whoever * * * sells, * * * furnishes, or * * * facilitates the sale, giving, furnishing * * * any heroin * * * to any person who has not attained the age of 18 years, may be fined not more than $20,000, and shall be imprisoned for life, or for not less than ten years, except that the offender shall suffer death

if the jury in its discretion shall so direct." 21 U.S.C.A. § 176b. No suspension of the imposition or execution of sentence or the granting of probation is permitted under the federal law.

No useful purpose was served in the instant matter in permitting the defendant to file an application for probation, because under section 11715.6, Health and Safety Code, the defendant was ineligible in any event.

Under the circumstances of this case the appellant, for no apparent reason, received at the hands of the judge a sentence of about one-half of what the statute specifically provides for in such cases.

The judgment in case number 172604 is affirmed.

The judgment in case number 191311 is affirmed.

LILLIE, J., concurs.

WHITE, P. J., concurs in the judgment.



159 Cal.App.2d 287

Janet V. McLAUGHLIN, Plaintiff and Appellant,

v.

Morris R. McLAUGHLIN, Defendant and Respondent.

Civ. 22551.

District Court of Appeal, Second District, Division 2, California.

April 9, 1958.

Hearing Denied June 4, 1958.

Action by former wife against former husband for breach of alleged property settlement agreement, and for damages for allegedly procuring a divorce by fraud. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered judgment for former husband on pleadings, and wife appealed. The District Court of Appeal, Fox, P. J., held that complaint by former wife for damages for breach of alleged property settlement agreement stated a cause of action, notwithstanding the fact that such agreement was not approved or incorporated in divorce decree obtained by husband, and notwithstanding the fact that complaint did not allege such agreement was in writing, athough wife, in order to recover thereunder would be required to prove the agreement was in writing and signed by both parties.

Judgment reversed in part, and in part affirmed.

1. Divorce ⇐254

Where an interlocutory divorce decree was not signed by either of the parties, wife could not assert any rights based on agreement embodied in the document on theory that such decree itself was a written property settlement agreement. West's Ann.Civ. Code, § 159.

2. Husband and Wife ⇐278(1)

A valid contract settling property rights between married persons does not require the approval of a divorce court to render it effective, but is binding on the parties and enforceable by either of them against the other even though the court fails or refuses to adopt or approve the agreement by its decree in a divorce proceeding.

3. Husband and Wife ⇐281

Complaint by former wife for damages for breach of alleged property settlement agreement stated a cause of action, notwithstanding the fact that such agreement was not approved or incorporated in divorce decree obtained by husband, and notwithstanding the fact that complaint did not allege such agreement was in writing, although wife, in order to recover thereunder, would be required to prove the agreement was in writing and signed by both parties.

4. Judgment ⇐518

An action at law for damages against an adversary party for allegedly procuring a judgment by fraud or perjury constitutes a collateral attack on the judgment, and

cannot be maintained while such judgment remains in force.

5. Divorce ⇐200

Where a divorce was granted to husband for wife's default, court was without jurisdiction to award wife alimony.

6. Divorce ⇐168

Where portion of a divorce decree granting husband a divorce was still in force, and former wife herself was not granted a divorce by such decree, former wife could not maintain the action for damages based upon husband's alleged fraud in the procurement of the divorce decree.

W. H. Wadsworth, E. L. Fraser, Charles E. McClung, Los Angeles, for appellant.

Warner & Sutton, Barbara Warner, Caryl Warner, Morris R. McLaughlin, Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff has appealed from a judgment on the pleadings in favor of defendant.

Plaintiff and defendant were married in 1921. They separated in 1935 and have lived separate and apart since that time. In 1948 the husband filed suit for divorce on the ground of extreme cruelty. The wife answered and filed a cross-complaint seeking divorce. In 1949 an interlocutory decree was entered granting the husband a divorce. The decree also provided for division of the community property and awarded the wife custody of the minor child, who was then 19 years old. The decree ordered the husband to pay the wife $200 per month for the "support, care and maintenance" of herself and the minor child until further order of the court. A final decree was entered in June, 1950. The minor child attained his majority in October, 1950. The decree has never been modified or set aside. In 1953 the husband ceased making any payments to the wife. In April, 1954, she procured an order to show cause re contempt by reason of his failure to make payments. This court issued a writ of prohibition. In that proceeding we held that the interlocutory decree failed to disclose any fact indicating that the provision for the wife's support was based on a contract settling the property rights of the parties, that on its face the provision for the wife's support was simply an alimony order, and that since on the record the divorce was granted to the husband for the wife's fault, the trial court was without jurisdiction to award her alimony and that such order was void. McLaughlin v. Superior Court, 128 Cal. App.2d 62, 274 P.2d 745.

Thereafter, the wife made a motion in the trial court for an order *nunc pro tunc* amending the interlocutory decree to show that the support order was based upon a property settlement agreement relating to the disposition of the community property and the support and maintenance of the wife and minor child. The motion sought to have the terms of the property settlement agreement incorporated in the decree. This motion was denied. She then made a motion for a writ of execution on the ground that the decree ordered payments by the husband to her of $200 per month until further order of the court. This motion was also denied. Both of these rulings were affirmed on appeal. McLaughlin v. McLaughlin, 141 Cal.App.2d 494, 296 P. 2d 878.

In 1955 the wife instituted the present action against her former husband. The complaint contains four counts. Her first count is based on the theory that the interlocutory decree "constituted a written contractual agreement" for the division of the community property and the support of herself and the minor child and that defendant herein has breached such agreement. In her second count plaintiff alleges a property settlement agreement in substantially the same terms as alleged in her first count, but she makes no reference to the divorce decree. It is then alleged that defendant has breached the agreement. In the third count plaintiff alleges that defendant made promises to her that he would pay for her support in her later years if he should be

granted a divorce; that defendant knew these promises were untrue and had no intention of keeping them; that defendant made such promises with the intention of deceiving plaintiff; that plaintiff believed defendant's promises and that, in reliance thereon, plaintiff relinquished her interest in most of the community property and refrained from introducing evidence in support of the allegations in her cross-complaint, thereby preventing her from obtaining a divorce and hence alimony. The fourth count need not be considered since plaintiff now concedes that it fails to state a cause of action.

[1] In her first count plaintiff does not purport to base her cause of action on the interlocutory decree per se. Rather, her position is that the decree is itself a written property settlement agreement. This count does not state facts sufficient to constitute a cause of action. "Civil Code section 159 controls property settlement agreements after separation and such agreements must be in writing and signed by both parties. * * *" McLaughlin v. McLaughlin, supra, 141 Cal.App.2d at page 497, 296 P.2d at page 880; see, also, Fitch v. Tyler, 105 Cal.App. 306, 311, 288 P. 74. On its face the document upon which plaintiff relies (viz., the interlocutory decree, a copy of which is attached to the complaint) does not meet the requirements of section 159 since it is not signed by either of the parties. It therefore follows that plaintiff may not assert any rights based on an agreement embodied in that document.

Plaintiff relies upon Gould v. Superior Court, 47 Cal.App. 197, 200, 191 P. 56, for the proposition that an interlocutory decree constitutes a contract between the parties. That proposition is not here applicable because the contract which plaintiff asserts must comply with the provisions of Civil Code, section 159, which requires the signatures of both parties. An interlocutory decree is not such a contract.

[2] Plaintiff's second cause of action is based upon an alleged property settlement agreement separate and apart from the divorce decree. We need only consider that portion of the alleged agreement which pertains to plaintiff's future support because the other terms of the agreement are identical with the provisions of the divorce decree which was an adjudication of those matters. It is clear that this alleged property settlement agreement was neither adopted nor approved in the divorce decree. McLaughlin v. McLaughlin, supra, 141 Cal.App.2d at page 497, 296 P.2d at page 880. "A valid contract settling property rights between married persons does not require the approval of a divorce court to render it effective. It is binding on the parties and enforceable by either of them against the other even though the court fails or refuses to adopt or approve the agreement by its decree in a divorce proceeding." Green v. Green, 66 Cal.App.2d 50, 56, 151 P.2d 679, 682. Such agreement may be "sued upon in an independent action to enforce its terms." Sanborn v. Sanborn, 3 Cal.App.2d 437, 442, 39 P.2d 830, 832; Anthony v. Anthony, 94 Cal.App.2d 507, 512, 211 P.2d 331. Under these principles plaintiff is entitled to maintain an action against defendant for the breach of a valid property settlement agreement.

[3] It is clear that the issues with respect to the support provisions of the property settlement agreement alleged in the second cause of action have not been litigated. No property settlement agreement was before the court at the divorce trial nor at the hearing on plaintiff's motion for a *nunc pro tunc* order amending the divorce decree. McLaughlin v. McLaughlin, supra, 1412 Cal.App.2d at page 497, 296 P.2d at page 880. All that was decided at the latter hearing was that the court did not intend at the trial of the divorce suit to approve any property settlement agreement. McLaughlin v. McLaughlin, supra, 141 Cal. App.2d at page 497, 296 P.2d at page 880. Moreover, there was no valid award for plaintiff's support. McLaughlin v. Superior Court. Therefore, the prior proceedings are not a bar to her enforcement of any rights to future support that she may have

under the contract alleged in the second count of her complaint.

Defendant asserts that the contract alleged in count two is oral. This may be true; the complaint does not allege whether the agreement is in writing (or signed by the parties) as required by section 159 of the Civil Code. Defendant's motion for judgment on the pleadings is the equivalent of a general demurrer, and the only question is whether the count in question states facts sufficient to constitute a cause of action. We have concluded that this issue is analogous to that involved in cases dealing with contracts which come within the statute of frauds. In those cases it is held that the complaint states a cause of action even though it does not allege the contract is in writing. "The law will presume the contract to be valid and not invalid, and thus, where required by the statute of frauds, will presume it to be evidenced by writing." Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 569, 112 P. 454, 455; see, also, Bradford Inv. Co. v. Joost, 117 Cal. 204, 48 P. 1083; Nunez v. Morgan, 77 Cal. 427, 19 P. 753; Reagan v. Justice's Court, 75 Cal. 253, 17 P. 195. Therefore, plaintiff's second count states a cause of action; but in order to recover thereon she will be required to prove that the property settlement agreement is in writing and signed by both parties.

[4, 5] Plaintiff's third cause of action is based upon defendant's alleged fraud in the procurement of the judgment in the divorce action. She alleges that he made promises which he had no intention of keeping, thereby inducing her to refrain from introducing evidence on her cross-complaint in the divorce action which would have entitled her to a decree of divorce and hence alimony. She also alleges that his promises induced her to transfer her rights in most of the community property to defendant. Since the divorce action adjudicated the rights of the parties respecting division of the community property it is clear that plaintiff may not maintain this action while the final decree in the divorce action is still in effect. Plaintiff's present action "constitutes a collateral attack on the [decree], which the law does not permit. [Citation.] For this reason, an action at law for damages against an adversary party for allegedly procuring a judgment by fraud or perjury cannot be maintained while such judgment remains in force." Gerini v. Pacific Employers Ins. Co., 27 Cal.App.2d 52, 55, 80 P.2d 499, 501. The divorce was granted to the husband for the wife's fault, and the court was without jurisdiction to award her alimony. McLaughlin v. Superior Court, supra, 128 Cal.App.2d at page 65, 274 P.2d at page 747. We have already noted that the divorce decree, which also provided for division of the community property, has never been vacated or modified. It is therefore clear that plaintiff's third count does not state facts sufficient to constitute a cause of action.

[6] Plaintiff apparently accepts the rule announced in the Gerini case, but she contends that it is not applicable in the case at bar. She asserts that "the judgment in the previous litigation relating to [her support] * * * has been held to be void and, accordingly, is not in force and effect * * *." Plaintiff is mistaken. Only that portion of the divorce decree which purports to award her alimony has been declared to be null and void. McLaughlin v. Superior Court, supra. The remainder of the decree is still in force. See Harwell v. Harwell, 26 Cal.App.2d 143, 144–145, 78 P. 2d 1167. Since the portion of the decree granting defendant herein a divorce and dividing the community property is still in force, and since plaintiff herself was not granted a divorce by that decree, plaintiff's third cause of action must fall as a collateral attack upon a judgment which is on its face valid.

The judgment is reversed as to count two of the complaint; as to counts one and three, the judgment is affirmed.

ASHBURN, J., and KINCAID, J. pro tem., concur.

Hearing denied; TRAYNOR, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert WILLIAMS, Defendant and Appellant.*

Cr. 6111.

District Court of Appeal, Second District, Division 3, California.

April 7, 1958.

Hearing Granted June 4, 1958.

Prosecution for two separate sales of heroin. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgments of conviction and order denying motion for new trial and defendant appealed. The District Court of Appeal, Vallée, J., held that where state witness and informer were working together and informer allegedly introduced witness to defendant for purpose of witness' purchase of narcotics and subsequently witness, while alone, allegedly met defendant again and purchased narcotics a second time, and defense was witness' misidentification of defendant, failure to compel disclosure of name of informer constituted reversible error.

Reversed.

1. Witnesses ⇐216

When an informer becomes a participant in the offense charged against the defendant, he and the people lose the right to keep his identity anonymous.

2. Witnesses ⇐216

Even where an offense is committed in immediate presence of officer of law, if an informant has in any way participated in the criminal activity, or if the informant was a material witness to alleged crime, then name of informer must be made known upon demand of the person charged.

3. Witnesses ⇐216

Where state witness and an informer were working together to apprehend sellers of narcotics and informer allegedly introduced witness to defendant, who sold heroin to witness, and a few days later witness, while alone, allegedly met defendant again and purchased additional heroin, upon demand, defendant, who relied on misidentification as his sole defense, was entitled to compel disclosure of informer's name.

* Opinion vacated 333 P.2d 19.

Ellery E. Cuff, Public Defender of Los Angeles County, and Paul G. Breckenridge, Jr., Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Albert Bianchi, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By indictment defendant was accused in two counts of selling heroin on February 4 and 7, 1957. He was found guilty on both counts and sentenced to state prison. He appeals from the judgment and the order denying his motion for a new trial.

The following is the testimony of police officer Renty, the only witness who testified for the prosecution:

On February 4, 1957 Renty and "another person" were on East Fifth Street in Los Angeles. Renty was seeking to buy narcotics and the other person knew it. They were working together. The other person called over to defendant, calling him "Red." Defendant went over to where Renty and the other person were standing. The other person told defendant Renty had the money. This meant that Renty wanted to buy narcotics. Defendant "said he could do us some good." Renty and defendant then went to a lounge in the back of a hotel. The other person waited outside. Renty handed defendant a $10 bill. Defendant went into a telephone booth. Renty did not see what defendant did in the booth. Defendant returned and handed Renty $1 and a bindle of narcotics. Renty then went outside and joined the other person. Renty would not have had the transaction with defendant on February 4 but for the fact that the other person "told Red to come over, and that [he, Renty,] had nine dollars."

On February 7, 1957 Renty was standing on the corner of Fifth and Stanford in Los Angeles. Defendant came out of a market. Renty walked up to defendant and asked him what was happening. He would not have approached defendant except for the fact that he had had the transaction with him on February 4. Defendant said, "What do you want?" Renty said he had $9. Defendant told him to go into a bar and wait there. Renty entered the bar and waited. Defendant went through the bar, out a rear exit, returned in about five minutes, and handed Renty a bindle of narcotics. Renty handed defendant $9 and said, "The stuff you sold me last time was pretty good." Defendant said, "Yes. This is, too." Renty had not known the man known as "Red" prior to the time the other person "called to some one and labeled him as 'Red' " on February 4. When he called to "Red" on February 7, Renty relied on the transaction he had on February 4. He would not have been able to identify the man known as "Red" and would not have gone up to him on the 7th except for the fact that he had the transaction on the 4th.

On cross-examination the court refused to compel Renty to disclose the name of the other person: the informer. It was stipulated that a chemist would testify the bindles handed to Renty contained heroin.

Defendant testified he did not sell Renty narcotics on either February 4 or 7, 1957; he had never seen him prior to his arrest; and that the first time he saw him was in Lincoln Heights jail.

Defendant contends the court erred prejudicially in not requiring Renty to divulge the identity of the informer.

Powell v. Superior Court, 48 Cal.2d 704, 312 P.2d 698, declares it to be "the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike" (48 Cal.2d at page 707, 312 P.2d at page 699).

[1, 2] When an informer becomes a participant in the offense charged against the defendant, he and the People lose the right to keep his identity anonymous. People v. Lawrence, 149 Cal.App.2d 435, 452, 308 P.2d 821; People v. Castiel, 153 Cal.App.2d 653, 315 P.2d 79; People v. Alvarez, 154 Cal.App.2d 694, 316 P.2d 1006. People v. Cox, 156 Cal.App.2d 472, 319 P.2d 681, 684, says the rule is "that even where an offense is committed in the immediate presence of an officer of the law, *if an informant has in any way participated in the criminal activity,* or if the informer was a material witness to the alleged crime, then, in such an event, the name of the informer must be made known upon demand of the person charged." (Emphasis added.)

In People v. Castiel, 153 Cal.App.2d 653, at page 657, 315 P.2d 79, at page 81, Mr. Justice Dooling in masterly fashion stated: "It would be intolerable if the government could convict its citizens of crime and thereby deprive them of their liberty and civil rights while denying them the opportunity to produce a witness or witnesses to the alleged crime, whose identity is known to the witnesses who testify against him. The defendant is entitled as a matter of due process of law to be allowed to interview and produce any witness who might give evidence favorable to his defense, and when a witness who testifies to the commission of a crime testifies that another person or other persons were also present, and particularly where such other person or persons according to the testimony were active participants, the right of the defendant to the disclosure of the identity of such person or persons on cross-examination seems too clear for successful contradiction. If this was a case without precedents logic and the basic constitutional guaranty of due process would compel this conclusion, but it is not a case without precedents. The cases generally hold that where in the trial of a criminal case the basic right of a defendant to produce evidence which might exonerate him comes into conflict with a

privilege of the government to withhold such evidence from disclosure the government's privilege must in general give way to the basic right of the defendant," citing numerous cases. On substantially the same basic facts as appear at bar this court in People v. Alvarez, 154 Cal.App.2d 694, 316 P.2d 1006, held the trial court erred prejudicially in not requiring the officer to disclose the name of the informer.

[3] The informer and Renty were working together as an undercover team. Their purpose was to obtain evidence on which criminal prosecutions could be based. The informer brought Renty and "Red" together so that Renty could purchase narcotics. The informer told "Red" in the narcotics jargon that he and Renty wanted to buy narcotics and that Renty had the money. "Red" apparently knew the informer and replied on his implied assertion that Renty was a person who could be trusted. On February 4 there was no conversation between Renty and "Red" after they left the informer's presence. Immediately after leaving "Red," Renty joined the informer. It is obvious the informer participated in the transaction charged in Count I.

The People contend that if there was error in the court's refusal to compel Renty to disclose the name of the informer, such error goes only to Count I but not to Count II. We think it cannot be said the informer did not participate in Count II. The two counts were tied together. Renty was the only witness as to both counts. At every essential step necessary to fix guilt, Renty's testimony shows that the undisclosed informer was a principal actor, and if called to the stand would be a material and important witness. The indictment was not returned until May 7, 1957. Three months elapsed between the second alleged transaction and defendant's arrest. There was no evidence Renty saw "Red" on any occasion other than February 4 and 7 prior to his arrest. Renty's identification, made at the time of the trial, must have been based solely on those two meetings, each of which lasted 10 minutes. The defense as to Count II was the same as to Count I: misidentification. The People's case as to both counts rested solely on Renty's identification of defendant. Renty relied on the first transaction to consummate the second. If he was in error in his first identification, he was also in error in his second identification. The informer was the only witness defendant could produce to contradict Renty's testimony. The availability of the informer for investigation and subpoena was essential to the defense. He was defendant's one marterial witness; the only witness other than defendant who could contradict Renty's identification. Defendant was denied access to the witness who might establish his innocence. The informer did more than set the wheels in motion which caused defendant to be suspected. He did more than point the finger of suspicion at "Red": he played a vital part in the criminal acts with which defendant was later charged. He was the procuring cause of the sale of the narcotics on both days; his activities were indispensable to both sales. If Renty had been required to disclose the name of the informer as to Count I and the informer had been called by defendant and had contradicted Renty on material points, it is obvious that if such testimony were believed it would have affected the identification of Renty as to Count II. Disclosure of the identity of the informer was as necessary to the defense of Count II as it was to the defense of Count I. When the court erred in refusing to compel Renty to disclose the name of the informer as to Count I, it cannot be said the error was not prejudicial as to Count II. Cf. People v. Lawrence, 149 Cal.App.2d 435, 452, 308 P.2d 821.

As stated in People v. Castiel, supra, 153 Cal.App.2d 653, at page 659, 315 P.2d 79, at page 82:

> "No one knows what the undisclosed informer, if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. It is the deprival of the defendants of the opportunity of produc-

ing evidence which *might* result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eyewitness case of the defendant's guilt."

The judgment and the order denying a new trial are reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



159 Cal.App.2d 99

In the Matter of the ESTATE of Emanuel M. BROWNE, Deceased.

Hugo BRUNI, Contestant and Appellant,

v.

Mary RISDON and Spanish American Institute, Proponents and Respondents.

Civ. 22921.

District Court of Appeal, Second District, Division 2, California.

April 2, 1958.

Rehearing Denied April 28, 1958.

Hearing Denied May 27, 1958.

Proceeding for probate of will. Contestant appealed from order of the Superior Court of Los Angeles County, Henry M. Willis, J., vacating and setting aside order denying probate of will and for new trial. The District Court of Appeal, Kincaid, J. pro tem., held that where attesting witnesses testified as to testator's due execution of will, a prima facie case in favor of validity of will was established, and jury questions were presented as to alleged unsoundness of mind of testator at time of execution, correctness of manner in which will was executed and undue influence.

Order affirmed.

1. Appeal and Error ⇐933(4)

Where motion for new trial was upon grounds of insufficiency of evidence and that judgment was against law and order granting new trial was silent as to any specification of ground of insufficiency of evidence, on appeal from such order it would be presumed that new trial was granted on ground that decision or judgment was against law. West's Ann.Code Civ. Proc. § 657.

2. Wills ⇐312

Court may deny probate of will without receiving any evidence on behalf of contestant or submitting any issue of fact for determination by jury only where proponent of will fails to make a prima facie showing that will was executed in all particulars as required by Probate Code.

3. Wills ⇐289

Where document offered for probate appeared on its face to be regularly executed in all respects and was declared to be the last will and testament of decedent and carried his signature as well as an attestation clause with signatures of witnesses thereto, document was sufficient to raise presumption that will had been duly executed.

4. Wills ⇐289, 303(5)

Where regularity of manner in which will was executed was put in issue, and document offered for probate appeared to be regular in all respects, presumption that will had been duly executed was to be weighed with testimony of subscribing witnesses as to what took place and as to what they did or did not remember, and forgetfulness of one of the attesting witnesses did not destroy other proof.

5. Wills ⇐324(4)

In proceeding to probate will, where subscribing witnesses testified that decedent in their presence declared document to be his will, signed it and asked them to sign it

as witnesses, and that each signed in presence of decedent and of each other, and that in their opinion decedent was of sound and disposing mind, there was prima facie case in favor of validity of will requiring submission of issues to jury for determination.

J. M Sinclair and Robert W. Herrick, Los Angeles, for appellant.

Anthony V. Randles, Los Angeles, and Roger Pryor, Compton, for respondents.

KINCAID, Justice pro tem.

[1] Contestant Hugo C. Bruni, brother of the decedent, Emanuel M. Browne, appeals from the order of the trial court granting the motion of proponent Mary M. Risdon to vacate and set aside the order denying probate of will and for a new trial. The motion for new trial was upon the grounds of: (1) insufficiency of evidence to justify the decision and judgment; (2) that said judgment is against law. The order granting the new trial is silent as to any specification of the ground of insufficiency of evidence to justify the decision so it must be presumed it was granted on the ground that the decision or judgment is against law. Code Civ.Proc., § 657.

The order denying probate of will was made by the court during the course of a jury trial involving the issues of both petition for probate of a will and contest of the will before probate. The order recites: "* * * after examining the petition and hearing the evidence of the two witnesses to said proposed will, and petitioner having rested, and finding that decedent, at the time of signing said will, did not declare same to be his will but did affirmatively declare same not to be his will * * * the document * * * be denied probate as the last will of said deceased."

[2] The contest of the will before probate was based upon the three grounds of (1) unsoundness of mind at the time of execution; (2) the will was not executed in the manner and form required by law; (3) undue influence. A jury having been duly empaneled evidence was received in behalf of the proponent. This evidence consisted of the testimony of the two witnesses to the execution of the will and several exhibits. Without receiving any evidence in behalf of the contestant or submitting any issue of fact for determination by the jury the court made its order denying the document to probate.

Such an order may properly be made by the court only where the proponent of the will fails to make a prima facie showing that the will was executed in all particulars as required by the Probate Code. As said in Swift v. Superior Court, 39 Cal. 2d 358, 365, 247 P.2d 6, 10: "If the proponents fails to make such prima facie showing, the court can properly deny the petition for probate and dismiss the contest, but the court must bear in mind the holding of In re Estate of Black, supra, 199 Cal. 257 at page 262, 248 P. 1015, 1017, wherein it is stated: 'We are satisfied that upon proceedings for the probate of a will involving both a contest of the will and a petition for probate the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether or not a *prima facie* case has been established in favor of the validity of the will, sufficient to warrant the submission of the case to a jury.'"

Here, as in the Swift case, direct issues are raised by the contest and answer thereto, as to the due execution of the will, the soundness of decedent's mind and the presence or absence of undue influence. In its opinion in that case the court continues: "Since all of these issues are either mentioned specifically in section 371 of the Probate Code, or are 'questions substantially affecting the validity' of this alleged * * * will as provided therein, petitioners are entitled to have all of them submitted to the jury unless upon the preliminary proof of the will there is 'such a dearth of evidence that the granting of a motion for a nonsuit would be proper.'"

[3] The document here offered for probate appears on its face to be regularly executed in all respects. It is declared to be the last will and testament of the decedent, carries his signature and contains an attestation clause with the signature of each of the witnesses thereto who testified herein. This is sufficient to raise a presumption that the will had been duly executed. In re Estate of Morey, 75 Cal.App.2d 628, 634, 171 P.2d 131; In re Estate of Pitcairn, 6 Cal.2d 730, 732, 59 P.2d 90.

[4] This presumption was to be weighed with the testimony of the subscribing witnesses as to what took place and as to what they did or did not remember. The forgetfulness of one of the attesting witnesses does not destroy the other proof. In re Estate of Darilek, 151 Cal.App.2d 322, 325, 311 P.2d 615; In re Estate of Harvey, 143 Cal.App.2d 368, 372, 299 P.2d 712.

[5] The attesting witnesses were James D. Randles, decedent's attorney, who had drawn the proposed will in accordance with decedent's instructions and his son, Anthony V. Randles, who is also an attorney.

Both witnesses testified that the decedent in their presence declared the document to be his will, signed it and asked them to sign it as witnesses; that each signed in the presence of the decedent and of each other, that in their opinion the decedent was of sound and disposing mind at and before the time of such signing.

Anthony V. Randles testified that after fully reading the document to the decedent James D. Randles asked "Now is that what you want?" The decedent said, "Well, yes, that is just the way I told you. * * * I have been thinking, though, about a couple of others that I would like to have included in it.

"My dad said, 'Well, do you want us to change this?'

"And he said, 'No, This is the way I want it. This is the way I told you to fix it up,' and he said, 'We can take care of the others later.'

"So Dad said, 'Well, all right. Now, you sign here,' and I remember we went to get one of these—there was some to-do about whether or not he was going to use the table that swung out over the bed, and he signed his name, and, as I recall, I said, 'Well, now, we have your name down here as Emanuel instead of just the initials.'

"So he said, 'All right.' So he signed it again using his full name of Emanuel.

"My father said, 'Now, do you declare this to be your will and do you want Tony and me to sign as witnesses?' and he said 'Yes, I do.'

"So my father and I both signed as witnesses. Then my dad said, 'Now, what do you want me to do with this will?'

"He said, 'Well, can you keep it for me?'

"Dad said, 'Yes. If you don't have any place to keep it now, we will keep it down in our office safe.'

"And he said, 'That will be fine.'

"Then my dad said, 'Now what about these others that you wanted to be remembered in here?'

"He said, 'Well, it is more just to remember them; nothing very much.' He said, 'I want'—I believe the man's name was Hogan or Logan—Hogan—he said, 'He works with me down in the office.' He said, 'I would like to leave the sum of $250 cash' and he mentioned some kind of art work, as I recall—I forget what it was—and described it.

"My dad said, 'Well, we better write this down.'

"He said—well, if I recall, it was a painting and he gave the painter's name and the year which it was dated, and he said, 'Now, there is my secretary down there that I want to remember.' I believe her name was Arroya—Isabel Arroya, I believe. He said, 'I want her to have the sum of $250, and there is some silver and there is some linens. I don't care about the ones that I have used,' he said, 'but I have some that have never been used there, and', he said, 'I would like to see her get those.'

"I remember my dad made some notes on this, took it down on a sheet of paper and said, 'Well, I will fix this up and bring it back to you.'

"And he said, 'Fine.'

"Dad said, 'Whenever it is convenient to get around to it, we will add those to it and make a new one.'

"As I recall, that is the substance of our conversation."

The testimony of James was substantially the same as that of his son Anthony excepting that he could not be certain as to whether the decedent declared his wish to include the bequests to his two friends before or after he had signed the will and it had been signed by the attesting witnesses. He was equally certain with Anthony that the decedent expressed himself as desiring to fully execute the first instrument in question as his will, and having it stand as such until a subsequent will or codicil should be executed by him including such bequests.

It further appears that about a week later the two Randles returned to the hospital to see the decedent bringing with them another proposed will substantially similar to the one already executed excepting that the requested bequests to the two friends were included. They found decedent too ill to then be disturbed and at his request agreed to return later. Decedent died before this instrument was ever executed.

From the foregoing it is apparent that by way of preliminary proof of the will there is not "such a dearth of evidence that the granting of a motion for a nonsuit would be proper." In re Estate of Black, supra, 199 Cal. 257, 262, 248 P. 1015, 1017. The action of the trial court in taking the case from the jury by then denying the petition for probate had the effect of a final determination of the issues on the merits, whereas, a prima facie case in favor of the validity of the will having been established, the court, as a matter of law, was required to submit the issues to the jury for determination.

Under such circumstances the court properly granted the motion to vacate and set aside the order denying probate of will and for a new trial. Carney v. Simmonds, 49 Cal.2d 84, 315 P.2d 305.

The order appealed from is affirmed.

ASHBURN, Acting P. J., and HERNDON, J., concur.



159 Cal.App.2d 275

Clyde R. BURR, as Executor of the Estate of Yvonne Crellin Barbee, Anne Crellin Seggerman, and Edward Crellin, Plaintiffs and Respondents,

v.

Curtis V. CRELLIN, Defendant and Appellant.

Civ. 22756.

District Court of Appeal, Second District, Division 1, California.

April 9, 1958.

Action by a former wife and two children against husband for moneys claimed to be due under a supplemental property agreement. The former wife died and her executor was substituted. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment against husband and husband appealed. The District Court of Appeal, White, P. J., held that under a supplemental property agreement providing that, after deducting all taxes required to be paid on unearned income, if unearned income should exceed twice the amount husband was required to pay for child support then husband would be required to pay 25 per cent of such excess as long and as often as such excess continued, where husband did not introduce evidence of amount of tax required to be, trial court computing amount owed to

children could not deduct from amount of unearned income any taxes.

Judgment affirmed.

1. Evidence ⇐78

Under a supplemental property agreement providing that, after deducting all taxes required to be paid on account of unearned income, if unearned income should exceed twice amount which husband was required to pay for child support, then husband would pay 25 per cent of excess as long and as often as such excess continued, where husband had in his possession or under his control income tax returns and other papers which would have shown amount of taxes, if any, required to be paid by him on amount of his unearned income and those records were not produced by husband, there was presumption that if such evidence had been produced, it would not have assisted husband's case or would have operated to his prejudice. West's Ann.Civ.Code Proc. § 1963, subd. 5.

2. Husband and Wife ⇐279(1)

Under supplemental property agreement between husband and wife providing for certain payments on unearned income and providing that, after deducting all taxes required to be paid on unearned income, husband should pay 25 per cent of excess of unearned income, where husband did not introduce evidence of amount of tax required to be paid, taxes could not be deducted from amount of unearned income and husband was responsible for 25 per cent of excess without deducting taxes.

3. Husband and Wife ⇐279(1)

Under a supplemental property agreement providing that, after deducting all taxes required to be paid on account of unearned income, if unearned income should exceed twice amount required at such time to be paid by husband for child support under agreement and property settlement, then husband would pay 25 per cent of such excess as long and as often as such excess continued as long as children remained living, since husband was not required to pay child support after children reached their 21st birthdays, reasonable construction of documents was that after children reached their respective 21st birthdays, they were entitled to payments only from unearned income and were entitled to 25 per cent of entire unearned income subject to agreement.

Roland Maxwell, Paul H. Marston, Richard W. Olson, Pasadena, for appellant.

Newell & Chester, Theodore A. Chester, Los Angeles, for respondents.

WHITE, Presiding Justice.

Defendant husband appeals from a judgment against him for breach of an agreement between himself and his former wife, now deceased, for the support of said wife and their children, for the settlement of their property rights and for the mutual release of all their claims against each other. Their agreement originally consisted of two documents dated and signed by them on June 1, 1934, and entitled "Property Settlement, Agreement for Support and Mutual Release" and "Supplemental Agreement" respectively.

On March 18, 1953, and while they were husband and wife, another "Property Settlement, Agreement for Support and Mutual Release" was made by them. It cancelled and superseded the "Property Settlement, Agreement for Support and Mutual Release" of June 1, 1934, and provided that the Supplemental Agreement of June 1, 1934 "shall remain in full force and effect in conjunction with this agreement".

The "Property Settlement, Agreement for Support and Mutual Release" included provisions for the support of plaintiffs who were the then wife and minor children of defendant. The amount of support payable monthly was conditioned upon the marital status of the wife, the minority of the respective children, and the continued life of each. Payments having been made as required to be made to the wife until she remarried and then died, and to the two children until each became 21 years of age, there are no further payments to be made under that agreement.

This action was commenced by defendant's former wife and his two children. His former wife, Yvonne Barbee died and Clyde R. Burr, as executor of her estate was substituted as a plaintiff. The action is for moneys claimed to be due under the Supplemental Agreement, from which the following paragraph is quoted:

"1. Subject to the maximum amounts hereinafter fixed, if at any time, or from time to time, the monthly income of First Party from any and all gifts, trusts, devises, bequests or inheritances, given, created, or left to him, or from any other sources other than his own earnings, after deducting all taxes required to be paid on account of same, shall exceed twice the amount required at such time to be paid by First Party under the agreement and property settlement first above mentioned, then the First Party will pay twenty-five per cent (25%) of such excess as long and as often as such excess continues in three (3) equal parts to Second Party and each of the two children of the parties, Anne Crellin and Edward Crellin, as long as all three remain living, except as hereinafter provided. Such sums shall be in addition to the amount of money which First Party is obligated to pay under the terms of the property settlement, agreement for support and mutual release. For the purpose of determining the amount of First Party's said income the amount of income from any property acquired from such sources but disposed of by him in any manner shall be included in the computation."

The court found on competent evidence, and it is no longer disputed, that defendant received unearned income as follows:

Year	Amount	Twice the Payments required by Agreement for Child Support	25% of Excess
1949	$8,838.12	$7,200.00	$ 409.53
1950	10,720.96	7,200.00	880.24
1951	9,739.31	7,200.00	634.82
1952	12,106.38	5,940.00	1,516.57
1953	14,602.47	2,100.00	3,125.61
1954	17,212.43	. . .	4,303.10
1955	12,125.68	. . .	3,031.42
1956 1/1-8/16	8,282.50 [1]	. . .	2,070.62

The children had their respective twenty-first birthdays on May 13, 1952 and May 28, 1953.

By the judgment, the court apportioned the "25% of the excess" as shown above between the two children, specified the dates from which the various amounts were to bear interest, what portions were to be paid directly to the children and what payments were to be made in trust as provided by other sections of the agreement.

Appellant contends that it was error to give judgment against defendant without "deducting all taxes required to be paid on account of" such unearned income. The court found that no evidence was offered of taxes required to be paid by defendant on account of such unearned income. From a careful examination of the record, only the following excerpts concern income taxes.

"Mr. Maxwell (Attorney for Appellant): Because of the matter of deduction of income tax, your Honor, there is a question which arises, or the wording of the clause with which we are concerned, there is a question which arises on the basis for tax deduction. Now, we have before the Court so far as the evidence has indicated, the income which has been received by the defendant, and I would assume, therefore, that the matter of determination of the amount of that deduction would be an arithmetical problem based upon the laws which would apply in court having the necessity of determining whether the measure for the deduction would be the status which Mr. Crellin had at the time the agreement was signed, or whether it would be that status as it has changed from time to time; and if any further evidence should be introduced on that point, why, we are not in a position of holding it out, or holding it back, but I make this statement for whatever guidance the Court may be able to give with respect to that problem.

"The Court: Is money received under a testamentary trust subject to income tax?

"Mr. Maxwell: Income would be.

"The Court: Income from that—

"Mr. Maxwell: Income would be, yes, it would be subject to income tax."

Then after some discussion of inheritance taxes and the offer and withdrawal of exhibits relating to them, the following transpired:

"Mr. Maxwell: I think that it relates only to the income, and I think we are concerned with income taxes, after a lot more mature consideration of it."

Plaintiffs then introduced as their exhibits the inheritance and estate tax returns so withdrawn by defendant.

"Mr. Maxwell: One more question, if I may.

"The Court: Very well.

"Redirect Examination

"Mr. Maxwell: Q. Mr. Crellin, you paid income tax on deposits of income received by you from any trust with respect to which there has been evidence? A. Yes."

After a recross-examination by which no facts or figures were elicited, in reply to a question regarding a figure given in the answer which had been verified by defendant's attorney, defendant testified: "This is the first time I have ever seen this document, so it doesn't make sense to me. All I could say was I have turned in all of my duplicate income tax returns to Mr. Maxwell; and if that figure corresponds to the income tax that I filed that year, it is the correct amount."

[1, 2] There is no evidence in the record as to the amounts of income taxes, if any, paid by defendant on the unearned income, or on any income, during any of the years 1949 to 1956, or at all. In the absence of any evidence, we must assume that the "amounts required to be paid" were the amounts, if any, paid by defendant. In the instant action, the record is clear that appellant had in his possession or under his control the income tax returns and other papers which would have shown the amount of taxes, if any, required to be paid by him on the amount of his unearned income. These records were not produced by appellant. The presumption, therefore, is that, had such evidence been produced, it would not have helped appellant's case (Code Civ.Proc. Section 1963, subd. 5; Hagy v. Allied Chemical & Dye Corp., 122 Cal.App.2d 361, 372, 265 P.2d 86), or it would have operated to appellant's prejudice. Hamilton v. Madison Auto Sales Co., 94 Cal.App.2d 619, 623, 211 P. 2d 335. Without any evidence as to the amount of tax "required to be paid", the trial court could not deduct any amount from the unearned income subject to the supplemental agreement.

[3] Appellant's other specification of error is that the court erred in adopting an unreasonable and unfair construction of the provision of said paragraph 1, that "if * * * the monthly income * * * (unearned) * * * shall exceed twice the amount required at such times to be paid * * * under the agreement and property settlement * * * then the First Party (appellant) will pay twenty-five per cent (25%) of such excess as long and as often as such excess continues * * *". The court determined 25% of such excess by deducting twice the amount of child support actually required to be paid and paid during the various years before the children reached their respective twenty-first birthdays. During 1954 and later no child support was required to be paid by said agreement, and the court necessarily deducted only twice zero, or nothing, leaving 25% of the entire unearned income subject to said paragraph 1. This was not error.

Appellant insists that, if the parties intended the agreement to be so enforced, they could have said so. We are persuaded that the parties did so intend and that they did say so. Appellant urges that the meaning given the agreement consisting of the two documents is unreasonable. We think not. Reading them together and in their entirety, it appears that the children during their minority were to receive certain support payments regardless of their source, and, in the event appellant should have received unearned

income exceeding twice the amount of support so paid, they would receive 25% of such excess. But, after their respective twenty-first birthdays, they would be entitled to payments only from unearned income. This seems to be the fair and reasonable meaning of the words used by the parties.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



159 Cal.App.2d 184

RICHFIELD OIL CORPORATION, a corporation, Plaintiff and Appellant,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, as Executor of the Estate of William L. Haskell, Deceased, and Elsam Co., a corporation, Defendants and Respondents.

Civ. 22483.

District Court of Appeal, Second District, Division 1, California.

April 7, 1958.

Hearing Denied June 4, 1958.

Tenant's action for declaratory relief and for specific performance of lease provision giving tenant first refusal option to purchase premises. The Superior Court of Los Angeles County, Julian Beck, J., entered judgment for defendants and tenant appealed. The District Court of Appeal, White, P. J., held that where lease gave tenant first refusal option to purchase premises if exercised within twenty days and irrespective of whether premises were sold to a third party notice of any subsequent bona fide offer acceptable to landlord was to be given to tenant, and after landlord had died executor of his estate gave notice of bid which tenant agreed to meet but a higher bid was subsequently received in proceedings before probate court which confirmed sale to third party making such high bid, tenant giving notice of exercise of option to purchase on the same terms as highest bidder within twenty days after confirmation of sale was entitled to specific performance.

Reversed with directions.

1. Executors and Administrators ⇐135

Landlord's death did not change terms of lease provision giving tenant first refusal option to purchase premises if exercised in a certain manner and within a certain time, but after landlord's death executor lacked power to bind estate by his acceptance of a bid of any party without confirmation by probate court.

2. Landlord and Tenant ⇐92(4)

Where lease gave tenant first refusal option to purchase premises if exercised within 20 days after receipt of notice of third party's offer to purchase, but irrespective of whether premises were sold to the third party notice of any subsequent bona fide offer was to be given to tenant, and after landlord had died executor gave notice of bid which tenant agreed to meet, exercise of option by tenant did not extinguish its option to buy when a higher bid was received in proceedings before probate court.

3. Specific Performance ⇐57, 92(1)

Where lease gave tenant first refusal option to purchase premises if exercised within 20 days after receipt of notice of third-party offer to purchase, and irrespective of whether premises were sold to third party notice of any subsequent bona fide offer was to be given to tenant, and after landlord died executor gave notice of bid which tenant agreed to meet but a higher bid was subsequently received in proceedings before probate court which confirmed the sale to highest bidder, tenant giving notice of exercise of option to purchase on the same terms as highest bidder within 20 days after confirmation of sale was entitled to specific performance of option to purchase.

4. Estoppel ⇐52

"Waiver" is the intentional relinquishment of a known right, and only an existing right may be waived.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

5. Estoppel ⇐119

Waiver is ordinarily a question of fact and the defense of waiver raises an issue of fact to be decided after a consideration of all the circumstances of the particular case.

6. Appeal and Error ⇐999(1), 1008(1)
Estoppel ⇐119

Unless but one inference can be drawn from the evidence waiver and estoppel are questions for the jury or trial court.

7. Landlord and Tenant ⇐92(4)

Where lease gave tenant first refusal option to purchase premises if exercised within 20 days after receipt of notice of third-party offer to purchase and after landlord died executor gave notice of bid of third party, but in proceedings before probate court for confirmation of sale higher bids were received in the presence of an agent of tenant who insisted on right to exercise option according to its express terms and specifically refused to waive any right, there was no waiver by tenant of right to exercise option to purchase on the same terms as the highest bidder within 20 days after confirmation of sale.

William J. DeMartini, Los Angeles, for appellant.

Behymer & Hoffman, Ralph W. Hoffman, Los Angeles, for respondent Elsam Co.

WHITE, Presiding Justice.

Plaintiff Richfield Oil Corporation, hereinafter called "Richfield", appeals from an adverse judgment in its action for declaratory relief and for specific performance. Defendant Security-First National Bank of Los Angeles is the executor of the estate of William L. Haskell, deceased, and will be hereinafter referred to as the "Executor". Defendant Elsam Co., a corporation, hereafter referred to as "Elsam", was the highest bidder for the decedent's real property at a probate sale thereof.

Richfield was the lessee and occupant of the real property so sold to Elsam. A lease dated December 16, 1954, superseded a prior five-year lease between the same parties dated January 30, 1951, and provided for a term of six years commencing March 1, 1955, one month after the death of the lessor, William L. Haskell.

Article 17 of the lease to Richfield provides that:

"In the event Lessor shall receive from a third party at any time during the term of this lease or during any extension thereof a bona fide offer to purchase the leased premises, or any part thereof, or any holdings of Lessor of which the leased premises are a part, and shall decide to sell the same for the amount named in said offer, Lessor shall promptly give to Lessee writtten notice of the terms of such offer including the name and address of the offerer and of Lessor's willingness to sell for the price offered, and Lessee shall have the option and privilege of purchasing the premises which are the subject of such offer at said price and shall notify Lessor in writing within twenty (20) days after the date it receives notice from Lessor whether Lessee will purchase said premises for the amount specified in said offer. In the event Lessee shall not give Lessor notice within said twenty day period of Lessee's election to purchase for the amount specified in said offer, Lessor may thereafter sell said premises to the party making the offer, subject, however, to the leasehold estate and rights herein granted to Lessee. Irrespective of whether or not said premises are sold to such party, notice of any subsequent bona fide offers acceptable to Lessor shall be given to Lessee upon the same terms and conditions for acceptance or refusal as hereinabove provided, and failure to exercise any option hereunder shall not affect or terminate Lessee's rights under any other option contained in this lease. * * * Conveyance of said premises by Lessor to

Lessee as in this article provided shall act to cancel this lease in all particulars and if Lessor shall have been paid rentals covering a period subsequent to the date of such conveyance such prepaid rentals shall be applied on and constitute a part of the purchase price of said premises."

Said lease further provides that "each and all of the covenants, obligations, and conditions" thereof shall be binding upon the heirs, personal representatives, successors and assigns of the lessor.

Richfield was notified by the executor that it had received a bid of $21,500 from a third party for the purchase of the premises of which Richfield was lessee. Richfield, pursuant to said Article 17, gave notice in writing of its election to buy on the terms offered and made a like bid. The executor then reported Richfield's bid to the court and prayed for confirmation of the sale. Upon the hearing in probate court the bidding was brisk. Elsam's bid of $29,600 was the highest bid received. The probate court then (December 9, 1955) announced that the premises were duly and regularly sold to Elsam "subject to" Richfield's lease. Elsam's bid was a fair and reasonable price for the property (subject to the lease), and Richfield's lease provided for a fair rental of the property for service station use. Under date of December 9, 1955, the executor notified Richfield that the leased premises had been so sold to Elsam for $29,600 and that Richfield would be told when to begin payment of rent to the new owner.

Within 20 days thereafter and on December 21st, Richfield served upon the executor and upon Elsam its notice in writing dated December 21, 1955, that it elected to purchase said property for the amount of $29,600 "plus such other sums as may be payable to you under and pursuant to the proposed sale to Elsam Co. as confirmed by order of the Superior Court".

Under date of January 3, 1956, the probate court made its formal "Order Confirming Sale of Real Property" and included therein findings as follows: "that the said real property hereinafter described is subject to a lease of record in which the Richfield Oil Corporation is the lessee and that an employee and agent of said Richfield Oil Corporation, to-wit Don G. White, was present in court and testified that he was authorized by the said corporation to represent it; * * * that participating in said bidding was the said agent of the Richfield Oil Corporation, by making a bid on behalf of said corporation; * * *" and that Elsam's bid of $29,600 was the highest made. Said order is "that the sale so made * * * subject to the lease of record * * be and the same hereby is confirmed and upon receipt of the purchase price * * * the executor is directed to execute to said purchaser a deed * * *".

The instant action was commenced January 5, 1956, and by it Richfield sought: (1) a declaration of "the rights and obligations of the parties hereto under the lease dated December 16, 1954, and under Article 17 thereof, as said rights and obligations have been affected by the sale to defendant Elsam Co. on December 9, 1955" in the probate proceedings and "by the exercise of the option to purchase the property described in said lease by plaintiff herein under and pursuant to its notice of exercise thereof"; (2) that the contract contained in said Article 17, as made "effective and operative by the exercise of the option by plaintiff by its notice dated December 21, 1955, may be decreed to be specifically performed * * *"; (3) "that any sums paid by plaintiff * * * as rental * * * subsequent to the date of exercise of said option * * * be applied to the purchase price * * *"; (4) for costs of suit; and (5) for other relief.

Richfield's lease had been recorded and the option provided in Article 17 thereof was discussed in court during the bidding. No claim is made that respondent Elsam was a purchaser without notice of Richfield's option.

[1] Elsam urges that "appellant's first refusal option was extinguished when it exercised its rights by meeting the original $21,500 offer which executor had received";

that once said right was extinguished "appellant was in the same position as any one who purchases real property from an estate" and "must protect the sale to him, in the event of any bidding by third parties, by making any necessary additional bids". Respondents cite, in support of their contention that Richfield's option has been extinguished, Civil Code, sections 1473 and 1682, and the decision in Manasse v. Ford, 58 Cal.App. 312, 208 P. 354. They urge that all of Richfield's rights under the option were extinguished when "the executor, standing in the shoes of the lessor, by notifying the appellant when it received the original $21,500 offer and giving appellant the opportunity to meet said offer, performed its obligation under the lease". The acts of executor so relied upon by respondents fall far short of the "full performance" contemplated by said sections of the Civil Code as the means of extinguishing an obligation. Lessor's death did not change the terms of his option agreement. Southern Pacific Co. v. Swanson, 73 Cal.App. 229, 234, 238 P. 736; Joost v. Castel, 33 Cal.App. 2d 138, 140–141, 91 P.2d 172. However, after lessor's death, his executor lacked the power to bind the estate by his acceptance of the bid of any party without confirmation by the probate court.

In Manasse v. Ford, supra, the lessee failed to exercise his option to purchase at the price and on the terms offered by another in accordance with the notice of the lessor that it would accept said offer unless lessee elected to buy. The property was so sold by lessor "subject to this lease", the term of which had another year to run. [58 Cal.App. 312, 208 P. 356.] Later the lessee attempted to force the purchaser to sell to him, claiming that the sale having been made "subject to this lease" was also subject to his option to purchase. The option in the Manasse lease included the following language: "* * * and provided further that if the lessee shall not within said period of thirty days elect to purchase the said property, the lessor may then sell the same to such other purchaser subject to this lease and this lease, the conditions, restrictions and covenants thereof shall then be in full force and effect and binding upon the lessee and the purchaser of the said property". After considering the contract in its entirety, it was held in the Manasse case, supra, 58 Cal.App. at page 317, 208 P. at page 355, that "The intent was to reserve to the lessor the unqualified right after November 6, 1919, to make an absolute sale of the property. This he did, and the resultant conveyance conveyed to the appellants an indefeasible title to the property".

Each option, or other contract, must be so interpreted as to give effect to its own language and to each and every part of it. Because of the provision in Article 17 of the lease and option being considered on the instant appeal, that "Irrespective of whether or not said premises are sold to such party, notice of any subsequent bona fide offers acceptable to Lessor shall be given to Lessee upon the same terms and conditions for acceptance or refusal as hereinabove provided, and failure to exercise any option hereunder shall not affect or terminate Lessee's rights under any other option contained in this lease * * *" even if Richfield had failed to exercise its option to buy for $21,500, the decision in the Manasse case, supra, is inapplicable to the facts of the instant action.

[2] We are satisfied that, by their lease and option agreement, decedent and Richfield did not intend that compliance with the terms of the agreement by lessor's notice that it had received and intended to accept a bid, followed by Richfield's notice of its exercise of its option to purchase, should extinguish Richfield's option to buy.

In Moreno v. Blinn, 81 Cal.App.2d 852, 185 P.2d 332, 333, a lease gave to the lessor permission to sell the leased property, but "giving tenant first right to purchase". When the tenant inquired the price acceptable to lessor, he was told $7,500. Some months later, without notice to the tenant, lessor sold the property to another for $4,500. The buyer, as in the instant action, had actual as well as constructive notice of the lessee's "first right to purchase". When

lessee learned of the sale, he served written notice and tender upon both the lessor and the purchaser that he desired to exercise his option and purchase the property. Then he brought an action against both for specific performance. At page 854 of 81 Cal. App.2d, at page 333 of 185 P.2d, in the Moreno case, supra, the court said: "* * * The option to buy was intended to mean something, * * *. The language used would indicate that he was given an unlimited right to purchase the property if the lessor decided to sell * * *"; and at page 856 of 81 Cal.App.2d, at page 334 of 185 P.2d: "The respondent was given the first right to purchase for the price at which the lessor was willing to sell. That was a matter capable of ascertainment, and it became fixed and determined long before this action was brought." The judgment which was affirmed required that plaintiff-optionee deposit $4,500 in court; that the defendant-purchaser should convey the property to the plaintiff and receive the $4,500; and retain jurisdiction to enter "such further judgment as might be necessary in order to obtain a full conveyance of the property to the plaintiff".

The fact that, in the instant action, the executor could not sell at any price without confirmation of the sale by the probate court did not change the terms of decedent's contract, but merely delayed the beginning of the time within which Richfield might exercise its option until the sale price was fixed by the probate court.

Richfield, in its closing brief, says: "It is apparent that everyone at the hearing with the exception of the Judge of the Probate Court misconstrued the powers of the Court at that hearing and the Judge appropriately confirmed the sale subject to any rights which appellant might have under the lease. The exercise of those rights was not before the Court."

[3] Richfield seeks specific performance of its option to purchase land of the decedent in the instant action. The price was not agreed upon and no manner of setting such price was provided other than the deceased owner's willingness to accept it from any party. After Haskell's death the price at which the property could be sold and the option exercised was controlled by the probate court, which was required to determine the necessity for the sale, or the advantage, benefit, and interest of the estate in having it made, and the fairness of the price bid. Probate Code, § 785.

A similar action to enforce a decedent's option contract was upheld by the Supreme Court in Bewick v. Mecham, 26 Cal.2d 92, 95, 156 P.2d 757, 157 A.L.R. 1277. There the plaintiff had an absolute option—not merely a first refusal—to purchase at a price to be fixed by arbitration as specified. Upon the executor's refusal to perform decedent's obligation to appoint an arbitrator, the court (not sitting in probate) determined the price and ordered the executor to convey the property to the optionee. Under the Bewick decision, supra, specific performance of decedent's option agreement, about which decedent's executor and his optionee disagreed, was properly sought in a court of equity rather than in the probate court.

Respondent next urges that appellant waived any rights it had to enforce the option clause by its acts and words at the probate sale, partial transcript of which is hereinafter set forth.

"Mr. Niemo (attorney for the Executor): "Due to the fact that the present lease provides for refusal, may I ask whether or not a representative of the Richfield Oil Company is in court?

"Court: Is there a representative of the Richfield Oil Company here?

"Mr. White: Yes. My name is Don G. White."

Thereupon Mr. White was called as a witness, duly sworn, and, in answer to questions asked by Mr. Niemo, testified that he, as the manager of the real estate for Richfield, was then acting as Richfield's agent; that he was familiar with the fact that there will be possible overbidding in this court and that he was there to protect Richfield's bid if he so desired.

The bids ranged from $23,000 to $29,600 and were made by Mr. Provisor, bidding for

himself, Mr. Joyce for respondent Elsam, Mr. Singer for one Jerome Brownstone, and Mr. White for Richfield. The following is quoted from the transcript of proceedings:

"The Court: $24,600. Any further bidding?

"Mr. White: This is the auction right now and the one that bids the highest bid gets it?

"The Court: You have to raise it if you want it.

"Mr. White: The lease provides that I have a right to purchase it at any price that is agreeable.

"The Court: We are auctioning it off in open court and you have to raise it at least one dollar. The one that bids the highest gets it."

Thereafter, between the bids of the others, Mr. White bid $24,650 and $24,750, after which the bidding of the others proceeded to $29,600, and the following colloquy took place.

"Mr. Provisor: If your Honor please, if you confirm the bid I think under the terms that Richfield has the right to only meet the offer.

"The Court: Not in this court. They have to bid it. This is being sold subject to the lease.

"Mr. Provisor: The lease provides that they can meet it.

"Mr. Niemo: You don't care to meet this?

"Mr. White: The lease provides that we have a right to meet it. I am not in a position to—I am not waiving anything.

"Mr. Provisor: I might mention also that there is some question—I think that the position of the Richfield is that they have 20 days from now to meet this bid.

"The Court: I have a petition for confirmation of sale of real property subject to a lease.

"Mr. Provisor: And the lease provides for 20 days.

"The Court: That is not before me. I am selling the property subject to the lease.

* * *

* * * * * *

"The Court: I am not interpreting that lease. I assure you. I am selling it subject to the lease."

In the instant action the conclusions of law and judgment are based upon the following so-called findings of fact:

"V. That it is true that the plaintiff by its actions, having been duly notified of the hearing on the Return of Sale and Petition for Confirmation of Sale on its bid, and having refused to make a bid equal to or in excess of the bid of Elsam Co., defendant herein, waived its rights under Article 17 of the said Lease, insofar as it concerns the sale of said premises by the Executor to Elsam Co., and that it is true that plaintiff had no right, either under said Article 17 of the Lease or otherwise, insofar as the defendants herein are concerned, to make another and further bid in connection with the said sale to Elsam Co. after the Order of the Court was made confirming the said sale to the defendant Elsam Co., a corporation.

* * * * * *

"VII. That it is true that the defendants, and either of them, have and had the right to refuse to accept the attempted bid of the plaintiff made after the Order of the Court confirming the sale to Elsam Co., for the reason that the Order of the Court authorizing the said sale was duly, regularly and legally made and that plaintiff has and had waived its rights claimed under Article 17 of the said Lease in connection with said sale to Elsam Co.

"VIII. That it is true that neither of the defendants are obliged or compelled to convey or transfer the aforesaid property to the plaintiff either by reason of its attempted exercise of its alleged right under Article 17 of said Lease, made after the Order of the Probate Court authorizing the sale to Elsam Co., defendant herein, or otherwise or at all.

"IX. That it is true that the plaintiff is foreclosed by the aforesaid Order of the Probate Court confirming the sale to Elsam Co., from exercising its attempt as relates to its bid subsequent to the said

Order, and is estopped by its conduct from so doing.

"X. That it is true that the defendant Security-First National Bank of Los Angeles, as Executor of the Estate of William L. Haskell, deceased, has complied fully with the provisions of the Lease and in accordance with the law has complied with all steps necessary and made a Return of Sale on the bid of plaintiff and has duly received the Court's Order authorizing it to convey the said premises to the defendant Elsam Co., subject to the provisions of the Lease, and by said Order is authorized and ordered to convey the said premises to the defendant Elsam Co., upon receipt of the said purchase price of $29,600.00 in cash."

In support of the waiver so found by the court, respondent in his brief quotes from Wilson v. Brown, 5 Cal.2d 425, 428, 55 P.2d 485, the following: "Lessors contended upon the trial of the case that the lessees had been offered the opportunity to purchase the premises described in the lease, but had in effect rejected the offer by stating that they did not desire to purchase all of the leased premises. Lessors claimed that the lessees stated that they did not desire to buy the dwelling house, but only the premises on which the service station was located. Had this claim been satisfactorily substantiated upon the trial of the case it would have been a complete defense to the suit by lessees for specific performance of their option."

In the instant action, there is no evidence, either disputed or undenied, that any agent of Richfield rejected any offer or stated that it did not desire to purchase all of the leased premises in accordance with the terms of the first refusal option. The only offer received by the Executor which could be accepted by him was that of Elsam—the last bid at the auction in the probate court. Almost concurrently therewith, the probate court indicated that, regardless of whether Richfield met Elsam's offer, the sale would be confirmed to Elsam "subject to the lease". Richfield's agent, Mr. White, then said, "The lease provides that we have a right to meet it (Elsam's bid). I am not in a position to—I am not waiving anything". Richfield's written notice of its election to buy on the same terms offered by Elsam is within the time required by its option agreement.

[4] A waiver is the intentional relinquishment of a known right. Only an existing right may be waived. Craig v. White, 187 Cal. 489, 498, 202 P. 648; Schultz v. Superior Court, 143 Cal.App.2d 781, 782, 300 P.2d 275.

[5, 6] Waiver is ordinarily a question of fact. Lyons v. Brunswick-Balke, etc., Co., 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173. The defense of waiver raises an issue of fact to be decided after a consideration of all the circumstances of the particular case, and is a question primarily for the trial court. Hefferan v. Freebairn, 34 Cal.2d 715, 722, 214 P.2d 386; Kerr v. Reed, 187 Cal. 409, 414, 202 P. 142. Unless but one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court. Huttlinger v. Far West Enterprises, 131 Cal.App.2d 808, 811, 281 P.2d 554; Krobitzsch v. Middleton, 72 Cal.App.2d 804, 815, 165 P.2d 729.

Where there is evidence that a right has been waived and there is none to the contrary, judgments depending upon the existence of the right so waived have been reversed on appeal. Bassi v. Bassi, 89 Cal.App.2d 886, 889, 202 P.2d 96; Jones v. Sunset Oil Co., 118 Cal.App.2d 668, 673, 258 P.2d 510. In Chin Ott Wong v. Title Ins. & Trust Co., 89 Cal.App.2d 183, 200 P.2d 541, judgment for plaintiff was reversed by this court for the reason that the implied finding of the trial court that plaintiff had not waived the provision of the contract making time of the essence was contrary to the undenied allegations of the complaint and that there was no evidence to support that finding. Petitions for rehearing by this court and for hearing by the Supreme Court were denied.

[7] There is nothing in the record on the instant appeal to indicate any failure

on the part of Richfield to exercise its option according to its express terms. Nor is there any act on the part of Richfield's agent or any statement by him which could have misled the respondents. Title to the leased premises did not pass upon confirmation of the sale by the probate court. In re Estate of Dargie, 33 Cal.App.2d 148, 155, 91 P.2d 126 and cases there cited. As stated by the probate court at the hearing of return of sale and petition for confirmation, Richfield's rights under its first refusal option were not then before it and could not be determined by it.

Richfield, under Article 17 of its lease, had the right to purchase at the price which could be accepted by the executor, and, not having waived that right, may specifically enforce it. Moreno v. Blinn, supra.

The judgment is reversed, and the trial court is directed to amend its findings of fact, conclusions of law and judgment in accordance with the views herein expressed, and to render judgment accordingly.

FOURT, J., and DRAPEAU, J. pro tem., concur.



159 Cal.App.2d 304

Raymond P. BRENNER, Plaintiff and Appellant,

v.

Harry Curtis BEARDSLEY, Defendant and Respondent.

Civ. 22423.

District Court of Appeal, Second District, Division 1, California.

April 10, 1958.

Hearing Denied June 4, 1958.

Action for injuries sustained by plaintiff when automobile in which he was riding on foggy morning collided with automobile which defendant had just backed onto road from private driveway. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Fourt, J., held that it had been prejudicial error, under circumstances disclosed, to instruct on unavoidable accident.

Reversed and remanded for new trial.

Appeal and Error ⇐1064(1)
Automobiles ⇐246(57)

In action for injuries sustained by plaintiff when automobile in which he was riding on foggy morning collided with automobile which defendant had just backed onto road from private driveway, it was prejudicial error, under circumstances disclosed, to instruct on unavoidable accident.

J. Paul Madsen, Whittier, for appellant.

Ball, Hunt & Hart, Long Beach, by Clark Heggeness, Long Beach, for respondent.

FOURT, Justice.

This is an appeal from a judgment for defendant in an action for damages for personal injuries sustained by Raymond P. Brenner while riding to work on the foggy morning of February 10, 1955, as a passenger in an automobile owned and operated by Robert Dealy, which automobile collided on Bloomfield Road, near Artesia in the County of Los Angeles, at approximately 6:50 a. m., on said date, with an automobile owned and operated by Harry Curtis Beardsley.

Beardsley had driven from his home on Bloomfield Road into a private driveway or feed alley on his dairy property, which was immediately adjacent to his home. Richard Acree, one of his employees, joined him in the automobile, and Beardsley backed his automobile "until the rear end of the car was approximately to the edge of the property line parelleling Bloomfield."

Beardsley testified that after stopping, "We looked both north or—both north

and south for approaching vehicles," and when asked how far he could see, he said "I would say approximately seventy-five feet." Having backed out across the shoulder of Bloomfield Road until at least the left rear wheel was on the asphalt-improved portion, Beardsley stated "I just practically started forward in very—going in very—I don't suppose over two to five miles per hour and I was hit in the rear."

Beardsley's automobile was first struck by the Dealy automobile in which Brenner was riding, and then almost simultaneously, the Beardsley car was struck by an automobile driven by Richard Phelps, which also was traveling in a southerly direction on Bloomfield Road behind the Dealy automobile. There were skid marks to the point of impact, and the testimony presented was in conflict as to whether the skid marks were laid down by the Dealy automobile or the Phelps automobile.

Contributory negligence was not in issue, and this appeal is based primarily upon alleged errors in the giving of certain instructions and in the refusal to give certain other instructions.

Specific exception was taken at the trial, and is taken on appeal to the instruction given at defendant's request on the issue of unavoidable accident, which instruction is as follows:

> "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.
>
> "Bear in mind, however, that if the defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained by the defendant."

It is further contended that plaintiff's requested instruction, which was refused as otherwise covered, should have been given, said requested instruction being as follows:

> "You are instructed that an unavoidable accident is one that human skill and foresight could not in the exercise of ordinary prudence have provided against, and if you find from the evidence in this case that the collision and consequent injury to the plaintiff could have been avoided by the exercise of ordinary care on the part of defendant Beardsley, then I instruct you that this was not an unavoidable accident."

In the recent case of Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500, the Supreme Court considered the propriety of giving California Jury Instructions, Civil (4th Rev.Ed., 1956) No. 134, the same instruction given by the trial court in the instant case. The court stated (49 Cal.2d at page 660, 320 P.2d at page 505), "The instruction is not only unnecessary, but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic re-

lation to negligence and proximate cause can lead only to misunderstanding."

To the above, the following comment is added (49 Cal.2d on page 661, 320 P.2d on page 506), "In addition, the giving of the instruction obviously overemphasized defendants' case, and, as we have said, the instruction suggested to the jury that they should consider unavoidability as an issue or ground of defense separate and apart from the questions of negligence and proximate causation."

Under the circumstances of this case the instruction on unavoidable accident was clearly prejudicial. Contributory negligence is not in issue; and there is nothing in the evidence tending to indicate that the collision could have resulted from any cause other than the negligence of the driver of the Beardsley car or the driver of the Dealy car in which Brenner was riding.

It is unnecessary under the circumstances of this case to determine the other contentions of appellant.

The judgment is reversed, and the cause remanded for a new trial.

WHITE, P. J., and LILLIE, J., concur.



159 Cal.App.2d 196

William P. LAWSON and Mary Alice Lawson, Plaintiffs, Cross-Defendants and Respondents,

v.

TOWN & COUNTRY SHOPS, Inc., et al., Defendant, Cross-Complainant and Appellant.

Civ. 22607.

District Court of Appeal, Second District, Division 1, California.

April 7, 1958.

Rehearing Denied April 30, 1958.

Action to recover damages for fraud wherein a cross-complaint was filed to recover rent. From a judgment of the Superior Court, Los Angeles County, Walter H. Odemar, J., the corporate defendant appealed. The District Court of Appeal, Fourt, J., held, inter alia, that in action for fraudulent representations made to induce plaintiffs to lease premises in shopping center, whether plaintiff waived fraud by act of remaining on the premises for about 15 months after discovery of fraud and by requesting and receiving certain modifications of plaintiffs' obligations was for jury.

Affirmed.

1. Fraud ⇐3

The general elements of a cause of action for fraudulent misrepresentation are misrepresentation, consisting of false representations, concealment, or nondisclosure, knowledge of falsity or "scienter", intent to induce reliance, justifiable reliance, and resulting damage.

2. Appeal and Error ⇐1001(3)

Where question raised on appeal was sufficiency of the evidence to support verdict, appellant was required to demonstrate that there was no competent evidence to support the verdict, and the mere recital of evidence favorable to appellant was not sufficient.

3. Fraud ⇐64(4, 5)

In action for fraudulent representations to induce plaintiffs to lease certain premises in shopping center from defendant, relating to number of other stores and business establishments, dates of occupancy of other store buildings, and names of purported tenants who had already supposedly leased space, evidence was not insufficient as matter of law to establish materiality of representations made and reliance upon them.

4. Evidence ⇐589
Witnesses ⇐92

The testimony of an interested party is competent and admissible, and, if believed by trial court, is sufficient to determine issue.

5. Estoppel ⇐53

There can be no waiver in absence of intentional relinquishment of a known right, and requests for modifications of contractual provisions and even the acceptance thereof merely are factors to be considered in determining whether requisite intent was express, or whether it can be implied or inferred from surrounding circumstances.

6. Fraud ⇐64(1)

In action for fraudulent representations made to induce plaintiffs to lease certain premises in shopping center, whether plaintiff waived fraud by remaining on the premises for about 15 months after discovery of fraud and by requesting and receiving certain modifications of plaintiffs' obligations was for jury.

7. Pleading ⇐246(3)

Where at close of trial a motion was heard in chambers outside presence of jury as result of which complaint in action for fraud was amended to increase the item of damages for operating losses to include damages for loss of personal services and unpaid balance of rent under leases, permitting such amendment was not error.

8. Trial ⇐133(6)

Where in each instance where objection was made to improper conduct of counsel jury was admonished to disregard any comments which had been made, and there were many indications that case was bitterly contested, and that counsel on each side failed on occasion to observe the highest standards of professional conduct, record failed to disclose misconduct of counsel of such magnitude as to constitute prejudicial error.

9. Fraud ⇐59(3)

The statute providing that defrauded person is entitled to recover difference between actual value of that with which defrauded person parted, and actual value of that which he received, was enacted to provide a uniform rule for all fraud cases, and provides the exclusive measure of damages. West's Ann.Civ.Code, § 3343.

10. Fraud ⇐59(1), 61

The statutory provisions that defrauded person may also recover any "additional damages" arising from particular transaction and that nothing in statute shall be deemed to deny to such person "any legal or equitable remedies" to which he may be entitled, do not indicate that any other measure of damages may be applied, since right to recover "additional damages" does not refer to the measure of damages, but, rather, to such matters as expenses or other consequential injury resulting from the fraud, but such statute does not preclude the allowance of exemplary damages. West's Ann.Civ.Code, § 3343.

See publication Words and Phrases, for other judicial constructions and definitions of "Additional Damages".

11. Fraud ⇐61

In action for fraudulent representations made to induce plaintiffs to lease certain premises in shopping center from defendant, relating principally as to number of other stores and business establishments, dates of occupancy of other store buildings and names of purported tenants who had already supposedly leased space, punitive damages were allowable. West's Ann.Civ.Code, §§ 1709, 3343.

12. Appeal and Error ⇐1004(1)

The reviewing court's power to declare an award of damages excessive exists only when from facts the amount appears at first blush to suggest passion or prejudice on part of jury, and there is no distinction when review is of an award of exemplary rather than actual damages. West's Ann.Civ.Code, §§ 1709, 3343.

13. Appeal and Error ⇐1004(3)

After award of damages has been approved by trial court the reviewing court will hesitate to declare amount excessive unless upon consideration of entire record including the evidence it must be said that award was the result of passion or prejudice. West's Ann.Civ.Code, §§ 1709, 3343.

14. Corporations ⇐423

False representations made by corporate lessor's rental agent to prospective

lessees of certain premises in shopping center, relating principally to number of other stores and business establishments, dates of occupancy of other store buildings, and names of purported tenants who had already supposedly leased space, was sufficient to subject corporate lessor to liability for damages including punitive damages. West's Ann.Civ.Code, §§ 1709, 3343.

15. Fraud ⇐59(1)

In action for fraudulent representations made by corporate lessor's rental agent to induce plaintiff to lease certain premises in shopping center, in view of award of damages on lessor's cross-complaint for rent due and to become due, such expenditures were properly included in determination of amount of consequential damages suffered by reason of fraud. West's Ann.Civ.Code, §§ 1709, 3343.

16. Fraud ⇐60

Loss of time and effort and loss of salary are items of damage proximately caused by making fraudulent misrepresentations as inducement to execute a lease, and are recoverable. West's Ann.Civ. Code, §§ 1709, 3343.

Gordon M. Emanuel, Beverly Hills, Bernard S. Selber, Abe Mutchnik, Los Angeles, for appellant.

Patricia Lane, Carmel, Patrick J. O'Reilly, for respondents.

FOURT, Justice.

This is an appeal from a judgment in an action for damages for fraud and deceit by Town & Country Shops, Inc., in favor of William P. Lawson and Mary Alice Lawson against all three of the original defendants: Jere Strizek, president of appellant corporation, Lew Levy, rental agent for appellant, and appellant.

There was a cross-complaint for rent due on a lease and for money due on promissory notes.

Damages assessed on the cross-complaint in the amount of $6,141.24 were deducted from the sum of $20,316.24 assessed as general damages on the complaint; and judgment was ordered in the net amount of $14,175 as general damages, plus $5,000 as punitive damages.

Subsequently a new trial was granted as to Jere Stizek; and the appeal as to Lew Levy was dismissed pursuant to Rule 17(a) of Rules on Appeal.

The fraud and deceit action is based upon certain representations made by Lew Levy to induce Mr. and Mrs. Lawson to lease certain premises in the "Town & Country Shopping Center" in Los Angeles from appellant, said representations relating principally to the number of other stores and business establishments, the dates of occupancy of the other store buildings, and the names of purported tenants who had already supposedly leased space. Two separate leases were executed on June 9, 1953, each of which was for a five-year term commencing August 1, 1953 and ending July 31, 1958.

The prayer of the original complaint included the following items of damage: $7,500 for permanent improvements, $11,000 for operating losses, $7,300 for loss of profits, $10,000 for exemplary damages, and $169.28 for electricity wrongfully appropriated.

Outside the presence of the prospective jurors, the item of damages consisting of profits on investment was waived; and a supplemental cross-complaint was permitted to be filed, adding as an item of damage the amount of $3,000 as the reasonable value of fixtures, to rental due in the amount of $5,900.92 and $1,000 due on certain promissory notes.

At the close of the trial a motion was heard in chambers outside the presence of the jury, as the result of which the complaint was amended to increase the item of $11,000 damages for operating losses to $23,500 to include damages for loss of personal services and the unpaid balance of rent under the leases. The motion to amend was then granted in the presence

and hearing of the jury prior to the closing arguments, the trial judge stating as follows:

"Ladies and gentlemen of the jury, as the Court has advised you a number of times in this case, all matters of law are for the Court to determine, and that is really what we have been discussing. Matters of fact are for you.

"The Plaintiff has made a motion to amend, which the Court will permit, and will permit the Plaintiff to amend the complaint in certain respects. In permitting the amendment to the complaint, the Court only rules upon the law and does not, by ruling upon the law, express or intend to express, any opinion as to what facts have or have not been established, or the evidence; or does not make, nor intend to make, any expression of an opinion as to what the Court feels is—has been proven or has not been proven. It is still a question of law and not a question of fact. The question of fact is up to the jury, and I express no opinion now, and have endeavored not to during the trial, and will not before the trial is over, express any opinion which I may have regarding the establishment or the failure to establish any fact whatsoever in the trial of the case.

"Now with that in mind, the Court has permitted, as a matter of law, the Plaintiffs to amend the complaint, Paragraph 12 specifically thereof, as follows:

"'The Plaintiffs allege and all of the Defendants deny and also affirmatively allege that the effect that any of it may or may not have had, has been waived by the waiver of the Plaintiffs—is alleged and denied and so forth—that by reason of the fraudulent representations of the Defendants and each of them as is set out—'

"and I am not going to read the whole complaint to you—

"'that as a direct and proximate result of the fraud and deception practiced on the Plaintiffs by the Defendants and each of them, that the Plaintiffs expended time and effort in developing said property and the operation of the business therein for a period of approximately seventeen months, during which period Plaintiffs suffered an operating loss,' and they have alleged $11,500.00, and the complaint is now amended to read '$23,500.00, including the reasonable value of Plaintiffs' services for seventeen months and the Plaintiffs ask for judgment in the amount of $23,500.00.'

"Now again, please, by granting that amendment, I express no opinion on what has or has not been established, or in connection with it, whatsoever.

"Now, Mr. Binkley, you may open the argument."

Appellants contend that as a matter of law, respondents have failed to prove all of the requisite elements of a cause of action in fraud and deceit; that as a matter of law there was a waiver of, and estoppel to rely upon, said fraud by the act of remaining on the premises for about fifteen months after discovery of the fraud and by requesting and receiving certain modifications of their obligations; that prejudicial error resulted in permitting amendment to the complaint, in the giving of certain instructions, and from certain comments of counsel; and that the measure of damages was incorrectly applied.

[1, 2] In the recent case of Zinn v. Ex-Cell-O Corp., 148 Cal.App.2d 56, at page 68, 306 P.2d 1017, at page 1025, it is stated, "The general elements of a cause of action for fraudulent misrepresentation are (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage." Appellant appears not to question that certain false representations were made, and directs his argument to the sufficiency of the evidence to establish the materiality of the representations made and reliance upon them. "Since the question raised is the sufficiency of the evidence to support the verdict *the appellants must practically demonstrate that there is no competent evidence to support the verdict.* Their mere recital of evidence favorable to them is not suffi-

cient. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550." (Emphasis added.) Zainudin v. Meizel, 119 Cal.App.2d 265, 270–271, 259 P.2d 460, 464.

[3, 4] We cannot say as a matter of law that the evidence was insufficient. The testimony of an interested party is competent and admissible, and, if believed by the trial court, is sufficient to determine the issue. See Zinn v. Ex-Cell-O Corp., supra, 148 Cal.App.2d 56, 69, 306 P.2d 1017.

Considerable confusion formerly existed in the California law as to whether a defrauded party was required to make an election of remedies; when and how the election had to be made, if an election were required; and what acts or conduct constituted a waiver of existing rights.

[5, 6] Certainly if the rule enunciated in Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54, which was followed in Schied v. Bodinson Mfg. Co., 79 Cal.App.2d 134, 179 P.2d 380, were determined to constitute a correct statement of the current California law as appellant contends, the trial court as a matter of law could have decided that there had been a waiver of the fraud. A careful review of some of the more recent cases, however, indicates that there can be no waiver in the absence of an intentional relinquishment of a known right, and that requests for modifications of contractual provisions and even the acceptance thereof merely are factors to be considered in determining whether the requisite intent was express, or whether it can be implied or inferred from the surrounding circumstances.

In French v. Freeman, 191 Cal. 579, at page 590, 217 P. 515, at page 519, it was stated, "The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be considered in determining the ultimate fact of waiver or nonwaiver * * *. We cannot say, as a matter of law, that plaintiff intended to and did waive the fraud herein complained of."

The problem was considered in Bagdasarian v. Gragnon, 31 Cal.2d 744, at page 751, 192 P.2d 935, at page 939, and the comment was made, "There appears to be no decision in California or elsewhere which squarely holds on its facts that the mere making of an unfulfilled request alone constitutes a waiver as a matter of law." The Supreme Court, speaking through Mr. Chief Justice Gibson, expressly disapproved of the language in Schmidt v. Mesmer, supra, to the extent that it indicated that the mere making of a request in itself would constitute a waiver; and then added, "There is serious doubt whether even a granted request of a favor, such as an extension of time, could be held to constitute a waiver in the absence of estoppel or the making of a new agreement supported by consideration, * * *."

In Friedberg v. Weissbuch, 135 Cal.App. 2d 750, on pages 755 and 756, 287 P.2d 785, on page 789, the specific problem referred to in Bagdasarian v. Gragnon, supra, was considered, and the court stated, "Appellants argue that the defendants, by entering into subsequent agreements with the plaintiffs, waived fraud. We are not in accord with this contention. The subsequent agreement referred to was merely a reduction in the monthly payments required by the contract and its other provisions were not thereby affected. * * * The question of whether the delay of defendants in the instant case was such as to render it inequitable to grant relief from fraud was a question for the trial court and is left to its sound discretion."

There had been a delay of fifteen months before a notice of recission was served in Williams v. Marshall, 37 Cal.2d 445, 235 P.2d 372. The Supreme Court reviewed the evidence, including the attempts through negotiations to avoid litigation and the fact that there were no replies to several letters, and then stated (37 Cal.2d at page 456, 235 P.2d at page 379), "'Where a party protests promptly on discovering that he has been defrauded in making a contract, and enters into negotiations for a peaceful settlement

which fail, a complaint filed within a reasonable time after such failure is not barred by laches.' Reiniger v. Hassell, 216 Cal. 209, 210–11, 13 P.2d 737, 738."

[7] The circumstances under which the motion to amend was allowed have been set forth hereinabove in detail. The ruling made in Sanguinetti v. Moore Dry Dock Co., 36 Cal.2d 812, 228 P.2d 557, upon which appellant relies, has been carefully considered, and we are of the opinion that it is not controlling in the instant case where comparative negligence was not in issue, and where the motion to amend was made in chambers and not in the presence of the jury.

[8] Appellant admits that in each instance where objection was made to improper conduct of counsel, the jury was admonished to disregard any comments which had been made. This claim of error was reviewed by the trial court in ruling on the motion for a new trial, which was denied. In reading the voluminous transcript in this case there are many indications that it was bitterly contested, and counsel on each side failed on occasion to observe the highest standards of professional conduct. Under the circumstances, we find no misconduct of counsel of such magnitude as to constitute prejudicial error. However, it may be noted that counsel presently appearing on this appeal are not the same counsel who represented the parties in the trial court.

Appellant claims that the damages awarded were excessive for a number of reasons, and the instructions to which exception is taken relate to the measure of damages to be applied. Appellant cites a number of cases as illustrative of the so-called "Minnesota rule" to the effect that the lease contract should be regarded as severable in respect to time, and that damages should be awarded only up to the time of the discovery of the fraud. Appellant urges that the same result would be achieved by a proper application of the mitigation of damage rule.

In the alternative, appellant argues that by an application of the theory of legal relations expounded by the late Professor Wesley N. Hohfeld, respondents must be deemed to have affirmed the leases, in which event the jury should have been instructed that all rent paid and owing and the value of the improvements removed in derogation of the leases should be deducted as items of damage for operating losses.

As another alternative, appellant contends that the "difference in value" rule set forth in Civil Code, section 3343 as the measure of damages in an action for fraud and deceit inducing the purchase, sale or exchange of property has now been extended in Collins v. Kobold, 146 Cal.App. 2d 868, 304 P.2d 182, to actions for fraudulent inducement to execute a lease.

Appellant then asserts that in the application of the measure of damages deemed to be proper, it becomes apparent that the damages actually awarded were so excessive as to indicate clear passion and prejudice; and that, as a matter of law, appellant cannot be liable for punitive damages.

Civil Code section 3343 upon which appellant relies, provides as follows:

> "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, *together with any additional damage arising from the particular transaction.*
>
> *"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."* (Emphasis added.)

Civil Code, section 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable *for any damage* which he thereby suffers." (Emphasis added.)

[9, 10] Extensive references have been made to the case of Bagdasarian v. Gragnon, supra, and the problem of measure of damages in a fraud case is discussed therein (31 Cal.2d at pages 762–763, 192 P.2d at page 946) as follows:

"In view of the broad, general language of section 3343 of the Civil Code and the uncertainty in the law that existed both here and elsewhere prior to the adoption of that section, it is reasonable to conclude that the statute was enacted to provide a uniform rule for all fraud cases, and we can see no reason for refusing to follow the decisions which have applied it as the exclusive measure of damages. Moreover, to hold that an additional or alternative measure may be applied in some cases would create further confusion with respect to when the alternative measure would be appropriate in place of the statutory measure and whether the matter would be one for the judge, as a matter of law, or for the jury.

"The provisions of section 3343 to the effect that the defrauded person may also recover any 'additional damage' arising from the particular transaction and that nothing in the statute shall be deemed to deny to such a person 'any legal or equitable remedies' to which he may be entitled, do not indicate that any other *measure of damages* may be applied. The right to recover *additional* damages does not refer to the *measure* of damages, but, rather, to such matters as expenses or other consequential injury resulting from the fraud. (Citing authorities.) * * * The construction which has been placed on section 3343 does not preclude the allowance of exemplary damages. (Citing authorities.)"

[11–13] It is apparent that punitive damages could properly be allowed in this type of case; and "The reviewing court's power to declare an award of damages excessive exists only when from the facts the amount appears at first blush to suggest passion or prejudice on the part of the jury. There is no distinction when the review is of an award of exemplary rather than actual damages. (Citing authorities.) These and other cases indicate that it is the province of the jury, and the trial court on the motion for a new trial, to say whether punitive damages should be awarded. The presumptions are in favor of the correctness of the verdict and judgment. After an award has been approved by the trial court the reviewing court will hesitate to declare the amount excessive unless upon consideration of the entire record including the evidence it must be said that the award was the result of passion or prejudice. (Citing cases.)" Finney v. Lockhart, 35 Cal.2d 161, 164, 217 P.2d 19, 21.

[14] The false representations of Lew Levy, rental agent for appellant, were sufficient to subject appellant to liability (Kruse v. Miller, 143 Cal.App.2d 656, 660, 300 P.2d 855; Rest., Agency, § 401, p. 914); and the loss which resulted could be held to include punitive damages. We do not regard such a holding to be inconsistent with the action of the trial court in granting a new trial as to Jere Strizek in his individual capacity. Apparently the trial court in exercising its discretion did not regard the showing as to participation in or ratification by or adoption of the acts of Lew Levy by Jere Strizek in his individual capacity to have been sufficiently clear to approve the award of punitive damage as to him, and did regard the showing to have been sufficient to approve the award of punitive damages as to appellant.

[15] No case has been cited by counsel allowing rent due or to become due as an item of damage. In view of the award of damages on the cross-complaint for this item, however, we are of the opinion that it would be unreasonable not to allow these expenditures to be included in the determination of the amount of consequential damage suffered by reason of the fraud.

[16] Loss of time and effort or loss of salary have been held to be items of damage proximately caused by making fraudulent misrepresentations as inducement to execute a lease, and have been held to be recoverable. Sutter v. General Petroleum Corp., 28 Cal.2d 525, 534, 170 P.2d 898, 167 A.L.R. 271; Rowland v. Columbia Mining, etc., Co., 2 Cal.App.2d 410, 421, 38 P.2d 418.

We do not regard the award to be the result of passion or prejudice.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.



159 Cal.App.2d 353

PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Edward LINDSEY, Defendant and Appellant.

Cr. 1341.

District Court of Appeal, Fourth District, California.

April 14, 1958.

Defendant was convicted of child stealing. The Superior Court of San Diego County, James C. Toothaker, J., rendered judgment, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that defendant's keeping 13 year old girl with him under claim of marriage over a period of many weeks was sufficient evidence of his intent with respect to detaining child from her mother to support conviction for child stealing.

Affirmed.

Kidnapping ⇐5

Defendant's keeping 13 year old girl with him under claim of marriage over a period of many weeks was sufficient evidence of his intent with respect to detaining child from her mother to support conviction for child stealing. West's Ann. Pen.Code, § 278.

John C. Thompson, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., John A. Vanderlans, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of child stealing in violation of Section 278 of the Penal Code. A jury found him guilty as charged. He was sentenced to state prison and he has appealed from the judgment.

The appellant lived next door to a Mrs. Weslasky at Santee from January, 1956, until he left his wife and children and went away in the latter part of April, 1956. When Mrs. Weslasky went to work on the morning of May 9, 1956, her daughter Rosemary, aged thirteen years, was in bed. When she returned, about 4:00 p. m., she found a note in Rosemary's writing reading in part "I have went for good. Don't look for me. I am in good care." The records of Western Union in San Diego disclosed that a telegram was filed by the appellant in Barstow at 7:16 a. m. on May 9 ordering payment of $10 to Rosemary, and that it was paid at 9:30 that morning. Rosemary had not been found up to the time the case went to trial on June 26, 1957. It appears, however, that at the time the appellant's request for probation was heard she had been located through his cooperation.

A witness who lived four miles west of Barstow testified that the appellant and Rosemary drove up to a trailer which was near her home on May 14; that the trailer had been there before; that this was a "fairly isolated place" about four miles from town; that she saw the appellant and Rosemary working in the yard around the trailer during the next two days; that Rosemary came over to her home on the morning of May 16 and then had on an engagement ring and a wedding ring; that her daughter stayed with Rosemary in the trailer on the night of May 16 and that she did not see Rosemary after May 17. The daughter of this witness testified that she saw Rosemary and the appellant working in the yard of the trailer on May 16;

that when she stayed with her on the night of the 16th, Rosemary had on a wedding ring and an engagement ring and she showed her the box they had come in; that this was the appellant's trailer; and that it had been there two or three weeks before that.

Another witness testified that she saw the appellant and Rosemary at the trailer on a couple of days; that Rosemary stayed there about three days; and that a car came in one night and she wasn't there after that. Another witness testified that he saw Rosemary in front of the trailer three different times; that on two occasions she and the appellant were together, doing a little yard work; that about 10:00 o'clock on the night of May 17 he saw an automobile drive up to the trailer, where it remained about twenty minutes and then departed; that this car looked like the car he had seen the appellant drive; that when the car drove off there were no lights on in the trailer; and that Rosemary was not at the trailer after that.

An automobile dealer in San Bernardino testified that he sold the appellant a new car on June 8 or June 9; that Rosemary was with the appellant at that time; that he asked the appellant who Rosemary was and the appellant answered that she was his wife and that he had divorced his other wife. An automobile mechanic at the same agency testified that he saw Rosemary with the appellant two or three or four weeks later when the appellant brought the new car in to have the clock fixed; that he then noticed that Rosemary had a wedding ring on; and that Rosemary left with the appellant.

A special agent for the F.B.I. testified that on July 12 the appellant told him that the last time he had seen Rosemary was on May 7 in Santee; that he had 'phoned Rosemary from Barstow telling her that he was sending her $10 by Western Union; that he sent the money on the same day; that he left San Diego on May 9 and drove to Las Vegas, where he remained four days and then returned to Escondido; that Rosemary called him from Boulder City on May 20; and that he tried to call her but was unable to locate her.

A deputy sheriff testified that in a conversation with the appellant on July 31 the appellant told him that he had not seen Rosemary since May 8; that Rosemary had called him in Escondido on May 20 and he had tried to locate her; and that he had not given Rosemary any money. He also testified that in another conversation about a week later the appellant told him that he had not talked with Rosemary on May 20; that he had had a telephone conversation with her on May 9 and had sent her $10, and that he had previously denied sending her any money because he did not want to become involved in the case. A criminal investigator for the Marine Corps testified that he talked with appellant on May 21, 1956, and that the appellant told him that he knew nothing as to Rosemary's whereabouts.

Appellant's sole contention is that the evidence was not sufficient to sustain the verdict because there was no evidence to show that he had any intention of detaining the child. It is argued that it is not enough, under the statute, to show an intent to take or entice the child away, but that such intent must be accompanied by an intent to detain such child from its parent; that while this presents a question of fact to be proven like any other fact from the acts and conduct of the parties, there was no evidence here to show any intent on his part to hinder, delay or detain Rosemary in any way; that if Rosemary willingly stayed with the appellant, she was not detained; and that there was an entire absence of any evidence to show that she was delayed, hindered or detained by him.

It is contended that this case is similar to the case of People v. Black, 147 Cal. 426, 81 P. 1099, and that the reasoning of that case is applicable here. We see little similarity between the facts in this case and those in the Black case. In that case the defendant persuaded two girls, who were determined to leave home and go to San Francisco, to go to a summer resort about

eleven miles from their home. This resort was conducted by a respectable family, and it was understood that the girls should leave there whenever they wished to do so. That same night he told an officer, who asked him what he had done with the girls, where he had taken them. There was no evidence that he made any effort to detain the girls, and no evidence of any improper relations between him and either of them. The evidence indicated that he was not prompted by any motive other than a wish to keep the girls from going to San Francisco at that time. The girls could have left the summer resort at any time on a bus which passed there daily, and the defendant was preparing to take the girls home at their request when he was arrested.

In the instant case the appellant had a telephone conversation with Rosemary and wired her a $10 money order on the day of her departure. Shortly thereafter he and Rosemary were seen together over a period of several days on the premises occupied by his house trailer near Barstow. This was an isolated place about two hundred miles from Rosemary's home. During that period Rosemary was wearing a wedding ring. About three weeks later Rosemary and appellant were together in San Bernardino, at which time the appellant said that Rosemary was his wife. Several weeks later Rosemary was again with the appellant in San Bernardino and was still wearing a wedding ring. The appellant told conflicting stories to the officers about what he had done in this connection and in May and twice in July, when questioned by the officers, he denied that he had seen Rosemary after May 9 or that he knew where she was. The appellant did not take the stand at the trial, and the undisputed evidence is not questioned except as to its legal effect.

The evidence with the inferences which could reasonably be drawn therefrom sufficiently supports the verdict and judgment. People v. Simmons, 12 Cal.App.2d 329, 55 P.2d 297; People v. Smith, 17 Cal.App.2d 468, 62 P.2d 436; People v. Moore, 67 Cal. App.2d 789, 155 P.2d 403. There was ample evidence of concealment and, aside from other considerations, keeping this girl with him under a claim of marriage over a period of many weeks is sufficient evidence of his intent with respect to detaining her from her mother.

Judgment affirmed.

GRIFFIN and MUSSELL, JJ., concur.



The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Nellard Robert BERVE, Defendant and Appellant.*

Cr. 5987.

District Court of Appeal, Second District, Division 3, California.

April 3, 1958.

Rehearing Denied April 22, 1958.

Hearing Granted May 27, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Joseph M. Maltby, J., of second degree murder, and he appealed. The District Court of Appeal, Shinn, P. J., held that confession of murder by abortion, obtained by beating and threats administered by victim's husband, was involuntary and inadmissible though police officers did not directly participate in brutality or threats.

Reversed.

1. Criminal Law ⇐742(2)

Where controlling facts were not in dispute, whether witness was an accomplice was a question of law for trial court and on appeal.

2. Criminal Law ⇐507(1)

Sister of abortion victim who knew of victim's intention to submit to abortion but

* Opinion vacated 332 P.2d 97.

was reluctant to encourage it, and accompanied victim but did not assist in, advise or encourage the abortion, was not an "accomplice" in murder by abortion so as to require corroboration of her testimony. West's Ann.Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

3. Criminal Law ⇐522(3)

Confession of murder by abortion, obtained by beating and threats administered by victim's husband, was involuntary and inadmissible though police officers did not directly participate in brutality or threats.

4. Criminal Law ⇐517(1)

The rule barring use of involuntary confessions is not designed merely as regulation of conduct of police officers; absence of volition condemns enforced confessions, the source of coercion being of no moment.

5. Constitutional Law ⇐266

The use of confessions induced by force, fear, promise of immunity or reward of any nature offends due process clauses, regardless of source of coercion. U.S.C.A. Const. Amend. 5; West's Ann.Const. art. 1, § 13.

6. Criminal Law ⇐1169(12)

Where it clearly appears that in obtaining a conviction, use was made of confession wrested from accused by force, fear, promise of immunity or hope of reward, it is of no consequence that facts confessed may be proved by other evidence or that guilt of accused may be satisfactorily established by the entire evidence.

7. Criminal Law ⇐1165(1)

The violation of constitutional rights of accused is of itself a "miscarriage of justice" and conviction cannot be allowed to stand though guilt may be established by entire evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

8. Witnesses ⇐271(2)

Refusal to require police officer to produce a statement made to him by another witness, to be used in cross-examination of officer, was not error since statement would be available in cross-examination of other witness if request had been made therefor.

Robert H. Aarons, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Nellard Robert Berve was charged by information with the murder of Mary Margaret Pettit. In a court trial defendant was found guilty of murder of the second degree and he was sentenced to state prison. Berve appeals from the judgment.

The deceased, a married woman, lived with her husband and their three minor children in Lakewood. Her older sister, Mrs. Wanda Roper, also lived in Lakewood. Wanda was the chief witness for the People. The following is the substance of her testimony. Prior to October 4, 1956, the deceased was in good health. On October 4th, Mrs. Pettit asked Wanda to take her to a certain motel and barroom in Lakewood. She told her sister that her purpose in going was to have an abortion and that defendant "was going to do it." Early in the evening Wanda drove Mrs. Pettit to the Bellflower Motel on Lakewood Boulevard. They arrived at about 7 or 7:30 p. m.; Wanda registered for a motel room in her own name; Mrs. Pettit paid the room rent, which was $5. Wanda then accompanied her sister to the Boulevard Stop, a cocktail lounge located on Lakewood Boulevard not far from the motel. The sisters sat down next to defendant and conversed with him for a few minutes. Mrs. Pettit went to the ladies' room. While her sister was absent, Wanda told defendant that "she sure hated to see Mary go through that." Berve replied that "he did too, but under the circumstances it was for the best." When Mrs. Pettit returned the three parties left the Boulevard Stop and went back to the motel in defendant's automobile.

Upon alighting from the car, defendant took a paper sack from the middle of the seat. Wanda did not see what was inside the bag. She accompanied defendant and her sister to the motel room, talked to Mrs. Pettit for a few minutes, and then proceeded to the Idle Hour, a cocktail lounge located across the street from the motel. On cross-examination, she was asked whether she had had "an understanding to stand by to help in any form that night." The witness denied having had such an understanding. Upon being asked whether she was going to stand by to help, she answered: "I would have, yes." Wanda remained in the Idle Hour for about an hour or an hour and a half. Then defendant entered the establishment, joined her at the bar and ordered a drink. Wanda asked him how her sister was and defendant said that she was o.k. She inquired whether "everything went o.k." and defendant said: "No, she was bleeding, and * * * it usually did not happen that way." They left the Idle Hour and walked to defendant's automobile. Mrs. Pettit was seated in the car. Defendant drove the sisters back to Wanda's car which was parked in front of the Boulevard Stop. Mrs. Pettit asked Berve to take it easy over the bumps and complained of bleeding and of pains in her stomach. Defendant told her that "the first time might not work, he might have to do it two or three more times, [and] for her to let him know." Wanda then took her sister home.

The People also called Jackson Hunter, who was a bartender employed at the Idle Hour. Hunter testified that he was on duty on the evening of October 4th. He saw Wanda Roper enter the establishment around 8 or 8:30 p. m. She sat at the bar and remained there for an hour or more. Defendant came in, ordered a drink, had a short conversation with Mrs. Roper, whereupon the two of them left. About a week after suffering the miscarriage, Mrs. Pettit was removed to the Los Angeles County Hospital. She was suffering from tetanus poisoning and despite the efforts of physicians to save her life she died from the effects of it. There was undisputed medical testimony that the infection was due to injury received in the performance of an abortion. The medical testimony was in conflict as to whether the injury could have been self-induced.

There was no evidence which connected defendant with the offense other than the testimony of Wanda and evidence of a full confession, which we shall discuss later. This evidence was received over the objection of defendant that his confession was not given voluntarily.

The first question is whether Wanda was an accomplice of defendant. It is necessary to decide this question. The testimony of Wanda was not corroborated except by evidence of defendant's confession. As we shall presently see, evidence of the confession was improperly admitted. If Wanda was an accomplice the evidence was insufficient to support the finding of guilt. If, however, she was not an accomplice, her testimony, considered with the uncontradicted evidence that Mrs. Pettit died of tetanus poisoning induced by an abortion, was sufficient to establish defendant's guilt. The trial judge declined to rule whether she was an accomplice and in his concluding remarks said: "And assuming, and she may be, I am not deciding it, because I don't think it is necessary for the decision, that Wanda Roper was and is an accomplice. Her testimony was corroborated by the defendant's own statement or his confession, by whichever term you want to designate them."

[1] Since the controlling facts were not in dispute, the question for the trial court whether Wanda was an accomplice was one of law and it is necessarily the same on appeal. People v. McDermott, 75 Cal.App. 718, 719–720, 243 P. 485; People v. Frahm, 107 Cal.App. 253, 264, 290 P. 678; People v. King, 30 Cal.App.2d 185, 197, 85 P.2d 928; People v. Lamb, 134 Cal.App.2d 582, 586, 285 P.2d 941.

[2] It has never been held in our jurisdiction that one who accompanies a woman to a residence or office knowing that she is to submit to an abortion thereby becomes an

accomplice of the person who performs the abortion. The decisions, as we shall see, hold that such innocent assistance, without more, does not amount to criminal activity.

In People v. Balkwell, 143 Cal. 259, 76 P. 1017, 1019, a Miss Byrne accompanied deceased to the home of the defendant where an abortion was performed; she endeavored to persuade the deceased not to have it done; she did nothing to help the defendant in the perpetration of the act. The court said: "It is further urged that the conviction was had upon the uncorroborated testimony of an accomplice, Miss Byrne, but there is no word of evidence to show that Miss Byrne was such an accomplice." And the court quoted from Underhill on Criminal Evidence (§ 346): "'Nor is a woman an accomplice, who, being an intimate friend and confidant of the deceased, knew of her pregnancy and her desire for relief, and accompanied her to the defendant's house, when she did not aid or advise the defendant, and was not present when the crime was committed.'"

In People v. Brewer, 19 Cal.App. 742, 127 P. 808, the husband of the deceased accompanied her to the residence of the defendant "with knowledge of her purpose, but without aiding or abetting or encouraging her therein, and who did not assist the defendant therein * * *." He was not present when the operation was performed and rendered no assistance. The court said: "Except that he was the husband of the pregnant woman, his conduct was quite similar to that of the witness in People v. Balkwell, 143 Cal. 259, 76 P. 1017, who was held not to have been an accomplice." The holding in the case was that the court could not say as a matter of law that the husband was an accomplice.

The facts in People v. Seiffert, 81 Cal. App. 195, 253 P. 189, were substantially the same as in Brewer. The sister of the deceased accompanied her to the defendant's office knowing that an abortion was to be performed. She testified that she advised against it but that she was willing to help her sister in any way she could. All that was held in this case was that the sister was not, as a matter of law, an accomplice of defendant. The court cited People v. Balkwell, supra.

There was a similar holding in People v. Davis, 43 Cal.2d 661, 673, 276 P.2d 801, 807, where the court said: "* * * and the mere accompaniment of a victim of abortion to defendant's residence, although realizing at that time the victim's purpose in going there is to obtain an abortion, does not necessarily make the companion an accomplice." Citing People v. Balkwell, supra, 143 Cal. 259, 261, 76 P. 1017; People v. Brewer, supra, 19 Cal.App. 742, 746, 127 P. 808; People v. Seiffert, supra, 81 Cal.App. 195, 198, 253 P. 189. These three cases were cited by the court in People v. Wilson, 25 Cal.2d 341, at page 346, 153 P.2d 720, at page 723, in support of the statement: "The mere fact that he (husband) accompanied his wife to defendant's office does not make him an accomplice." In the foregoing cases and in People v. Malone, 82 Cal.App.2d 54, at page 68, 185 P.2d 870, the question whether witnesses for the People were accomplices was submitted to the jury upon exceedingly thin evidence that they had any connection whatever with the commission of the offenses. However, the contention made in each case on appeal was that the court should have instructed that each of the several witnesses was an accomplice as a matter of law. These contentions were rejected and properly so since under the holding in People Balkwell, supra, the facts would not have justified a conclusion that they were accomplices. However, the holdings in those cases that the witnesses were not, as a matter of law, accomplices, was the equivalent of holding that they were not accomplices, since, in each case, upon the facts, the question was one of law.

We hold that Wanda Roper was not an accomplice. Section 1111 of the Penal Code says in part: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Wanda's testimony shows that

she was reluctant to see her sister submit to an abortion, and there was no evidence whatever that she rendered any assistance in it, or did or said anything to advise or encourage it. There was nothing even suggestive of criminality upon her part in anything she did upon the importunity of her sister. It seems no less than absurd to assert that she was subject to prosecution. It follows that from the proof of death by criminal means and defendant's connection therewith, as established by the testimony of Wanda, there was sufficient evidence to justify the finding of guilt.

As previously mentioned, the trial court was of the opinion that even if Wanda was an accomplice her testimony was adequately corroborated by the confession of the defendant.

[3] It is contended that the evidence of the confession was inadmissible for the reason that the evidence conclusively established that the confession was obtained by the use of force and fear. This point is well taken.

There was no dispute as to the facts with respect to the circumstances and the manner in which defendant's confession was obtained. The trial court was not in doubt as to the facts. This clearly appears from the statements of the court of its reasons for overruling defendant's objection to evidence of the confession. The court's ruling, as we shall see, was based upon an erroneous concept of the law as applicable to the established facts.

Wanda testified that on the afternoon of the day defendant gave his confession she went to the sheriff's station where she discussed the affair with Lieutenant Peterson. She returned to her home where she met Peterson and a reporter to whom she dictated a statement. Then, with Peterson, another officer, and the reporter, she went to defendant's place of business where they remained outside. From there they went to Wanda's home. Peterson and two other officers were there when Wanda arrived. In the meantime Harry Pettit had brought defendant to Wanda's home and he, with his brother Sonny and a man named Jim Johnson, were present with defendant. Defendant was seated on a couch, bleeding from the forehead. A window glass had been broken and a leg had been broken from a coffee table. A rug was mussed up. The officers ordered defendant to get up and they left with him. Harry Pettit was holding a rifle. Defendant testified that in the early evening of the same day Harry Pettit, the husband of the deceased, encountered defendant at the latter's place of business at closing time; at the point of a rifle he compelled defendant to enter a car and drive to Wanda's home while he, Pettit, sat in the rear seat holding a rifle on defendant and occasionally touching his head with it. Defendant testified that at Wanda's home he was brutally beaten for the purpose of forcing him to make a confession to the authorities. He was beaten with fists and knocked through a plate glass window, suffering a cut, which bled freely. A leg was broken from a coffee table and thrown at him; he was called unrepeatable names. Harry Pettit sat in front of him with the rifle trained on him and occasionally struck him with the butt of the rifle. He was threatened with death if he failed to make a confession. He was invited to run away so Pettit could shoot him; he was put in great fear for his life and was willing to admit anything to escape from his torture. This ordeal lasted about two hours until the officers came which was shortly before Wanda's arrival.

Defendant testified to all this mistreatment, and also testified that a car had been parked in front of his parents' home and that the occupant had been watching his parents. In the Roper home threats were issued against defendant's parents if they tried to assist him; he was "chilled with fright." Officer Peterson testified that when he arrived at the Roper home he observed defendant's condition and that he was bleeding, bruised, in a disheveled state and perspiring. He saw Harry Pettit seated on a chair in front of defendant with a gun in his hands. He knew that

defendant had been brought to the house at the point of a gun. He had seen defendant about two hours earlier and knew that his injuries had been inflicted in the meantime. The People did not call either of the Pettits or Johnson as a witness. Not only was defendant's testimony concerning his mistreatment without contradiction, but it was substantially corroborated by the testimony of Officer Peterson. The officer who had come to the Roper home prepared to obtain a confession from the defendant soon learned that he had been subdued to the point where his resistance to demands for a confession had been broken. This law enforcement officer, ignoring the obvious fact that defendant had been severely beaten, and assaulted with a deadly weapon, was concerned only with the fact that he was apparently in a condition of mind to confess his guilt. Defendant was arrested; his hands were handcuffed behind his back and he was taken to the sheriff's station where he was immediately questioned and his statement admitting guilt was reported and transcribed.

Officer Peterson testified that no threats were uttered and no inducements offered at the station and, as far as he could observe, defendant's confession was free and voluntary. That defendant was brutally beaten and put in fear of his life was the only reasonable conclusion consistent with the evidence. The court was convinced of those facts but altogether disregarded the evidence that the confession had been extorted from defendant by means of force and fear. With respect to the use of the rifle the court said: "I don't know what difference it makes. Suppose somebody brought him down there at the point of a gun. Unless that can be traced to these officers, how would that make a confession involuntary?" The court also said: "It is also clear to the Court that the confession of the defendant was voluntary. We can even go farther than that, and I say it is the opinion of the Court that he was extremely happy to see these officers upon their arrival, and the defendant thought for some reason that his life was in danger and that these sheriffs saved his life. In any event, there is no evidence before this Court that any force was used, or threats or promises made to the defendant. He was not promised any immunity, or threats made to him by any law-enforcement officers." The court said further: "Is there anything further before I rule on this issue of whether this confession is admissible. It is now submitted to me. * * * The objection is overruled. Do not argue on this question, there is no use."

We have yet to hear from those whose duty it is to administer the law and protect the rights of the citizens the first word of criticism of the brutal methods that were employed to extort a confession from the defendant. The officers had full knowledge of it and offered the puerile excuse that they were not the ones who beat the defendant into submission. The court gave tacit approval to the use of force and threats by Pettit and his accessories as a means of obtaining a confession. The Attorney General agrees with the court's reasoning and justifies its ruling upon the ground that the officers did not participate in defendant's mistreatment. He says "Here it is undisputed that 'those in authority' did nothing which could have caused the confession to be involuntary." It is not difficult to foresee the evil consequences that would flow from toleration of this attempted evasion of fundamental principles of law.

[4] The quoted statements of the court disclose an erroneous concept of the principles under which confessions illegally obtained are excluded from the evidence. To the trial court the fact that the mind of a prisoner was so saturated with fear or hope that he felt forced to make a confession is immaterial unless it was brought about by the acts of law enforcement officers. By the court's own statement it appeared that defendant was put in fear of his life if he refused to confess. Although it appears that the court was convinced that defendant had agreed to confess because he was in fear of his life, the court considered nothing except the absurd statement of Officer

Peterson that as far as he could see defendant's confession was given freely and voluntarily. The officer knew full well that between the time he saw defendant earlier in the evening and when they met in Wanda's home defendant had been "worked over" for the very purpose of extorting a confession. We are convinced that the trial court was not so naive as to believe that the confession was given voluntarily. The court was merely mistaken in its view that the rule of law which bars the use of involuntary confessions is designed merely as a regulation of the conduct of peace officers, and that a confession may be obtained by any one else by any means whatever and used as evidence without violating any right of a defendant. The error in this concept of the law is self-evident. It is the absence of volition which condemns enforced confessions. The source of the coercion is of no moment.

[5] The principles which forbid the use of confessions induced by force, fear, promise of immunity or reward of any nature are of a part with the right of an accused to a fair trial, in accordance with the laws of the land. The use of such evidence offends the due process clauses of the Federal and State Constitutions, U.S. Const. Amend. 14; Const. art. 1, § 13. Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192, 1193; see People v. Speaks, 156 Cal.App.2d 25, 319 P.2d 709, 716, and cases collected note 4. "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. * * * Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." Rochin v. People of California, 342 U.S. 165, 173–174, 72 S.Ct. 205, 210, 96 L.Ed. 183, 190–191.

There was not the slightest reason for believing that defendant's mind was free from the fear of death which induced him to promise to confess. Although the officers did not make threats they took advantage of the threats which they knew had been made by the others, and the results were the same as they would have been if the officers, themselves, had used similar methods. We may well quote from People v. Jones, 24 Cal.2d 601, 609, 150 P.2d 801, 805, a statement that fits the present case. The court was speaking of the repetition of a confession made under threats and it was said: "If a defendant is subjected to threats or violence and within a few days thereafter he makes a confession, it may not be introduced in evidence unless it clearly appears that such improper treatment did not cause him to confess. In a situation such as here presented, there is a presumption that the influence of the prior improper treatment continues to operate on the mind of the defendant and that the subsequent confession is the result of the same influence which rendered the prior confession inadmissible, and the burden is upon the prosecution to clearly establish the contrary. (Citations.)"

[6, 7] When it clearly appears that in obtaining a conviction use was made of a confession wrested from the accused by force, fear, the promise of immunity or the hope of reward, the inquiry need go no farther. It is of no consequence that the facts confessed may be proved by other evidence or that the guilt of the accused may be satisfactorily established by the entire evidence. The Constitution affords protection to the guilty as well as the innocent. The use of such a confession is a violation of due process. The conviction cannot be allowed to stand. The violation of the rights of the accused is, of itself, a miscarriage of justice.

[8] Appellant complains of the court's refusal to require Officer Peterson to produce a statement made to him by Wanda prior to defendant's arrest. It was sought to use the statement in the cross-examination of the officer. There was no error. The statement would properly have been made available to appellant in the cross-

examination of Wanda, but no such request was made.

All the purported appeals from nonappealable orders listed in the notice of appeal are dismissed. The judgment is reversed.

VALLÉE, J., and PATROSSO, J., pro tem., concur.



159 Cal.App.2d 126

John CALISE, as Secretary-Business Agent and principal officer of and for and on behalf of the Seine and Line Fishermen's Union of San Pedro, AFL–CIO; Thomas Ivey; as President of and for and on behalf of Cannery Workers Union of the Pacific; and Steve Edney, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY of LOS ANGELES, Respondent,

and

Franco-Italian Packing Company, a corporation, Real Party in Interest.

Civ. 22934.

District Court of Appeal, Second District, Division 2, California.

April 3, 1958.

Proceeding on petition by labor union seeking a writ of prohibition to restrain Superior Court from hearing an order to show cause why a preliminary injunction should not issue enjoining union from certain activities, and to restrain court from enforcing a temporary restraining order issued by it. The District Court of Appeal, Kincaid, J. pro tem., held that activities and practices of labor unions in inducing or encouraging employees to engage in a strike or concerted refusal in course of their employment to handle certain produce with object of forcing or requiring employer to cease doing business with owner of a certain vessel and with owners of nonunion vessels, constituted unfair labor practices prohibited by National Labor Relations Act, and exclusive jurisdiction of action arising out of such activities was vested in National Labor Relations Board in absence of showing that activities were other than peaceful and orderly.

Writ of prohibition ordered issued.

1. Labor Relations ⇐395, 510

Activities and practices of labor unions in inducing or encouraging employees to engage in strike or concerted refusal in course of their employment to handle certain produce with object of forcing or requiring employer to cease doing business with owner of certain vessel and with owners of nonunion vessels, constituted unfair labor practices prohibited by National Labor Relations Act, and exclusive jurisdiction of action arising out of such activities was vested in National Labor Relations Board, in absence of showing that activities were other than peaceful and orderly. West's Ann.Labor Code, §§ 1131–1134, 1115–1120; National Labor Relations Act, §§ 1 et seq., 8(b) (4) (A) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 158(b) (4) (A).

2. Labor Relations ⇐510

Where labor activities or practices affecting interstate commerce are either forbidden or protected by Labor Management Relations Act, federal law affords exclusive jurisdiction, depriving state court of jurisdiction to grant equitable relief by way of injunction, unless activities complained of are other than peaceful and orderly. National Labor Relations Act, § 1 et seq., as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

3. Labor Relations ⇐922

Even though unfair labor practices may be prohibited by National Labor Relations Act, state court has jurisdiction to enjoin violent, nonpeaceful conduct. National Labor Relations Act, § 1 et seq., as amended by Labor Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

4. Prohibition ⇐10(2)

Prohibition will lie to restrain a lower court from acting further in excess of its jurisdiction where that court has determined it has jurisdiction and has proceeded to exercise it by issuing a temporary restraining order and an order to show cause.

Gilbert, Nissen & Irvin, Los Angeles, for petitioners.

Leonard Di Miceli, San Pedro, for real party in interest.

KINCAID, Justice pro tem.

[1] The petitioners are two labor unions and through their officers are seeking a writ of prohibition to restrain the respondent court from hearing an order to show cause why a preliminary injunction should not issue enjoining petitioners from causing or inducing the cannery-worker employees of the real party in interest to refuse to unload and process certain deliveries of fish, from boycotting or picketing the plant and business of the real party in interest, and from doing various other acts as detailed in said order to show cause. The petition likewise seeks to restrain the respondent court from enforcing a temporary restraining order issued by it, and from taking any further proceedings in the action instituted by the real party in interest against petitioners and other parties.

An answer to the petition has been filed by the real party in interest, Franco-Italian Packing Company, a corporation, hereinafter referred to as "Packing Company."

The Packing Company in October 1957 filed a complaint against petitioners herein as defendants in the superior court seeking a temporary restraining order, preliminary and permanent injunctions and damages. A copy of this complaint is attached to and made a part of the petition as Exhibit A thereof.

It was stipulated that at all times in question the Packing Company was and is operating a business engaged in interstate commerce.

Since the filing of the above-described complaint the respondent court has issued a temporary restraining order enjoining and restraining the defendants in the action and petitioners herein from engaging in picketing, boycotting and other concerted activities. The respondent court further made and issued an order to show cause directed toward defendants and petitioners to show cause why a preliminary injunction should not be issued restraining and enjoining said parties from doing any of the acts complained of in the complaint.

The facts in this proceeding as reflected by the complaint are substantially as follows:

1. Packing Company is engaged in the business of packing, canning and processing fish and fish products at its plant on Terminal Island in the Los Angeles Harbor area, and of selling said fish and fish products throughout the United States.

2. All of the cannery workers employed by Packing Company are members of the defendant "Cannery Workers Union of the Pacific, AFL-CIO" (hereinafter for convenience called "Cannery Workers Union"); that said union represents itself to be the collective bargaining representative of Packing Company's cannery-worker employees, and has been recognized and accepted as such by Packing Company.

3. Defendant "Seine & Line Fishermen's Union of San Pedro, AFL-CIO" (hereinafter for convenience called "AFL-CIO Fishermen's Union") and defendant "Fishermen's Union Local 33 ILWU" (hereinafter for convenience called "ILWU Fishermen's Union") are unions which represent themselves to be collective bargaining representatives of certain groups of employees (fishermen-crewmen) on commercial fishing boats.

4. That on or about September 24, 1957, the owner of a commercial fishing boat known as the "Sandy Boy" entered into an agreement with the ILWU Fishermen's Union as the supposed collective bargaining representative of the employees of said

vessel to pay certain agreed sums per ton to said employees for their catches of fish.

That also on or about said September 24, 1957, Packing Company, believing in good faith that the vessel "Sandy Boy" was in good standing and manned by crew members under the jurisdiction of the ILWU Fishermen's Union, entered into an agreement with the owner of the "Sandy Boy" to buy said vessel's catches of fish at certain agreed prices; and that, in conjunction therewith, Packing Company executed a master bargaining agreement with said ILWU Fishermen's Union whereby Packing Company in substance met all the demands, terms and conditions then being demanded by commercial fish boat owners and by the crew members of said boats through their respective bargaining agents.

5. That a jurisdictional dispute, in alleged violation of section 1115 et seq., of the Labor Code of the State of California, has arisen and exists between said AFL-CIO Fishermen's Union and said ILWU Fishermen's Union, over which of said unions is the collective bargaining representative of the fishermen-crewmen employees of the "Sandy Boy" and other commercial fishing vessels.

6. That after Packing Company had entered into the aforementioned agreements with the owner of the "Sandy Boy" and with the ILWU Fishermen's Union, the AFL–CIO Fishermen's Union notified Packing Company that said vessel and its owner had been classified as unfair; that Packing Company would be prevented from accepting deliveries of fish from said vessel; that said vessel would be picketed upon arrival at Packing Company's docks by the members of said AFL–CIO Fishermen's Union; and that the latter had notified the Cannery Workers Union that said vessel was unfair, and that the members of said last-named union who were employees of Packing Company should not unload or process and pack fish sought to be delivered from said vessel to Packing Company.

That almost concurrently therewith, the Cannery Workers Union also notified Packing Company that the employees of Packing Company who were members of said Cannery Workers Union, would not unload or process and pack fish sought to be delivered by the "Sandy Boy" to Packing Company.

That, on the other hand, Packing Company was notified and threatened by the ILWU Fishermen's Union that, unless Packing Company took deliveries from the "Sandy Boy," said ILWU Fishermen's Union would picket and boycott Packing Company's business and would picket any and all other commercial fishing vessels, union or nonunion, seeking to deliver fish to Packing Company.

7. That, in addition to the foregoing, it is in substance alleged in the complaint that the defendants have engaged in, or threatened to engage in, conduct, as follows:

(a) *As to the Cannery Workers Union*:

That the Cannery Workers Union has threatened and continues to threaten that it will cause all cannery workers of Packing Company to walk out of Packing Company's plant, to call a work stoppage and to boycott Packing Company in its dealings with nonunion vessels, if Packing Company abides by its agreements with the owner of the "Sandy Boy" and with the ILWU Fishermen's Union. That, on one specific occasion when the "Sandy Boy" sought to deliver its catch of fish, Packing Company's cannery-worker employees because of fear, coercion and intimidation brought against them by said Cannery Workers Union refused to unload fish from the "Sandy Boy" and threatened that, if Packing Company should unload said fish, they would walk out of the plant; and that, as a consequence, Packing Company was unable to take delivery to its irreparable injury and damage. That also upon each occasion when the ILWU Fishermen's Union as hereinafter noted has established a picket line at Packing Company's plant to prevent Packing Company from taking delivery of fish from nonunion small scoop fishing vessels, Cannery Workers Union has refused and threatens to continue to refuse to unload or work any fish delivered from said non-

union fishing boats; and that, as a consequence, Packing Company has been unable to take deliveries from said nonunion vessels to its irreparable injury and damage.

(b) *As to the AFL–CIO Fishermen's Union:*

That the AFL–CIO Fishermen's Union has threatened and continues to threaten Packing Company that its members will continue to maintain picket lines at Packing Company's plant in positions to interrupt effectively the delivery of fish to Packing Company and the processing and shipment thereof. There are no direct, specific allegations as to the conduct of said union in maintaining picket lines or otherwise; but the allegations of the complaint may be fairly construed as alleging that the AFL–CIO Fishermen's Union has maintained a picket line at Packing Company's plant, and that it has endeavored to cause or induce Packing Company's cannery workers not to unload or process fish from the "Sandy Boy."

(c) *As to the ILWU Fishermen's Union:*

That said ILWU Fishermen's Union has from time to time established, and threatens to continue to establish, a picket line along and in front of Packing Company's wharf in order to prevent Packing Company from taking deliveries of fish from nonunion small scoop fishing boats; that, by such action, said nonunion fishing boats have been coerced and intimidated into proceeding to wharfs of other canners; and that said union threatens to continue such picketing and to boycott Packing Company in its dealings with vessels whose crews are not members of the ILWU Fishermen's Union, until and unless Packing Company accepts deliveries of fish from the "Sandy Boy."

In addition, the complaint negatively alleges that there is no labor dispute, disagreement or controversy between Packing Company and said Cannery Workers Union (or the members thereof, who are Packing Company's employees) concerning the negotiation, fixing, maintaining, changing or the seeking of arranging terms or conditions of employment, or concerning wages or hours of employment; and that likewise there is no labor dispute, disagreement or controversy concerning such matters as between Packing Company and the AFL–CIO Fishermen's Union, nor as between Packing Company and the ILWU Fishermen's Union. Further the complaint alleges that Packing Company is not a party to any of the labor disputes which do exist, namely: (a) the aforementioned jurisdictional dispute between the AFL–CIO Fishermen's Union and the ILWU Fishermen's Union; (b) a labor dispute between the officers of the AFL–CIO Fishermen's Union and certain dissident members thereof; and (c) a labor dispute between the AFL–CIO Fishermen's Union and the owners of commercial fishing vessels. The complaint also contains allegations to the effect that all of the defendants have unlawfully conspired to interrupt and cripple the business activities of Packing Company; and allegations to the effect that the defendants are engaged in activities violative of the provisions of sections 1131–1134 of the Labor Code prohibiting secondary boycotts and refusal to handle so-called hot cargo.

The prayer for injunctive relief is likewise detailed but the substance thereof is that the defendants be enjoined and restrained from engaging in any individual or concerted activity, and from in any way threatening, intimidating, coercing, harming or harassing the cannery-worker employees of Packing Company, to cause or induce said employees to refuse to unload or process fish from the "Sandy Boy" or from nonunion scoop fishing boats, or to call or to engage in a walkout, work stoppage or secondary boycott against Packing Company; and from boycotting Packing Company's business or picketing its plant and wharf.

The principal question presented is whether the activities and practices on the part of the said labor unions as to which Packing Company complains are not those forbidden or protected by the National Labor Relations Act, as amended by the Labor Management Relations Act, with exclusive jurisdiction to act in the matter therefore being vested in the National Labor Rela-

tions Board. Our conclusion is that this question must be answered in the affirmative.

[2] It is now established that in labor controversies affecting enterprises engaged in interstate commerce, where labor activities or practices are either forbidden or protected by the Labor Management Relations Act (29 U.S.C.A. § 141 et seq.), there is a conflict between the injunctive relief that may be available under the act and that available under the equity powers of a state court. Excepting where the activities complained of are other than peaceful and orderly, the federal law affords the exclusive remedy, thus depriving the state court of jurisdiction to grant equitable relief by way of injunction. G. C. Breidert Co. v. Sheet Metal, etc., Ass'n, 139 Cal.App.2d 633, 294 P.2d 93; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546; Capital Service v. N.L.R.B., 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887; Garner v. Teamsters, Chauffeurs & Helpers Local Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228; Garmon v. San Diego Bldg. Trades Council, 49 Cal.2d 595, 320 P.2d 473, 476; Seven Up Bottling Co. v. Grocery Drivers Union, 49 Cal.2d 625, 320 P.2d 492, 493.

Thus in the Breidert case, supra, it was held that a state court has no jurisdiction, notwithstanding the provisions of the California Jurisdictional Strike Act (Lab.Code, §§ 1115–1120), to grant injunctive relief against picketing, boycotting and other practices of certain labor unions designed to force an employer to recognize said unions as the collective bargaining representatives of the employer's employees instead of another labor organization, where the employer was engaged in interstate commerce, where the activities complained of where peaceful, and where the National Labor Relations Board was clothed with jurisdiction to consider and determine in the first instance any charges of unfair labor practices on the part of said labor unions.

In the Weber case, supra, it was held that the provisions of the National Labor Relations Act, as amended, preclude a state court from enjoining, as a violation of a state's restraint of trade statute, a labor union's picketing of an employer's plant for the purpose of compelling the employer to insert into a contemplated collective labor contract a clause obligating the employer to employ, for repair or replacement of machinery, only contractors having collective labor agreements with said union.

In the Garner case, supra, it was in substance held that a state court could not enjoin, as a violation of a state labor relations act, a labor union from picketing for the purpose of inducing the employees of a company to join said union; and that the employer could have and should have presented his grievance against said labor union to the National Labor Relations Board, even though it appeared that no controversy, labor dispute or strike was in progress and that the employer had not at any time objected to it employees joining said union.

The alleged activities and practices on the part of the defendant labor unions as to which Packing Company complains are clearly denounced and proscribed as unfair labor practices by the provisions of the National Labor Relations Act as amended.

Section 158 of Title 29 U.S.C.A. (§ 8 of the Labor Management Relations Act) provides in part, as follows: "(b) It shall be an unfair labor practice for a labor organization or its agent * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. * * *"

Other portions of the said Labor Management Relations Act have been cited by petitioners as supporting their contention that the acts complained of in the complaint constitute (if true) unfair labor practices under the act, as amended. However, it seems unnecessary to discuss them since the essence of the complaint is that the petitioners are, to paraphrase the above-quoted provisions of said act, inducing or encouraging the employees of Packing Company to engage in a strike or concerted refusal in the course of their employment to handle or work fish, with the object of forcing or requiring the Packing Company to cease dealing and doing business with the owner of the "Sandy Boy" and with the owners of nonunion vessels.

Since the defendant labor organizations, under the terms of the complaint, are engaged in unfair labor practices prohibited by the National Labor Relations Act as amended, it is of no consequence as to whether any labor dispute exists between Packing Company and the defendants or its cannery-worker employees. Garner v. Teamsters, Chauffeurs & Helpers Local Union, supra, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228.

[3] While it is settled that state courts still have jurisdiction to enjoin violent, nonpeaceful conduct (G. C. Breidert Co. v. Sheet Metal, etc., Ass'n, supra, 139 Cal. App.2d 633, 294 P.2d 93; United Automobile, Aircraft and Agricultural Implement Workers v. Wisconsin Employment Relations Board, 351 U.S. 266, 76 S.Ct. 794, 100 L.Ed. 1162), the allegations of the complaint herein fail to show that the actions of petitioners have been other than peaceful and orderly. There are no averments of activities which threaten (in the words of the Breidert case, 139 Cal.App.2d at page 638, 294 P.2d at page 96) "a probable breach of the State's peace" or call for "extraordinary police measures," such as mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, blocking of entrance to and egress from a factory, picketing of employees' homes, or recurrent unannounced work stoppages.

Insofar as the conduct of petitioners is involved, the most that can be said for the complaint is that it contains allegations from which it can probably be concluded that the petitioning AFL–CIO Fishermen's Union has engaged in some peaceful picketing of Packing Company's plant and that the cannery workers have refused to unload fish from the "Sandy Boy," "because of fear, coercion and intimidation brought against them by the Cannery Workers Union." There is an absence of any allegations as to how, in what manner, or by what actions said cannery workers were supposedly so coerced and intimidated. Accordingly and since the complaint fails to show that the actions of petitioners have not been peaceful and orderly, assumption of jurisdiction and granting of injunctive relief cannot be justified upon the basis that a state court has jurisdiction to enjoin violent, nonpeaceful conduct.

[4] Finally prohibition will lie to restrain a lower court from acting further in excess of its jurisdiction where that court has determined it has jurisdiction and has proceeded to exercise it by issuing a temporary restraining order and an order to show cause. Holt v. Superior Court, 100 Cal.App.2d 403, 404, 223 P.2d 881; Rescue Army v. Municipal Court, 28 Cal.2d 460, 464, 465, 171 P.2d 8. The respondent court has assumed jurisdiction, has issued a temporary restraining order enjoining the defendants in the action and the petitioners herein from engaging in the labor activities stated, and an order to show cause as to why a preliminary injunction should not issue as to them.

In the light of these acts and for the reasons heretofore stated a peremptory writ of prohibition is ordered issued herein.

ASHBURN, Acting P. J., and HERNDON, J., concur.

159 Cal.App.2d 180

Ellena SHACHUNAZARIAN, Plaintiff and Appellant,

v.

Bertha I. WIDMER, Defendant and Respondent.

Civ. 17578.

District Court of Appeal, First District, Division 2, California.

April 7, 1958.

Rehearing Denied May 7, 1958.

Action for injuries to pedestrian struck by automobile. The Superior Court of the City and County of San Francisco, Thomas M. Foley, J., rendered judgment on verdict for defendant, and plaintiff appealed. The District Court of Appeal, Draper, J., held that evidence was insufficient to show whether accident occurred in business district, and hence court erred in reading to jury section of San Francisco Traffic Code governing pedestrian's duties in metropolitan traffic district or business district.

Reversed and remanded.

1. Municipal Corporations ⇐703(1)

Ordinance prohibiting pedestrian in metropolitan traffic district or business district from crossing, except in crosswalk, is properly within field of municipal regulations. West's Ann.Vehicle Code, § 459.1.

2. Automobiles ⇐246(58)

In action for injuries to pedestrian struck by automobile, evidence was insufficient to show whether accident occurred in business district, and hence court erred in reading to jury section of San Francisco Traffic Code governing pedestrian's duties in metropolitan traffic district or business district. West's Ann.Vehicle Code, §§ 83, 89, 90.1, 459.1.

3. Evidence ⇐32

Court cannot take judicial notice of city ordinances.

4. Municipal Corporations ⇐646

In general usage, a city street is a "roadway" from curb to curb. West's Ann. Vehicle Code, §§ 83, 89, 90.1, 459.1.

See publication Words and Phrases, for other judicial constructions and definitions of "Roadway".

5. Highways ⇐18

"Roadway" is the strip of land over which a road is constructed; hence, a road; specifically, that part of road over which the traffic travels. West's Ann.Vehicle Code, §§ 83, 89, 90.1, 459.1.

6. Automobiles ⇐217(1)

One traversing all or a portion of paved area between curbs of a city street is "crossing the roadway" within requirement that he use crosswalk, though he is walking from curb to safety zone. West's Ann. Vehicle Code, §§ 83, 560, 562.

See publication Words and Phrases, for other judicial constructions and definitions of "Crossing the Roadway".

7. Municipal Corporations ⇐646

A parking strip, comprising the portion of a paved city street adjacent to the curb, is part of the "roadway". West's Ann. Vehicle Code, §§ 83, 89, 90.1, 459.1.

Hoberg & Finger, Albert Polonsky, San Francisco, for appellant.

Pelton, Gunther, Durney & Gudmundson, San Francisco, for respondent.

DRAPER, Justice.

Plaintiff stood on the south curb of Geary Street in San Francisco, awaiting an eastbound streetcar. She was opposite the western end of the safety zone marked for streetcar passengers, and an appreciable distance west of the Parker Avenue crosswalk. Defendant had parked her car parallel to the curb on the same side of Geary Street and sat in the car awaiting a friend. Upon the friend's arrival, defendant started the car and backed up, striking plaintiff, who had left the curb to walk to the safety zone. Plaintiff brought this action for damages for personal injuries thus sustained, and appeals from judgment upon jury verdict for defendant.

[1–3] Appellant urges that the court erred in reading to the jury Section 77 of the San Francisco Traffic Code:

> "Unless otherwise directed by a police officer, no pedestrian in the metropolitan traffic district or in any business district shall cross a roadway other than in a crosswalk."

and in instructing the jury that violation of this ordinance raises a rebuttable presumption of negligence. The ordinance is properly within the field of municipal regulation. Veh.Code, § 459.1. Upon the record here, however, the instruction was error. The ordinance, by its terms, applies only in the metropolitan traffic district or a business district. The portions of the ordinance defining such districts were not before the court. We cannot take judicial notice of city ordinances. Simpson v. City of Los Angeles, 40 Cal.2d 271, 253 P.2d 464. Thus we cannot determine whether the location here in question was within such a district. Respondent suggests that the definitions of the Vehicle Code (§§ 89, 90.1) apply. If they are incorporated in the ordinance, the evidence is insufficient to show whether the area in question constitutes a business district as there defined.

This error requires reversal. However, to aid the trial court upon retrial, we discuss a further question raised by this appeal.

Appellant contends that the ordinance can have no application because appellant, in walking from the curb to the streetcar safety zone, was not "crossing a roadway." Her view apparently is that the ordinance does not prohibit the crossing of part of a roadway, at least where the part so crossed lies between the curb and a safety zone.

[4, 5] In general usage, a city street is a "roadway" from curb to curb. Roadway is defined as "the strip of land over which a road is constructed; hence, a road; specif., that part of a road over which the traffic travels." Webster's New International Dictionary, 2d Ed. The Vehicle Code defines "roadway" as "that portion of a highway improved, designed or ordinarily used for vehicular travel." Veh.Code, § 83. As to city streets, either definition would include the paved area from curb to curb.

Appellant, however, cites authorities which she claims hold that crossing part of a street, particularly that portion between curb and safety zone, is not the crossing of a roadway. But these decisions do not support the rule urged by appellant. In Croxall v. Broadway Dept. Store, Inc., 127 Cal.App. 153, 15 P.2d 546, 547, a city ordinance contained language requiring pedestrians to cross at a crosswalk or "by the shortest route to the opposite curb." Relying in part upon the quoted language, the court held that the "strict letter" of the ordinance prohibited only curb to curb crossing by pedestrians. Comparable language does not appear in the ordinance before us.

Brockway v. Western Union Tel. Co., 29 Cal.App.2d 244, 84 P.2d 524, 526, holds only that a pedestrian not in a crosswalk is not guilty of contributory negligence as a matter of law. Vehicle Code section 562 requires a pedestrian crossing a roadway other than at a crosswalk to yield the right of way to vehicles, but specifically provides that it shall not relieve a driver from the duty to exercise due care. Defendant sought reversal on the ground that the deceased pedestrian was guilty of contributory negligence as a matter of law. But on the facts recited in the opinion, it is clear that there was some evidence to support an implied finding that decedent was not negligent or that his contributory negligence, if any, was not a proximate cause of the collision. Clearly these questions were for jury determination. The court's statement that decedent "was merely crossing that part of the roadway between a safety zone and a curb" was not necessary to the decision, and the case does not purport to hold that the space between the curb and the safety zone is not a "roadway" within the meaning of the code section.

Newton v. Thomas, 137 Cal.App.2d 748, 291 P.2d 503 and Kuist v. Curran, 116 Cal. App.2d 404, 253 P.2d 681, are not in point.

Both turn upon the fact question whether the pedestrian was standing still or was in fact crossing the roadway. In one case plaintiffs' decedent was conversing with the occupant of a parked car, and in the other plaintiff was a newspaper vendor selling in the middle of the street. In neither case was a safety zone involved, and in each the question was whether the pedestrian was standing still, in which case he would not be "crossing" a roadway, or was in fact in motion.

[6] We find no merit in appellant's argument for limited definition of the phrase "cross a roadway." The definition she seeks would require proof of the intent of the pedestrian despite the total absence of any indication in the statute of such a requirement. It must be remembered that the term is used not only in the ordinance here in question, but in Vehicle Code sections 560 and 562. One of these sections is designed to protect the pedestrian and one the driver. We doubt that appellant would argue that a pedestrian in a crosswalk is, to secure the benefit of section 560, required to show that he intended to cross the entire width of the street. The proposed construction could lead to infinite complications in cases where a plaintiff pedestrian is entitled to the presumption of due care.

We find nothing in the ordinance, the Vehicle Code sections, or the cases to require such a result. We therefore hold that one traversing all or a portion of the paved area between the curbs of a city street is "crossing the roadway" within the meaning of the ordinance and the code sections, even though he is walking from curb to safety zone.

[7] Appellant also argues that a "parking strip" is not a part of the roadway. But certainly the portion of a paved city street adjacent to the curb is no less "improved, designed or ordinarily used" for vehicular traffic (Veh.Code, § 83) than is the center portion. Its use for parking is dependent upon movement of vehicular traffic in and out of the parking zones. When not occupied by parked cars, it is available and is commonly used for through traffic.

It is unnecessary to discuss the other points raised by appellant.

Judgment reversed and case remanded for new trial.

KAUFMAN, P. J., and DOOLING, J., concur.



159 Cal.App.2d 117

Louis GROOBMAN, Plaintiff and Appellant,

v.

James W. KIRK and Edward A. Kirk, as Co-Administrators of the Estate of Nellie L. Kirk, Deceased (substituted as parties defendant in place and stead of Nellie L. Kirk, Deceased), Defendants and Respondents.

Civ. 22911.

District Court of Appeal, Second District, Division 2, California.

April 3, 1958.

Purchaser brought action against vendor for specific performance of contract for sale of realty. The Superior Court of Los Angeles County, Frank C. Charvat, J., entered judgment adverse to the purchaser, and the purchaser appealed. The District Court of Appeal, Herndon, J., held that where contract for sale of realty provided for closing date in 90 days and required vendor to furnish policy of title insurance showing title free of encumbrances, except taxes, easements, and rights of way, and to deposit deed in escrow within closing date, and required purchaser to pay balance of purchase price in escrow within closing date, and, when purchaser discovered that realty was subject to lease, he made demands on vendor prior to closing

date to clear title, but vendor was unable to do so, covenants of parties were mutual and concurrent, and deposit of balance of purchase price by purchaser was not a condition precedent to deposit of satisfactory title policy and deed by vendor, and purchaser had right to condition his deposit of balance of purchase price on delivery of deed by vendor free from encumbrance of lease.

Judgment reversed.

1. Vendor and Purchaser ⇐76, 168

Where contract for sale of realty provided for closing date in 90 days and required vendor to furnish policy of title insurance showing title free of encumbrances, except taxes, easements, and rights of way, and to deposit deed in escrow within closing date, and required purchaser to pay balance of purchase price in escrow within closing date, and, when purchaser discovered that realty was subject to lease, he made demands on vendor prior to closing date to clear title, but vendor was unable to do so, covenants of parties were mutual and concurrent, and purchaser had right to condition deposit of balance of purchase price on delivery of deed by vendor free from encumbrance of lease. West's Ann.Civ.Code, §§ 1437, 1496, 1498.

2. Specific Performance ⇐10(1)

Where vendor of realty could not comply with requirement of contract for sale of realty by conveyance of title free from encumbrance of lease, purchaser had right to seek specific performance of the contract, to demand conveyance by vendor of such title as vendor possessed, and to seek damages for defect in title because of lease. West's Ann.Civ.Code, §§ 3392, 3394.

Bewley, Knoop & Lassleben, Whittier, and Burnett Kee Maxwell, Jr., Paramount, for appellant.

Shafer & Seymour and Samuel V. Cornell, Compton, for respondents.

HERNDON, Justice.

Plaintiff and appellant, hereafter referred to as "buyer," appeals from an adverse judgment in an action for specific performance of a contract of sale of real property. The defendants and respondents are the administrators of the estate of Nellie L. Kirk who died after the case was submitted, but before judgment. Mrs. Kirk was the seller of the property and will hereafter be referred to as the "seller."

In the court below the cause was submitted for decision at the conclusion of plaintiff's case, defendant seller offering no evidence. Hence there is no dispute as to the essential facts. The parties seem to agree that the determinative question of law is substantially as follows: whether buyer's obligation to pay into escrow the agreed balance of the purchase price within the specified 90-day period was an absolute obligation and a condition precedent to his right to specific performance, or whether, under the circumstances of this case, the buyer's obligation in this respect was conditional and dependent upon seller's concurrent performance of her obligation to deposit a deed and a title policy insuring an unencumbered title.

The judgment of the trial court is based upon a holding that the buyer's obligation was absolute and that proof of its literal performance was a condition precedent to buyer's right to specific enforcement of the contract. Our holding is to the contrary. We have concluded that under the undisputed facts here presented the promises of the buyer and seller were mutual and concurrently conditional.

The contract of which specific performance was sought consists of written escrow instructions executed by both parties on January 6, 1954, with a closing date of April 6, 1954. Seller therein agreed to convey certain land to buyer for $29,500 cash; to furnish a policy of title insurance showing her title to be free of all encumbrances except (a) certain real and personal property taxes and (b) covenants, conditions, restric-

tions, easements, rights and rights of way of record; and to deposit in escrow a deed to the property "to be used when you hold for my/our account the total sales price." Buyer paid outside of escrow $1,000 which was applied on the purchase price, deposited $4,000 concurrently with the execution of the instructions and agreed to pay the balance of $24,500 within the 90-day period of the escrow.

Under the term "General Instructions" signed by the buyer and specifically approved by the seller is the following: "Time is of the essence of these instructions. If for any reason other than my (the buyer's) failure to comply with the foregoing instructions this escrow cannot be closed by April 6, 1954, I may, by written notice to you, demand the return of money and/or instruments that I have placed therein; otherwise complete this escrow as soon as possible. If both parties fail to comply within the said time limit, then neither party shall be entitled to the return of money and/or instruments until, after demand, a five day notice shall have been given to the other party by ordinary mail at the address given you. Party electing to cancel this escrow agrees to pay cancellation charges."

Buyer made the $4,000 deposit and the trial court found that he had not withdrawn from the escrow any of the money deposited by him.

A few days after the opening of the escrow the escrow holder obtained a preliminary title report which showed that the real property was subject to a lease executed by the seller and her deceased husband to their son, Edward, as lessee, for a term of ten years expiring on February 28, 1957. This lease was recorded July 21, 1947, in the office of the County Recorder. Buyer had no knowledge of the lease at the time the escrow instructions were signed but he learned about it ten days later when the information contained in the preliminary title report was conveyed to him. Thereupon he consulted his attorney who, on February 3, 1954, addressed a letter to the seller informing her of the facts disclosed in the preliminary title report and reminding her that she had promised to convey clear title to the property, free from any lien or encumbrance, and to furnish buyer with a title policy insuring the same. She was also advised in this letter that "my client intends to hold you to strict compliance with the said escrow agreement. Mr. Groobman is prepared to fully perform his portion of the escrow agreement, *including deposit of the balance of the purchase price, which is tendered hereby.* Demand is made upon you that you promptly comply with the escrow agreement by tendering to my client clear title to said premises, free from any lien or encumbrance, together with a policy of title insurance insuring the same." (Emphasis added.)

It should be noted that there is uncontradicted evidence that at all times during the period of the escrow, buyer was in a financial position to make the final deposit of $24,500. The foregoing letter produced no response from the seller. She did not accept the offer nor object to the mode or form of either the demand or the offer therein contained.

On March 19, 1954, still within the period of the escrow, buyer's attorney addressed a second letter to the escrow holder, with a copy to the seller, reading in part as follows: "You are advised that Mr. Groobman is ready, willing, and able to complete his performance of the escrow instructions by deposit in escrow of the balance of the purchase price, the sum of $24,500, which said sum is tendered hereby, forthwith upon execution and deposit in escrow of a quitclaim deed executed by Edward A. Kirk and terminating and releasing the lease upon the subject property. Please notify me immediately upon deposit of such executed quitclaim deed. Immediately upon receipt of such notice, Mr. Groobman will deposit the said sum of $24,500.-00 into escrow." This letter, also, failed to evoke any response from the seller.

On April 9, 1954, three days after the designated closure date of the escrow, buyer commenced this action. In his original complaint buyer prayed for specific performance of the contract according to its terms, or: "If the said agreement cannot be specifically performed, that the defendant convey to the plaintiff the said real property, subject to the said lease" and the taxes, covenants, conditions, etc. set out in the escrow instructions, and for certain damages. Service of summons on the original complaint was delayed, apparently for the reason that in the meantime seller had commenced an action in unlawful detainer against her son, the tenant under the lease. To assist her, buyer "loaned" her the services of his own attorney, and she apparently gladly accepted the same. The complaint in unlawful detainer was filed April 20, 1954, and judgment in favor of the tenant was entered May 24, 1954.

On June 9, 1954, seller addressed a letter to the escrow holder, with copy to buyer's attorney, instructing the escrow holder to cancel the escrow "within one week from the date of this letter unless in the meantime the buyer complies with the terms of said escrow and deposits the sums required by the terms of said escrow." On June 14, 1954, buyer's attorney addressed a letter to seller in which, after stating his assumption that she did not wish him to represent her further in connection with any proceedings to cancel or forfeit the lease, he stated: "You are aware that Mr. Groobman attempted to cooperate closely with you so that you would not suffer because of his specific performance action against you. Of course, such cooperation is now out of the question. I have instructed the marshal's office to attempt service upon you of Mr. Groobman's complaint for specific performance and damages. As you know the action was held in abeyance during our attempt to cooperate with you and work out a peaceful and mutually beneficial solution to the problem."

Seller at no time prior to the expiration of the term of the lease, February 28, 1957, cleared her title to the real property of the encumbrance of the lease, and no further correspondence or negotiations took place. Buyer elected not to deposit in escrow the balance of the purchase price so long as these conditions prevailed. Such deposit was the only covenant or condition of the contract of sale which buyer had not performed—there remained nothing else for him to do.

On August 29, 1956, while the lease was still in effect, buyer filed his amended complaint in which he alleged his previous demands and tenders of the $24,500 and that he "is now ready, able and willing to pay the balance of the total sales price. * *" He further alleged: "The plaintiff has elected to accept and take title to said real property subject to the encumbrances hereinabove specifically described and to said lease and to demand damages for the withholding of said real property." By way of damages it is alleged that the fair rental value of the property is and has been $125 per month, and buyer asks that amount from February 1, 1954, until he obtains possession of the real property.

Seller relies upon, and the trial court apparently was governed by, the decision of this court in Pitt v. Mallalieu, 1948, 85 Cal. App.2d 77, 192 P.2d 24, 26. That was an appeal from a judgment of dismissal following the sustaining of a general demurrer to a second amended complaint without leave to amend. In Pitt, as in the case at bar, the escrow instructions specified that a part of the purchase price should be deposited in the escrow at the time of signing the instructions and the entire balance should be so deposited within 90 days thereafter and time was declared to be of the essence of the agreement. There, as here, after the 90-day period had expired and the additional deposit had not been made by the vendee, the vendor gave written notice that she considered the contract at an end.

But the cases differ in this respect: In Pitt the vendor gave notice of cancellation *before* vendee commenced his action. After the cancellation, vendee deposited $1,750 "as

evidence of his good faith" and several months later filed the action. Furthermore, the cancellation, the deposit and the filing of the action took place about *two years* after the opening of the escrow.

In the instant case, buyer filed his action three days after the escrow was due to close, and thereafter, before serving summons, assisted the seller in her attempt to remove the encumbrance of the lease. It was not until after this proved futile that seller cancelled.

It is true that in Pitt the vendee sought to excuse his nonperformance on the ground that he had discovered a cloud on vendor's title which was not removed and that to have made the deposit as required by the contract would have been an idle act. In holding such was no excuse this court said, at page 81 of 85 Cal.App.2d, at page 27 of 192 P.2d: "But while the agreement implies that defendant's title might not prove merchantable and she might not perfect it within a reasonable time, the remedy for plaintiff in such an event is provided by the agreement's provision 'that the purchaser shall have the option of demanding back said deposit and shall be released from all obligation hereunder.' The requirement that plaintiff deposit the total purchase price in escrow was not conditional but was absolute. His failure to make the deposit within the 90 days after the agreement was a breach of it and terminated his rights. (Citation.) Unless the complaint alleges full performance *or an offer to perform* plaintiff's part of the contract he is not entitled to maintain his action to enforce performance. (Citation.) The fact that there was an encumbrance against defendant's title which she was not able to remove within the time fixed for performance *did not relieve the vendee from making a tender of the purchase price and demand of performance as a condition for his action.* (Citations.)" (Emphasis added.)

[1] The above quoted language indicates additional and substantial distinction between the Pitt case and the case at bar. Here the allegations of the complaint and the proof show both tender and demand on the part of the buyer, as previously set forth herein. Here buyer contends that the covenant to pay the balance of the purchase price and the covenant to deliver a good and sufficient deed were mutual and concurrent. We hold that this contention is well taken. Section 1437, Civil Code, defines concurrent conditions as follows: "Conditions concurrent are those which are mutually dependent, and are to be performed at the same time."

We sustain buyer's further contention that since his covenant to deposit the balance of the purchase price and seller's covenant to deposit a good and sufficient deed (together with a title policy as provided for) were concurrent, buyer had the right to condition his offer to deposit such balance upon the performance by seller of her covenant to convey the premises free from the encumbrance of the lease. Buyer correctly invokes section 1498 of the Civil Code: "When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition." Furthermore, section 1496, Civil Code, provides: "The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance, unless the offer is accepted."

In Gervaise v. Brookins, 156 Cal. 103, 103 P. 329, the vendor agreed to sell and convey certain lots to the vendee for $15,000, payable as follows: $3,000 cash, and the balance in ten annual payments of $1,200 each, evidenced by ten promissory notes, each of which was payable on or before a specified date. The vendor agreed to deliver a good and sufficient deed upon the payment of the last note. After making the cash down payment and after paying the first three notes, the vendee learned that the vendor had conveyed the land to an oil company. Taking advantage of a provision in the notes permitting him to pay the same before the specified due dates, the vendee offered to pay the remaining notes on con-

dition that the vendor convey said lots to him. Concerning this offer, the Supreme Court said at page 106 of 156 Cal., at page 330 of 103 P.: "He [the vendee] was entitled to the performance of this concurrent condition, and he had a right to make his own offer dependent thereon. Civ.Code, § 1498. He was then, and ever since has been, ready, able, and willing, to pay the whole price upon the condition stated. His offer was therefore a good offer of performance under the law and the contract, * * *." Such is the situation in the case at bar.

Nor, in the instant case, is the seller's contention that the offer should have been accompanied by the actual cash of any avail. As was said in Peckham v. Stewart, 97 Cal. 147, 152, 31 P. 928, 929: "They [the vendees] had a right, at the time of making the offer, to demand that defendant perform his part of the contract by delivering the conveyance required by the contract; and until defendant signified his acceptance of their offer to pay, by a tender of such conveyance, plaintiffs were under no obligation to actually produce before him the money mentioned in their written offer."

In Marshall v. Hilton, 209 Cal. 531, at page 534, 289 P. 165, at page 167, under similar facts and dealing with the same contention as in Peckham v. Stewart, supra, the court said: "Here no claim is made that the tender proven extinguishes the obligation of the respondents to pay to the appellant the amount due her under the agreement of sale, but was a preliminary step to be taken before an action could be instituted by the respondents against the appellant to specifically perform the contract. In such a case, 'the law does not require the purchaser to keep the tender good or deposit the money in the vendor's name and thus place himself at the vendor's mercy, since the decree, if granted, will require the plaintiff to pay the purchase money before receiving the deed.' 23 Cal.Jur. 459."

In Katemis v. Westerlind, 1953, 120 Cal. App.2d 537, 261 P.2d 553, 556, this court reversed a judgment of nonsuit in an action by the purchaser for specific performance and damages. The receipt for the buyers' deposit contained certain of the terms of the contract of sale including: "Time is of the essence of this contract; but the time for any act required to be done may be extended not more than 30 days by the undersigned agent." The buyers' escrow instructions provided for deposit of the balance of the purchase price prior to March 1, 1952, which seller could use provided on or before March 1 he had filed for record instruments entitling him to procure a policy of title insurance showing title vested in the buyers free, with some exceptions, of encumbrances. Seller agreed also to furnish a termite report, and if it showed infestation, to eliminate it and repair the damage at her own expense. The instructions also contained a provision that if the conditions of escrow were not complied with prior to March 1, 1952, "you are nevertheless to complete the escrow as soon as the conditions, except as to time, have been complied with, unless written demand shall have been made upon you not to complete it." Seller agreed to be bound by the foregoing instructions prior to March 1, and further said: "I will hand you *all instruments* and money necessary for me to comply therewith, including a deed of the property described. * * *"

March 1 and 2, respectively, fell on a Saturday and Sunday. Prior to March 1 the seller deposited all instruments called for except the termite report. Buyers, having gone to Chicago to get the money, mailed the balance of the purchase price on February 29, but it was not received and deposited in the escrow account until March 3. Also the termite report, showing some infestation, and offering to perform the necessary work for $925, was deposited in escrow on the same day. On March 5 the seller wrote the escrow holder to cancel the escrow because buyers had not complied with their agreement to deposit the money prior to March 1.

In reversing the judgment of nonsuit this court held that "Nowhere in the escrow instructions is there any clear-cut language

manifesting an intent to make time of the essence." 120 Cal.App.2d at pages 543–544, 261 P.2d at page 558. But the decision proceeds to point out that even if it were to be considered that time was of the essence, the nonsuit was still erroneous. It was held that the deposit of the money by buyers and the deposit of the instruments by seller were concurrent conditions, mutually dependent, each promise given in consideration for the other, and each being due at the same time, citing Civil Code, section 1437. This court says, commencing at page 545 of 120 Cal.App.2d, at page 559 of 261 P.2d: "This principle is more elaborately set out in section 267 of The Restatement of Contracts as follows: 'Promises for an agreed exchange are concurrently conditional, unless a contrary intention is clearly manifested, if the promises be simultaneously performed * * * where by the terms of the promises (a) at the same time is fixed for the performance of each promise; or * * * (d) the same period of time is fixed within which each promise shall be performed.' * * * Applying these rules to the case at bar, it is clear that in a contract for the sale of real estate calling for concurrent performance, neither party can place the other in default unless he is fully able to perform or make a tender of the promised performance." It seems clear that the foregoing principles apply to the instant case and that deposit by the buyer of the full purchase price was not a condition precedent to the deposit of a satisfactory title policy and deed by the seller.

[2] Here the appellant buyer had the right to seek specific performance, to demand conveyance of such title as the seller possessed, and to seek damages for the defect in the title. It was held in Miller v. Dyer, 20 Cal.2d 526, syl. 2, 127 P.2d 901, 141 A.L.R. 1428, "While a vendor may not force a defective title on an unwilling purchaser or compel performance while conditions precedent to his recovery remain for him to perform (Civ.Code, §§ 3392, 3394), he cannot defend an action for specific performance on the ground that his title is not so complete as the one he agreed to convey. If the vendor has any interest in the property he has contracted to convey, the vendee, at his option, may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in performance."

The judgment is reversed.

FOX, P. J., and ASHBURN, J., concur.



159 Cal.App.2d 163

Marjorie L. COFFILL, Plaintiff,

v.

Lewis H. BACH, Mazie Woolstenhulme, Defendants.

Mazie WOOLSTENHULME, Cross-Complainant,

v.

Marjorie L. COFFILL, Lewis H. Bach, Cross-Defendants.

Mazie WOOLSTENHULME, Appellant and Cross-Respondent,

v.

Marjorie L. COFFILL, Respondent and Cross-Appellant.

Civ. 9301.

District Court of Appeal, Third District, California.

April 3, 1958.

Action by successor in interest of grantee against successors in interest of grantor to quiet title to land and for declaration that she was entitled to money held in escrow resulting from sale of timber cut from land and was owner of timber on land. The Superior Court, Tuolumne County, J. T. B. Warne, J., held that plaintiff was entitled to sum held in escrow and that defendant was entitled to take timber for repair of buildings on land and that defendant was

owner of certain buildings erected on land, and both parties appealed. The District Court of Appeal, Schottky, J., held that where agreement between grantor and transferee of grantee stated that one of considerations for execution of deed by grantor to grantee was that until grantee constructed dam, grantor reserved ownership of surface of land for farming with right to use timber for fencing, domestic use and repair of buildings, and subsequently grantor, in another action, claimed only those rights, grantor and his successors were limited by terms of such reservation and grantor did not retain ownership of timber, and that buildings constructed for use in exercising grantor's right to farm were not intended to become part of real estate but remained personal property.

Affirmed.

1. Deeds ⇐144(1)

The law is favorable to vesting of estates and consequently a stipulation in a conveyance will be construed, if possible, not to create a condition.

2. Logs and Logging ⇐2

Where agreement between grantor and transferee of grantee stated that one of considerations for execution of deed by grantor to grantee was that until grantee constructed dam, grantor reserved ownership of surface of lands for farming with right to use timber for fencing and domestic use and repair of buildings, and subsequently grantor, in another action, claimed only those rights, his rights and rights of his successors were limited by terms of reservation, and grantor did not retain ownership of timber. West's Ann.Civ.Code, § 1110.

3. Logs and Logging ⇐2

Where grantor conveyed fee and reserved ownership of surface for farming with right to use any timber necessary for fencing lands, for domestic use and repair of buildings on the land until such time that dam was constructed, grantor was entitled to construct any buildings reasonably necessary to farming of land from timber on land and the word "repair" in reservation applied to any structures on land and was not limited to those in existence at time of agreement. West's Ann.Civ.Code, § 1110.

See publication Words and Phrases, for other judicial constructions and definitions of "Repair".

4. Fixtures ⇐21

Where grantor reserved right to farm land until dam was constructed and land was covered with water, buildings constructed for use in exercising right reserved by grantor for farming were not intended to become part of real estate, and remained personal property of grantor's successors in interest.

William C. Coffill, Sonora, for plaintiff-appellant Coffill.

C. Ray Robinson, Merced, by James A. Cobey and William J. Adams, Merced, for cross-complainant-appellant Woolstenhulme.

SCHOTTKY, Justice.

In the year 1907 one T. H. Carlon entered into a contract of sale with one E. A. Wiltsee whereby Carlon agreed to sell Wiltsee 320 acres of land known as Stone Meadows and 480 acres of land known as Ackerson Meadows. In 1908 Carlon conveyed the land to Wiltsee. The deed provided that it was made and executed subject to the terms and conditions of an agreement executed by T. H. Carlon, dated December 9, 1907. The agreement between Carlon and Wiltsee was never recorded and is now a lost instrument. In 1908 Wiltsee conveyed Stone Meadows and Ackerson Meadows to the Tuolumne Power and Light Company. This deed contained the following provision:

"* * * This deed is made and executed subject to the terms, conditions and covenants contained in a written agreement executed by Timothy H. Carlon * * * to E. A. Wiltsee for the sale of said land * * * dated the 9th day of December, 1907 and is the only agreement made in writing

between said Timothy H. Carlon and said E. A. Wiltsee in said matter and this deed is accepted by the party of the second part [Tuolumne Power and Light Company] hereto subject to the terms and conditions of said agreement."

In 1909 Carlon and Tuolumne Power and Light Company entered into an agreement which referred to the agreement of sale between Carlon and Wiltsee of December 9, 1907, and the deed of conveyance from Carlon to Wiltsee and the deed of conveyance from Wiltsee to Tuolumne Power and Light Company. The agreement then provided:

"* * * [A]nd whereas the said E. A. Wiltsee has executed a deed of the said property to the party of the second part [Tuolumne Power and Light Company] herein and whereas one of the considerations for the execution of said deed by the party of the first part [Carlon] to E. A. Wiltsee was that until the said E. A. Wiltsee should construct a dam upon said lands for storing waters, the party of the first part reserved the ownership of the surface of said lands for pasturage and farming with the right to any timber necessary for fencing said lands and for domestic use and for repair of buildings on said lands and when said dam shall have been completed the party of the first part will still have the right to pasture and farm any of said lands not covered with water and to the free use of any of the stored waters in said dam for use of his live stock and for domestic purposes. In the work of constructing said dam or dams the said E. A. Wiltsee should have the superior right to use said lands or any part thereof necessary to be used in the construction of said dams and to all timber on said lands, and the party of the first part to have the use of all buildings on said lands until said lands are covered with water from said dam.

"It is therefore, now hereby expressly agreed and stated that the party of the second part herein, to-wit:

"Tuolumne Power and Light Company has accepted said deed from E. A. Wiltsee with notice of the terms and conditions of said agreement as above stated, and hereby acknowledges and declares that all of said terms and conditions are binding upon it to the same force and extent as the same were binding upon E. A. Wiltsee."

This agreement was signed by Carlon.

By mesne conveyances Stone Meadows became the property of an Eric J. Segerstrom. Marjorie Coffill is the successor to Segerstrom. Mazie Woolstenhulme is now the owner of Ackerman Meadows and is the successor in interest of any rights of T. H. Carlon in Stone Meadows. In 1951, while the estate of Segerstrom was in probate, a lumber company was permitted to cut and remove timber from a certain proposed road on Stone Meadows and the proceeds of the sale of the timber were placed in escrow.

Marjorie L. Coffill commenced the instant action against Bach, the escrow holder, and Mazie Woolstenhulme, setting up three causes of action in her complaint. The first cause of action was to quiet title to 320 acres of land commonly known and hereinafter referred to as Stone Meadows; the second was to have it declared that she was entitled to the moneys held in escrow resulting from the aforementioned sale of timber; and the third was for a declaration that she was the owner of the timber on said land and entitled to remove it.

Mazie Woolstenhulme filed an answer denying the material allegations of the complaint and also filed a cross-complaint in which she alleged that plaintiff's claims in the property adverse to her were without right, and seeking a declaration of the rights of the parties in the property in controversy.

Following a trial the court found that plaintiff and cross-defendant is the owner

of Stone Meadows, together with all the timber now growing upon said lands or which may grow upon said lands in the future; that plaintiff and cross-defendant has the right to remove said timber subject to the laws, rules and regulations of the state of California governing the removal of timber from private lands; and also that plaintiff and cross-defendant has a right to construct a dam or dams upon said lands for the storing of water. The court found further that said lands are subject to, and the cross-complainant is the owner of, an easement to pasture and farm said lands and to take any timber necessary for fencing said lands, and for domestic use, and for the repair of buildings on said lands. The court found further that in the event that a dam is built upon said lands, the defendant and cross-complainant, Mazie Woolstenhulme, shall then have the free use of any of the stored water from said dam for watering of livestock and for domestic purposes, provided, however, that in the event that said dam is built upon said property, then the plaintiff and cross-defendant shall have a superior right to use any part or all of said lands necessary to be used in the construction of said dam, and to all timber on said lands. The court found further that plaintiff is entitled to the sum of $3,629.42 held in escrow, resulting from the sale of timber, less the commission and expenses of the escrow holder.

Defendant and cross-complainant, Mazie Woolstenhulme, has appealed from the judgment entered in accordance with the aforesaid findings, and plaintiff and cross-defendant, Marjorie L. Coffill, has appealed from that portion of the judgment permitting Mazie Woolstenhulme to take timber for repair of buildings on said land and for domestic use and that portion decreeing that Mazie Woolstenhulme is the owner of certain buildings erected on the land.

Appeal of Defendant and Cross-Complainant.

Appellant Woolstenhulme first contends that the original deed from Carlon to Wiltsee conveyed only a conditional fee on a condition precedent. She contends that Stone Meadows was conveyed by Carlon for the purpose of building a power plant dam upon the property, and inasmuch as the dam has not been built the fee to Stone Meadows was not transferred by Carlon and remains in her as his successor in interest. Appellant cites section 1110 of the Civil Code which reads: "An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition." Appellant's argument appears to be based on the fact that the agreement spells out the rights of Carlon until the dam was constructed and the rights of Wiltsee during construction. It is further argued that since Carlon reserved ownership of the surface of the land he retained the surface rights including the timber until the dam was constructed.

[1] The argument of appellant is ingenious but unconvincing. We agree with the interpretation of the trial judge that Carlon conveyed a fee to Wiltsee subject to the right of Carlon to use the property for certain purposes. The law is favorable to the vesting of estates and consequently a stipulation in a conveyance will be construed, if possible, not to create a condition. Buttram v. Finley, 37 Cal.App.2d 459, 99 P.2d 1093. There are no words of condition in the agreement. A reading of the agreement between Carlon and Tuolumne Power and Light Company which spells out the rights reserved to Carlon in the contract with Wiltsee indicates that Carlon was reserving the right to pasture cattle on the land until the dam should be constructed, and to pasture cattle on the land not flooded after the dam was constructed, and the right to use timber for the repair of buildings and for fences. This interpretation is fortified by a subsequent admission of Carlon. One of the later grantees of Stone Meadows filed an action against Carlon in which it was alleged that Carlon had entered into an agreement with the complainant whereby Carlon had granted and assigned all of his rights in certain land to the complainant. It was further alleged that through an error

the description of the land was omitted from the agreement and that the land intended to be described was Stone Meadows. The complainant asked that the instrument be reformed and that it be declared that Carlon had no interest in the property. In his verified answer to the complaint Carlon "admits that plaintiff is the owner of the property described in plaintiff's complaint subject to the right of this defendant to use, possess, occupy and enjoy the possession and use of said property until such time that said lands are actually flooded with water for reservoir purposes." Carlon further alleged he was the owner of the following rights: "The ownership of the surface for pasturage and farming with the right to any timber necessary for fencing the lands and for domestic use and for repair of buildings on the land until such time that a dam be constructed. * * *"

[2] We do not agree with appellant's contention that since Carlon reserved ownership of the surface of the land he retained the surface rights, including ownership of the timber, until the dam was constructed. We think it is clear from the documents in the record and from the other evidence that Carlon conveyed the fee to Stone Meadows with the specific reservation of the use of the surface for pasturage and farming, with the right to use the timber for fencing, domestic use and for repair of buildings on the land. His rights and the rights of his successors were limited by the terms of this reservation. It is to be noted that the reservations specifically include the right to use timber for fencing and repairs, and it is reasonable to conclude that if Carlon had intended to reserve ownership in the fee or in the timber he would not have taken pains to specify the rights reserved.

Cross-Appeal of Plaintiff and Cross-Defendant.

In her cross-appeal plaintiff appeals from the portion of the judgment permitting defendant Woolstenhulme to take timber for the repair of buildings which were constructed on said lands after December 9, 1907, said buildings having been constructed about the year 1942, and also from the portion of the judgment that the present buildings, consisting of a dwelling house, barn and corral, belong to defendant.

Plaintiff contends that by the terms of the reservation in the contract of 1907, the parties did not contemplate that new structures could be erected on the land, and that the right to repair was limited to structures in existence in 1907. Plaintiff argues that the general connotation of the word "repair" is to mend an old thing, not to make a new thing; to restore something; to restore to a sound state something which has become partially dilapidated, not to create something new. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 576, 194 P. 1024; Whalen v. Ruiz, 40 Cal.2d 294, 300, 253 P.2d 457.

[3] However, it must be borne in mind that Carlon reserved the right to farm the land until a dam was constructed and the land was covered with water, and we believe that the right to farm the land would entitle Carlon to construct any buildings reasonably necessary. We think that the trial court was correct in concluding that the word "repair" applied to any structures on the land and was not limited to those in existence at the time of the agreement.

[4] There is no merit in plaintiff's further contention that the court erred in determining that the present buildings on the land belong to defendant. As has been hereinbefore pointed out, these buildings were constructed for use in exercising the right reserved by Carlon for pasturage and farming. We agree with cross-respondent's contention that the house, barn and corral were not intended to become part of the real estate, but instead were intended to remain the personal property of cross-respondent.

> "Of the criteria which determine the classification of objects as fixtures the intention of the parties to the annexation is an important factor. In Gosliner v. Briones, 187 Cal. 557, 560, 204 P. 19, 20, this court said '* * * the

character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties.'" Rinaldi v. Goller, 48 Cal.2d 276, 280, 309 P.2d 451, 454.

Such intention (that the house, barn and corral should not become part of the real estate) could be inferred from the testimony of cross-respondent that when the tenant who built the house, barn and corral gave up possession of the land, he left the buildings on it and cross-respondent then got the buildings back. Such intention could further be inferred from the fact that when the buildings were built, the documents delineating the respective interests of the parties in this land indicated that cross-appellant's predecessor had a right to flood the land, thus it would reasonably be inferred that the party constructing the buildings should intend to have the right to move the buildings to another location on the land, or remove them from the land in the event of flooding.

The trial court's conclusion and judgment in this matter is that the present buildings, consisting of a dwelling house, barn and corral, located on Stone Meadows, belong to cross-respondent. Such conclusion and judgment are fully supported by the finding that said buildings are a reasonable and necessary incident to cross-respondent's rights in Stone Meadows. Implicit in such conclusion and judgment is a finding that the house, barn and corral were not intended to and did not become part of the real estate.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

A. J. FAIRRINGTON et al., Plaintiffs and Appellants,

v.

DYKE WATER COMPANY, a corporation, et al., Defendants and Respondents.

L. A. 24501.

Supreme Court of California, In Bank.

April 18, 1958.

Action to quiet title and for injunctive relief. The Superior Court, Orange County, Raymond Thompson, J., withheld relief, and plaintiffs appealed. The Supreme Court, Shenk, J., held that where license granted by plaintiffs' predecessors in interest for installation of sign on property adjoining that purchased by defendants had terminated (by death of such predecessors) prior to defendants' erection of sign, sign constituted continuing trespass which might, in time, ripen into easement, and plaintiffs would be entitled to mandatory injunction requiring removal of such sign; and held that mere fact that sign was a "substantial benefit" to defendants and that its existence did not interfere with plaintiffs' use of their property would not justify denial of relief, since deprivation of substantial benefit is not equivalent to imposition of substantial hardship, for purposes of doctrine of balancing of conveniences, under which injunctive relief may be denied where plaintiff, seeking to vindicate a technical and unsubstantial right, would impose an unusual hardship upon public or defendant.

Reversed.

Opinion, 318 P.2d 710, vacated.

1. Injunction ⇐23, 24

When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of right of eminent domain in favor of private person and, thus, proof of irreparable injury is a necessary element of defense based upon a balancing of conveniences upon public or defendant.

2. Injunction ⇐23, 24

Deprivation of substantial benefit is not equivalent to imposition of substantial hardship, for purposes of doctrine of balancing of conveniences, under which injunctive relief may be denied where plaintiff, seeking to vindicate a technical and unsubstantial right, would impose an unusual hardship upon public or defendant.

3. Injunction ⇐48

Equity will enjoin a wrongful act which, if continuous, would give rise to easement or servitude.

4. Injunction ⇐51

Where license granted by plaintiffs' predecessors in interest for installation of sign on property adjoining that purchased by defendants had terminated (by death of such predecessors) prior to defendants' erection of sign, sign constituted continuing trespass which might, in time, ripen into easement, and plaintiffs would be entitled to mandatory injunction requiring removal of such sign.

Mize, Larsh, Mize & Hubbard and Royal E. Hubbard, Santa Ana, for appellants.

James E. Walker, Santa Ana, for respondents.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment for the defendant in a suit for a mandatory injunction and to quiet title to real property. The appeal is on the judgment roll.

In December 1952 the defendant purchased a parcel of real property from Henry and Irma Fairrington. The escrow agreement provided in part: "The Sellers also give to the Buyers permission to erect a sign on Garden Grove Boulevard between the driveway and the sidewalk next to the Post Office Building." The property described in the escrow agreement was owned and retained by the grantors until their deaths in September 1953. Thereafter, the defendant posted a sign on the

property above described bearing the words "Dyke Water Company." The sign was mounted on a 6½ inch pipe embedded in a concrete foundation. The plaintiffs, heirs of Henry and Irma Fairrington, succeeded to the property upon which the sign was posted. Upon defendant's refusal to remove the sign, the plaintiffs brought this suit for a mandatory injunction to require the defendant to remove it and to quiet title to the property.

The trial court found and concluded that the defendant purchased the property from the plaintiffs' predecessors in interest in reliance upon the permission to erect a sign on the adjoining property; that the defendant expended money in its installation also in reliance upon the permission contained in the escrow agreement, but with full knowledge that the permission was a revocable license; that the sign "is a substantial benefit to the defendant in the carrying on of its business"; that the sign "constitutes no substantial detriment to Plaintiffs at the present time and does not interfere with any present or contemplated use of their property by them"; that the so called license contained in the escrow agreement was revoked by the deaths of the grantors, and that "relief to plaintiffs should be withheld at this time by the Court sitting in equity." The court retained jurisdiction to entertain future application by plaintiffs for injunctive relief. Judgment was entered accordingly.

The findings of fact upon which the conclusions of law and the judgment withholding relief apparently rest are those stating that the maintenance of the sign is a substantial benefit to the defendant's business and that its continued presence neither constitutes a substantial detriment to the plaintiffs at present nor interferes with any present or contemplated use of the property by them.

[1, 2] It will be noted that the court did not conclude that the removal of the sign would result in hardship to the defendant. It concluded only that the sign is a "substantial benefit to the defendant in the carrying on of its business." The doctrine of balancing of conveniences is often invoked as a defense in a suit for an injunction where the plaintiff, seeking to vindicate a technical and unsubstantial right would impose an unusual hardship upon the public or the defendant. Deprivation of a substantial benefit, however, falls short of the imposition of substantial hardship. This is more than a verbal distinction. When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. Christensen v. Tucker, 114 Cal.App.2d 554, 560, 250 P.2d 660; McClintock, Discretion to Deny Injunction Against Trespass and Nuisance, 12 Minn. L.Rev. 565, 572. Thus, proof of irreparable injury is a necessary element of a defense based upon a balancing of conveniences. Wright v. Best, 19 Cal.2d 368, 386–387, 121 P.2d 702. The findings are, therefore, insufficient to support a balancing of the conveniences as a ground for the withholding of injunctive relief.

The determination that the court should not have endeavored to balance the conveniences, however, is ancillary to the issue whether an injunction should be granted at all. The conclusion that the conveniences cannot be balanced in favor of the defendant does not determine the plaintiffs' right to a mandatory injunction.

[3, 4] It is the plaintiffs' contention that because the license was revoked prior to the erection of the sign, the presence of the sign on plaintiffs' land constitutes a continuing trespass which might ripen into an easement to maintain the sign in perpetuity. It is settled that equity will enjoin a wrongful act which, if continuous, will give rise to an easement or servitude. Vestal v. Young, 147 Cal. 715, 721, 82 P. 381; Walker v. Emerson, 89 Cal. 456, 26 P. 968; Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; City of Dunsmuir v. Silva, 154 Cal.App.2d 825, 317 P.2d 653; Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal.App.2d 478, 141 P.2d 46; Felsenthal v. Warring, 40

Cal.App. 119, 180 P. 67; 24 Cal.Jur. 700; 27 Cal.Jur.2d 157. If the deaths of the grantors terminated the license, as found by the trial court, then plaintiffs' assertion that the presence of defendant's sign is a continuing trespass is unassailable. That it was so terminated is conclusively established by the record.

The defendant has shown no equitable or other defense to the suit for a mandatory injunction, nor has it advanced any reason why plaintiffs' title should not be quieted.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



50 Cal.2d 202

Alvin E. HONOROFF, Petitioner,

v.

STATE BAR OF CALIFORNIA, Respondent.

L. A. 24883.

Supreme Court of California, In Bank.

April 18, 1958.

Rehearing Denied May 14, 1958.

Proceeding to review a recommendation of the board of governors of the state bar that an attorney be suspended from the practice of law for nine months. The Supreme Court held that the evidence sustained finding that attorney had been guilty of engaging another to solicit professional employment for him and that penalty of nine months' suspension from practice was not excessive.

Judgment of suspension from practice for nine months.

1. Attorney and Client ⇐57

Findings of Board of Governors in disciplinary proceedings are not binding on reviewing court, which will pass upon sufficiency and weight of evidence.

2. Attorney and Client ⇐57

Attorney seeking review of decision of Board of Governors in disciplinary proceeding has burden of showing wherein board's decision was erroneous or unlawful.

3. Attorney and Client ⇐53(2)

Evidence sustained finding that attorney had been guilty of engaging another to solicit professional employment for him. Rules of Professional Conduct, rules 2, 3, West's Ann.Bus. & Prof.Code following section 6076.

4. Attorney and Client ⇐53(2)

The keeping of proper books of account, vouchers, receipts and checks has significant bearing on issue of an attorney's honesty and professional conduct when his actions are called into question.

5. Attorney and Client ⇐58

Nine months' suspension from practice was proper penalty for misconduct of attorney in solicitation of professional employment.

Morris E. Cohn, Beverly Hills, for petitioner.

Garrett H. Elmore, San Francisco, and David K. Robinson, Pasadena, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioner Alvin E. Honoroff be suspended from the practice of law for a period of nine months.

Petitioner was charged with the violation of his oath and duties as an attorney at law in that he engaged one Zachary Goodman to solicit professional employment for him, contrary to rules 2 and 3 of the Rules of Professional Conduct, 33 Cal.2d 27. The local administrative committee found petitioner guilty on this charge and recommended his suspension from practice

for nine months. The board, upon further hearing and review, approved and adopted, with slight modification, the findings of the local committee. It further added that petitioner knew that the legal representation in question, "if obtained, would be the result of, and caused by unauthorized and improper solicitation of professional legal employment * * * by Goodman," and that he "agreed to and * * * did compensate Goodman * * * for steering said professional employment" to him. The board recommended the same suspension period of nine months, with two members dissenting on the ground that the degree of discipline recommended was "too severe."

[1, 2] Petitioner, who is 38 years of age, was admitted to practice in this state in 1950. He has not been the subject of any previous disciplinary proceeding. He contends (1) that the evidence was insufficient to sustain the board's findings and (2) that in any event, its disciplinary recommendation is too severe. While such findings are not binding on this court, which will itself pass upon the sufficiency and weight of the evidence (Higgins v. State Bar, 46 Cal.2d 241, 242, 293 P.2d 455; Clark v. State Bar, 39 Cal.2d 161, 165, 246 P.2d 1), petitioner has the burden of showing wherein the decision of the board is erroneous or unlawful. Tonini v. State Bar, 46 Cal.2d 491, 492–493, 297 P.2d 1; Alkow v. State Bar, 38 Cal.2d 257, 258, 239 P.2d 871. He has not met that burden.

[3] Mrs. Lola Meredith, the wife of Mills Meredith, and their two children were injured in the wreck of a Santa Fe train near Lomax, Illinois, on August 22, 1954. Petitioner, who was practicing in Los Angeles, read a newspaper account of the accident, including the names of persons injured. Among those listed were the names Meredith, Shugan, and D'Agostino. Shugan was an attorney in Los Angeles and a friend of petitioner. He and his wife were both injured in the wreck. D'Agostino's wife and children were also injured, but he was not in the accident. D'Agostino lived in Los Angeles. He had never known petitioner, professionally or otherwise. Petitioner made a note of these names, and he contacted D'Agostino relative to the injuries to his family.

About August 26, 1954, petitioner left by plane for Chicago. Petitioner testified that he had been contemplating a trip east for some time, to take a deposition and to attend a convention in Massachusetts, and was planning to stop in Chicago where he formerly practiced law. He further stated that when he read of the Santa Fe wreck and the injury to the Shugans, who were reported as hospitalized near the scene of the accident, he decided to make the trip at once as far as Chicago to see if he could be of any help. The deposition was never taken and petitioner never did attend the convention.

Petitioner spent a couple of days in Chicago with his former law associate, and then the two drove to the scene of the accident. Upon inquiry at the hospital where the Shugans had been patients, petitioner learned that they had already left. Then petitioner and his former Chicago law associate proceeded to investigate the accident, interviewed people who had been injured and others, and made notes. Petitioner stated that he might have ordered photographs and a copy of the coroner's transcript. He also made an attempt to see D'Agostino's family in the hospital. Up to this time petitioner had not been retained by anyone in connection with the accident, and his fromer law associate was never so employed. Petitioner returned to Chicago for a few more days and then flew back to Los Angeles shortly after the first of September. About a week later, petitioner talked to Shugan and gave him his "evaluation of the case" but Shugan settled his own claim directly with the railroad, and petitioner had no connection with it.

On September 15, 1954, petitioner received a phone call from Zachary Goodman, whom petitioner had not previously met but who introduced himself as the husband of a distant cousin of petitioner. Goodman had worked for some twenty years as

a "capper," primarily in the Chicago area, contacting persons who were involved in personal injury cases and signing them on contracts with attorneys, for which he received a percentage of the attorney fees. He had heard that petitioner had been in Illinois investigating the Santa Fe wreck, and he told petitioner that he had "a substantial matter" to discuss with him. Following the phone call, Goodman immediately went to petitioner's office.

The major conflict in the evidence concerns the exact nature of the conversation between petitioner and Goodman at this first meeting. According to Goodman, he told petitioner that he could bring in some cases whereby petitioner could make a lot of money; that he had had considerable experience in handling railroad cases, working on a percentage basis of the fee; and that he asked petitioner if he was financially in a position to handle such cases, which would mean the advance of living expenses to the litigants until the conclusion of their cases. Goodman stated that petitioner had on his desk a piece of paper on which he had listed the names of several persons who had been injured in the Santa Fe wreck. The words "Lola Meredith" with hospital notation "same place as Mrs. Shugan" were on this paper. Goodman further testified that he had not known of the Merediths before this time; that petitioner agreed to handle such cases from the Santa Fe accident as Goodman might get; that petitioner then gave him the above-mentioned list of names, whereupon Goodman said that he would try to contact the Merediths; petitioner said that was "all right with him," and Goodman, with petitioner's permission, telephoned from petitioner's office to Mr. Meredith in Iowa City, where Mrs. Meredith was then hospitalized.

According to petitioner, Goodman came to him seeking employment as an investigator, and he agreed to give Goodman some work. Goodman then stated that he had friends who had been injured in the Santa Fe wreck, asked petitioner if he would be interested in representing them, and petitioner replied that he would. Petitioner admits that in the course of their discussion, he gave Goodman the mentioned list of injured persons as he had noted them, that Goodman telephoned Meredith from his office, in an adjoining room, and then told petitioner of his arrangement to meet Meredith in Iowa City the next day. Apparently, neither Goodman nor petitioner knew the Merediths, and this telephone call from Goodman was their first contact with the Merediths. Testimony of Meredith concerning this conversation is by way of stipulation. In this, Meredith stated that several weeks after the accident when he was in Iowa City, Iowa, where his wife was hospitalized, he received a telephone call from Los Angeles from a man who said that he was an attorney, giving petitioner's name, that he had an aunt who was injured in the same wreck as Mrs. Meredith, that he would be glad to represent him and would send some one to see him; that Goodman arrived the next morning, said that he had been sent by the attorney and gave him an advance on living expenses, which he said the attorney had told him to do; that prior to that time he had never known or heard of petitioner or Goodman.

Goodman, with petitioner's authorization, flew to Iowa City the evening of September 15, 1954. He met Meredith there the next morning. They discussed the accident and petitioner's ability to handle such cases. Meredith and Goodman flew back to Los Angeles that day, September 16. During the plane trip Goodman had Meredith sign a general one-third contingency fee contract for petitioner's employment in his case against the Santa Fe. Petitioner met Goodman and Meredith at the airport, and they arranged for a conference the next morning at petitioner's office.

At the scheduled meeting on September 17, petitioner discussed with Meredith the terms of employment and Meredith signed two more contingent fee contracts retaining petitioner, one covering the damage claim of the Meredith children and the oth-

er covering the claims of Mr. and Mrs. Meredith. Petitioner then arranged to advance weekly living expenses to Meredith until the conclusion of the case. Petitioner also gave Goodman a check for $854.62, partially itemized as reimbursement to Goodman for expenses on the Iowa City trip—which included Goodman's own round trip ticket, Meredith's single plane fare, money advanced to Meredith, and certain miscellaneous items—and with the sum of $350 left under the general note of "photography and investigation." Petitioner maintains that was the full amount he paid Goodman on that day, but Goodman claims that he received approximately $2,500. Goodman's bank records and cash receipts for expenditures that day support his claim. The evidence indicates that immediately prior to this date Goodman was "broke."

About a week later petitioner gave Goodman a piece of paper listing a number of persons who were involved in the Santa Fe wreck and who had been noted in the newspaper article as in "serious condition." After the names there were various identifying notations, all in petitioner's handwriting, such as "released home"; "brother's case out"; "talked to sister-in-law, 'she' is out, see *brother personally.*" Petitioner stated that he had made these notes in connection with his investigation of the accident during his trip to Chicago in the latter part of August. He told Goodman to contact these people when he next went east.

It is not disputed that Goodman performed services in the Meredith case from its initial stages, September 15, 1954, until January 24, 1955, when petitioner, after having filed an action for the Merediths, was substituted out of the case. During this period Goodman devoted his entire time to the Meredith case, making some five or six trips to Iowa City with Meredith and keeping Meredith "happy" with his employment of petitioner. Petitioner admitted that he at no time checked Goodman's qualifications as an investigator or whether he was licensed to act as such, and Goodman never furnished any investigative reports, such as witness statements, photographs, or information concerning the happening of the accident. Petitioner continued to pay Goodman substantial sums but he was not sure of the exact amounts, the dates of payment, or whether or not he received vouchers, time records or expense statements from Goodman. He thought that he had received some accounting from Goodman after one or two of the trips to Iowa City but he was not able to produce any expense sheets from Goodman. The record indicates Goodman was paid over $6,300 for his work, of which some $1,250 appears to have been reimbursement for expenses. Receipts in various amounts were signed by Goodman without particular itemization or with the general note of "investigation." On December 2, 1954, petitioner had Goodman sign a note for $5,000, which petitioner claims was the approximate amount of moneys he had paid Goodman for expenses and services rendered to date. The note contains no mention of the Meredith case. It appears simply as a straight loan transaction, yet petitioner stated that Goodman did not owe him this money and there was no intention that Goodman would pay it to petitioner. The Meredith case was ultimately settled, and the attorney who took over the case paid petitioner a percentage of the fee and petitioner's expenses listed as some $13,000.

The main question to be determined is whether petitioner employed Goodman to solicit the Meredith case. Petitioner maintains that he only employed Goodman to act as an investigator and that Goodman offered to refer the Meredith case to him, which offer petitioner accepted. He attacks the credibility and character of the admitted "runner" or "capper," Goodman, points to various contradictions and discrepancies in Goodman's testimony, and submits that without total reliance on Goodman's version of his employment, petitioner cannot be found guilty on the solicitation charge. While it might be said that Goodman's testimony was "less than

satisfactory," that in certain details he may have been "not only careless with the truth" but may have also had "a tendency to embellish it," and that he apparently was "hostile and adverse" to petitioner, yet consideration of the record as a whole sustains the essential core of Goodman's story that petitioner knowingly embarked on the illicit venture of solicitation of the Meredith case through employment of Goodman for that purpose on their first meeting, September 15, 1954. Accordingly, reference will be made to certain passages of petitioner's own testimony and to various circumstantial factors showing petitioner's culpability.

First, there was petitioner's trip to Chicago and the scene of the accident about August 26, a few days after the Santa Fe wreck, where he entered upon extensive investigating and interviewing activities, incurred expenses in getting photographic and transcript reports, and made notes of contacts with several persons on the "serious condition" list, all at a time when he had not been retained to represent any one in connection with the accident. When asked to explain various notations on his own handwritten lists of certain of the injured persons, petitioner was unable to "recollect" their meaning, and his testimony was clearly evasive. Petitioner claims that he made the trip to the scene of the accident as an act of service and from a desire to help his friend Shugan. However, petitioner did all his investigative work after he found that the Shugans had left the hospital where they had been patients, petitioner was never retained by Shugan to do any work on the case for him, and petitioner never submitted any investigative reports to the Shugans.

Petitioner admits that at their first meeting, September 15, 1954, he gave to Goodman his list of injured persons as he had selected them from the newspaper article he had read. On that list appeared the name "Lola Meredith." Goodman maintained that he never suggested the name "Meredith" as a possible referral to petitioner, and that he never knew the name until petitioner mentioned it, and then Goodman, with petitioner's authorization, telephoned Meredith at Iowa City and arranged his trip there. Goodman's account is supported by Meredith's stipulated testimony that he had never known either petitioner or Goodman until he received the telephone call at Iowa City, and then the next morning in Iowa City, he met Goodman when Goodman identified himself as the man sent by petitioner.

[4] Furthermore, petitioner's records of Goodman's services and expenses are confusing and ambiguous. According to petitioner, only one or two of Goodman's several trips to Iowa City were covered by an accounting. While petitioner claimed that any advances he made to Goodman were "Oked" by Meredith on yellow sheets, these are "missing." Most of the payments to Goodman were in "round figures," bearing notations simply as "loan" or "investigation." There is no evidence that Goodman did any investigative work for petitioner, in the sense of furnishing reports, signed statements from witnesses, photographs, or other information bearing on the happening of the accident. According to the record, petitioner apparently paid Goodman about $6,300 for his services, including the substantial sum of $2-500 on September 17, 1954, the day the contracts were signed with Meredith in petitioner's office. In the course of his dealings with Goodman, petitioner had Goodman sign the fictitious note of $5,-000 on December 2, 1954, as a straight loan transaction and without reference to the Meredith case. While petitioner claimed once that such sum approximated advances to Goodman as of that date, later petitioner stated that there was no intention that Goodman should repay such amount, that he did not owe it. The keeping of proper books of account, vouchers, receipts, and checks has significant bearing on the issue of an attorney's honesty and professional conduct when his actions

are called into question. Cf. Clark v. State Bar, supra, 39 Cal.2d 161, 174, 246 P.2d 1.

In short, it appears that on September 15, 1954, when petitioner and Goodman first met in petitioner's office, petitioner was well acquainted with the facts of the Santa Fe wreck by virtue of his own trip to the scene of the accident in Illinois, his contacts with some of the injured persons, and other investigative work, all undertaken at his own expense but still without a client to represent. Consistent with this outlay of time and money, petitioner apparently was anxious to obtain employment in connection with this accident and engaged Goodman, an admitted "capper" or "runner" in railroad cases for some twenty years, to solicit the Meredith case. It further appears that petitioner reimbursed Goodman for all his expenses on his trip to bring Meredith, a stranger to both petitioner and Goodman, from Iowa City to Los Angeles. Thereafter, during the four months petitioner was handling the case, Goodman's entire time was devoted to "shepherding" Meredith and keeping him "happy." Petitioner paid Goodman $6,300 to cover such services and expenses of some $1,250. Such record clearly and convincingly indicates that petitioner knowingly accepted the Meredith case as solicited professional employment and compensated Goodman, pursuant to prior agreement, for his activities in steering such professional employment to him.

[5] While the record thus shows petitioner's misconduct through the solicitation of professional employment, there remains the question of the extent to which petitioner should be disciplined. Petitioner makes no showing of mitigatng circumstances but simply argues that a nine months' suspension from practice is too severe in view of other cases where a milder discipline was imposed: Mitton v. State Bar, 49 Cal.2d 686, 321 P.2d 13; Higgins v. State Bar, supra, 46 Cal.2d 241, 293 P.2d 455. However, the aggravated circumstances of petitioner's misconduct indicate that the recommended discipline is appropriate. Petitioner appears to have been guilty of a callous and brazen indifference to his obligations as an attorney, with "the object of personal gain." Tonini v. State Bar, supra, 46 Cal.2d 491, 497, 297 P.2d 1, 5. His vacillating conduct, his evasive testimony, and his lack of candor before the local committee were not compatible with the high degree of fidelity to his professional duties owed by an attorney at law. Burns v. State Bar, 45 Cal.2d 296, 303, 288 P.2d 514. His actions, in short, exhibit an intentional, flagrant violation of the rules designed to prohibit unprofessional conduct in obtaining contracts of employment. In these circumstances, it is proper that he should be suspended from the practice of law for a substantial period of time.

It is ordered that Alvin E. Honoroff be suspended from the practice of law for a period of nine months, commencing 30 days after the filing of this opinion.



159 Cal.App.2d 301

Edith GRAHAM and Kenneth L. Graham, Plaintiffs and Appellants,

v.

Marjorie MEAD and Dapite, Inc., Defendants and Respondents.

Civ. 17601.

District Court of Appeal, First District, Division 2, California.

April 10, 1958.

Driver and occupant of first automobile brought action against driver of second automobile, which was on the right of first automobile as they approached intersection, and another for personal injuries and property damage sustained in collision in intersection when second automobile struck first automobile broadside. The Superior Court, County of Contra Costa, Homer W.

Patterson, J., entered judgment adverse to the driver and occupant of the first automobile, and they appealed. The District Court of Appeal, Dooling, J., held that where there was no testimony in record from which jury could reasonably find that second automobile entered intersection at same time as first automobile, giving of instruction containing provision of Vehicle Code that when two vehicles enter an intersection from different highways at the same time, the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right, and that error in giving such instruction was prejudicial error, where jury requested that instructions regarding right of way, particularly instruction regarding situation where vehicle on the right has the right of way, be sent to the jury room, and jury's verdict was reached by a nine to three vote.

Judgment reversed.

1. Automobiles ⇐244(43), 246(58)

In action by driver and occupant of first automobile against driver of second automobile, which was to right of first automobile as they approached intersection, and another for personal injuries and property damage sustained in collision at intersection when first automobile was struck broadside by second automobile, evidence was insufficient to justify a finding by jury that automobiles entered intersection at "same time" within meaning of provision of Vehicle Code that when two vehicles enter intersection from different highways at "same time" driver of vehicle on left shall yield right of way to driver on right, and therefore giving of instruction, which included such provision of the Vehicle Code, was error. West's Ann.Vehicle Code, § 550.

2. Trial ⇐252(1)

If instruction, which is couched in proper language, finds no support in the evidence, it is improper.

3. Appeal and Error ⇐1066

Giving of instruction which finds no support in the evidence is prejudicial error, if instruction is calculated to mislead jury.

4. Appeal and Error ⇐1066

In action for personal injuries and property damage sustained in collision at intersection, error in giving instruction with reference to provision of Vehicle Code that, when two vehicles enter intersection from different highways at same time, driver of vehicle on left shall yield right of way to driver of vehicle on right, when there was no testimony in record from which jury could reasonably find that automobiles entered intersection at same time, was prejudicial error, where jury requested that instructions regarding right of way, and particularly instruction regarding situation where vehicle on right has right of way, be sent to jury room, and jury's verdict in favor of driver of automobile on right was reached by a nine to three vote. West's Ann.Vehicle Code, § 550.

Hart & Bortin, Joseph L. Bortin, San Francisco, for appellants.

James C. Calkins, Alameda, for respondents.

DOOLING, Justice.

Plaintiffs, husband and wife, appeal from a judgment for defendants entered upon a jury's verdict.

The action was for personal injuries and property damage to plaintiffs' automobile. The automobile driven by plaintiff husband was struck broadside by an automobile driven by defendant in the intersection of Jefferson Avenue and Alston Way in Berkeley.

The court instructed the jury at defendant's request:

"Vehicle Code section 550 reads as follows:

" 'Vehicle Approaching or Entering Intersection.

" '(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

" '(b) When two vehicles enter an intersection from different highways at the

same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.' "

Appellants argue prejudicial error in the inclusion of subdivision (b) of this section in the instruction on the ground that the evidence shows without contradiction that their automobile entered the intersection first.

The only evidence pertinent to this question was given by the two plaintiffs, the defendant under cross-examination (Code Civ.Proc. § 2055) and a police officer who examined the scene of the collision after it had occurred.

Appellants were driving easterly on Alston Way and respondent was driving northerly on Jefferson Avenue. Appellant husband testified that he was driving at a speed of 15 to 20 miles per hour and as he approached the intersection he saw respondent's car 6 or 7 car lengths from the intersection. "I saw that the car was a safe distance back so I continued on across the intersection." The next he knew his wife said: "Look out. She is going to hit us" and the collision occurred.

Appellant wife testified that as they reached the intersection she saw a car to the right "so far back my husband and I both didn't say anything about it." The officer testified that the point of collision showed that appellants' car was 28 feet into the intersection and respondent's car 15 feet into the intersection. The officer measured 26 feet of skid marks made by respondent's tires.

Respondent testified: "As I approached the intersection I looked to my left. I did not see any car and I looked at my left and I didn't see a car, and as I turned my head back the car was directly in front of me."

[1] It is clear that there is no testimony in the record from which the jury could reasonably find that respondent's automobile entered the intersection at the same time as appellants'. Giving respondent's testimony its full weight "as [she] *approached* the intersection" there was no car to her left and when she looked ahead it was already in front of her. She had not entered the intersection when she looked to her left. Counsel for respondent argues that the determination of the facts is for the jury, but he does not suggest any rational theory on which they could find from any evidence of any witness that respondent's automobile entered the intersection at the same time as appellants'.

[2, 3] "Even though an instruction is couched in proper language it is improper, if it finds no support in the evidence, and the giving of it constitutes prejudicial error if it is calculated to mislead the jury." Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4, 15; Elm v. McKee, 139 Cal. App.2d 353, 359, 293 P.2d 827; Staggs v. Atchison, Topeka & S. F. Ry. Co., 135 Cal. App.2d 492, 503, 287 P.2d 817.

[4] The prejudice in this case is demonstrated by the proceedings on motion for new trial. It developed, as shown by an affidavit of appellants' counsel, that while the jury was deliberating the jury requested the bailiff that the instructions regarding the right of way, "particularly the instruction regarding the situation where the vehicle on the right has the right of way," be sent to the jury room; and the bailiff told the jury that the only way to get the instructions was to go back into the courtroom and have the instructions reread, that they could not be sent into the jury room. While this was hearsay as to the counsel making the affidavit the record shows that "in open Court counsel stipulate that the facts stated in the affidavit of Joseph Bortin [appellants' counsel] on file herein are true stated facts." The jury's verdict was reached by a 9 to 3 vote.

The record makes it clear that the jury was confused into believing that the right of way of the one entering the intersection from the right was in issue under the evidence, and, particularly in view of the divided vote of the jury, we are satisfied that the record shows prejudice from the giving of the instruction on that subject.

This conclusion makes it unnecessary to consider the further argument that the

bailiff was guilty of misconduct in communicating his understanding of the law to the jury instead of conveying their request to the court. Nelson v. Southern Pacific Co., 8 Cal.2d 648, 649, 655, 67 P.2d 682.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.



159 Cal.App.2d 600

In the Matter of the ESTATE of Gregorio DEL VAL, etc., Deceased.

Juana Del Val Vda de DAYRIT, Sixto Tanjuanguio, Honorio Del Val, Isabel Val Zapanta, Petitioners, Contestants and Appellants,

v.

R. V. DISON and Victoria Dison, Legatees and Respondents,

W. A. Winstanley, Respondent.

Civ. 22695.

District Court of Appeal, Second District, Division 1, California.

April 22, 1958.

Will contest. From a judgment of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., declining to revoke probate of will, the contestants appealed. The District Court of Appeal, Lillie, J., held that construed in light of circumstances surrounding execution and delivery of document and decedent's subsequent conduct, will evinced no intent on part of testator to make it conditional, notwithstanding use therein of language "if there is anything happen to me tonight."

Affirmed.

1. Wills ⇐439

In interpretation of will, ascertainment of intention of testator is cardinal rule of construction, to which all other rules must yield. West's Ann.Prob.Code, §§ 24, 101, 102, 142.

2. Wills ⇐80

Will is not to be regarded as conditional when it reasonably can be held that testator, in using language in question, was merely expressing his motive or inducement to make will. West's Ann.Prob.Code, §§ 24, 101, 102, 142.

3. Wills ⇐440

In determining testator's intent, court must look first to language itself and how it is used in conjunction with rest of document.

4. Wills ⇐80

Circumstances which court may take into consideration, in determining whether deceased regarded contingency as relating to motive inducing making of will rather than as condition to its becoming operative, differ in each case, but generally include those surrounding execution of document and its delivery, testator's state of health, his plans for the future, preservation of document, particularly after contingency has failed, instructions upon delivery, subsequent declarations of testator, lack of another subsequent will, lack of alternative disposition of property and amount of estate disposed of by instrument.

5. Wills ⇐80

Construed in light of circumstances surrounding execution and delivery of document and decedent's subsequent conduct, will evinced no intent on part of testator to make it conditional, notwithstanding use therein of language "if there is anything happen to me tonight". West's Ann. Prob.Code, §§ 24, 101, 102, 142.

Mitchel & Strange, James R. Biram, Los Angeles, for appellants.

C. M. Castruccio, San Marino, for respondents.

Harold W. Kennedy, County Counsel, James W. Goodman, Deputy County Coun-

sel, Los Angeles, for respondent W. A. Winstanley.

LILLIE, Justice.

On February 28, 1956 Gregorio Del Val died leaving a holographic will dated April 14, 1955, which was admitted to probate on April 11, 1956. E. A. Winstanley, public administrator, was appointed administrator with will annexed of the estate. Besilio and Victoria Dison, husband and wife, respondents herein, are the sole legatees under the instrument.

Juana Del Val Vda de Dayrit, sister, Sixto Tanjuanguio and Honorio Del Val, nephews, and Isabel Val Zapanta, niece of deceased, all residents and citizens of the Republic of the Philippines, filed a petition for revocation of probate of will. The contestants alleged therein that the document admitted to probate on April 11, 1956, is not a valid testamentary instrument in that it was a conditional will, the condition of which was never fulfilled, making the instrument inoperative and invalid as a will.

The matter was heard by the court sitting without a jury and after hearing all of the evidence the trial judge made, among others, the following finding of fact: "It was not the intention of said deceased that the language in his said will 'if there is anything happen to me tonight * * *' be a condition in his will."

On March 28, 1957 the court entered its judgment denying contestants' petition to revoke probate of will. It is from this judgment contestants appeal.

The following facts were submitted to the trial court by way of stipulation. The sole legatees and the respondents herein, Victoria and Basilio V. Dison, had known the deceased for a period of 41 years. They had many friends in common and he made frequent social visits to their home. For ten years prior to his death decedent had had a heart condition. On April 14, 1955, the day before he went to the hospital, the deceased wrote in his own hand the following document:

"Thursday April 14, 55
"1666 W. 28th St.,
"Los Angeles, Cal

"That I Gregorio Del Val of a sound mind, if there is anything happen to me to night I leave all my belongings to Mr. B. V. Dison and to his wife Mrs. Victoria Dison including my money in The Banks of America #21

"Gregorio Del Val"

and delivered it to Victoria, saying: "This is my will. Take care of it." Around noon the following day he went to the White Memorial Hospital where he stayed four weeks. Upon his release he went to the home of the Disons and remained there approximately 3½ months. During this period and at no time after April 14, 1955 was there any conversation among them about the will. He died of a heart condition on February 28, 1956.

Appellants contend that the instrument admitted to probate is expressly conditional on its face and that the evidence was insufficient to support the finding that it was not the intention of the decedent that the language "If there is anything happen to me tonight * * *" be a condition in the will. In brief, they claim that the effectiveness of the instrument was conditioned on his dying "tonight" and he, not having died at that time, the condition was not fulfilled and the disposition did not take effect.

Section 24 of the Probate Code accords conditional wills statutory recognition in this state. Whether an instrument constitutes a conditional will is of course a matter of construction. To aid a proper construction of a will as conditional, section 142 of the Probate Code expressly defines a condition precedent. Whether such a condition has been created depends not only on the language employed by the decedent but on his intention in using it.

[1, 2] In the interpretation of a will, ascertainment of the intention of the testator is the cardinal rule of construction

to which all other rules must yield (Probate Code, section 101; In re Estate of Salmonski, 38 Cal.2d 199, 238 P.2d 966; In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; In re Estate of Foley, 126 Cal. App.2d 810, 273 P.2d 26). In line with the well-established rule set out in Re Estate of Sewall, 14 Cal.App.2d 554, 58 P.2d 744, and Probate Code, section 102, that the construction of an instrument preventing intestacy is to be favored over one which results in intestacy, our courts will not regard a will as conditional when it reasonably can be held that the testator in using the language in question was merely expressing his motive or inducement to make the will.

The leading case in California on the subject of conditional wills is In re Estate of Taylor, 119 Cal.App.2d 574, 259 P.2d 1014, 1015. The court in that case set up the test to be used in determining whether certain language constitutes a narrative reciting the inducement or motive of the decedent or is in fact a condition required to be fulfilled before an instrument attains a testamentary character. Taylor, about to go overseas during the war, executed a document in the form of a letter wherein he used the following language: "in case Davie Jones gets me out in the South Pacific ocean in other words lost at Sea * * *." He died 10 years later. The appellant therein contended that since Taylor returned from the sea voyage the condition was not fulfilled and the disposition did not take effect. The court held that it was an absolute will. In discussing the test to be used in determining whether a will is conditional, the court said, 119 Cal. App.2d at page 580, 259 P.2d at page 1017, "Did the testator intend, by the language used, to make the happening of the possibility referred to a condition precedent to the operation of the will, in which case the instrument is not entitled to probate if the condition is not fulfilled; or did he state the possibility of the happening merely as the motive or reason which lead to the making of the instrument and which was carelessly stated in language suggestive of a condition, in which case the will becomes operative on the testator's death even if the event, the possibility of which appears to have induced the will, has not taken place? One may, by way of narrative, state a contingency he has in mind as the inducement for making his will, or he may, on the contrary, state it as the condition on which the will is to become operative.

"In order to require a denial of admission to probate on the ground that death did not occur in circumstances contemplated by the decedent, the writing must contain language which clearly indicates a purpose to limit its operation." The court there made an exhaustive study of many cases involving instruments containing various kinds of phraseology. It serves little purpose here to review them in view of the clear language of the court in the Taylor case except to comment that they all expound the general theory that if the decedent intended in the use of the language in question to recite the inducement or motive for executing the instrument, then it becomes operative as a testamentary document.

Perhaps language closest to that used by Del Val is found in the will construed in the case of French v. French, 14 W.Va. 458. This phraseology was used: "* * * if I get drowned this morning, March 7, 1872." The court held that this language was an expression of the decedent's motive for writing the instrument and that the will was unconditional in nature. The testator wrote the will before starting a journey over an unbridged river. He returned safely and did not die until one year later. Another case involving an instrument using similar language in which the court held the will to be absolute is In re Dowling's Estate, 16 Pa.Dist. & Co. 381. The testator wrote "* * * I, Michael P. Dowling is to go on opperation for a groth in the head if anything serious shoud happen to me I leave all I own to * * *." In the case of In re Tinsley's Will, 187 Iowa 23, 174 N.W. 4, 11 A.L.R. 826, the court construed the phrase "In case of

any serious accident * * *" as sufficient to indicate a testamentary intent. A similar holding is found in Re Swords, Dom.L.R. 564, 566, in which the instrument used these words, "If anything happens that the operation is not successful * * *."

[3, 4] In determining the testator's intent, of course, the court must look first to the language itself and how it is used in conjunction with the rest of the document. Recognizing that many lay people who write wills in their own hand are unfamiliar with legal terms, often are not too well educated and many times inaccurate in their use of language, the courts have been lenient in their interpretation of the documents in order to put into effect the testator's intention. In re Estate of Soulie, 72 Cal.App.2d 332, 164 P.2d 565; In re Estate of Eggleston, 129 Cal.App.2d 601, 277 P.2d 469. In line with this general policy, our courts have also held that the language in question should be interpreted to be mere inducement if that construction is fairly permissible (Buttram v. Finley, 37 Cal.App.2d 459, 99 P.2d 1093; In re Estate of Taylor, supra). Those circumstances which the court may take into consideration in determining whether the deceased regarded the contingency as relating to the motive inducing the making of the will rather than as a condition to its becoming operative, of course differ in each case, but generally they include those surrounding the execution of the document and its delivery; the testator's state of health; his plans for the future, the preservation of the document, particularly after the contingency has failed; instructions upon delivery; subsequent declarations of the testator; lack of another subsequent will; lack of alternative disposition of the property and the amount of the estate disposed of by the instrument.

In the instant case Del Val had suffered from a heart condition for a period of ten years before his death. At the time he executed the instrument in question he no doubt contemplated death because the next day he was admitted to the White Memorial Hospital for a condition that was serious enough to require hospitalization for four weeks. Before going to the hospital he wrote the words in question which are obviously expressive of a special apprehension. The court in the case of In re Tinsley's Will, supra [187 Iowa 23, 174 N.W. 7], cited as authority by the court in Re Estate of Taylor, supra, interpreted the words of such general character in a will as "* * * if anything happens to me" to mean "if I should die." Del Val, contemplating that he might die "tonight" felt a necessity to draw the instrument so that the Disons would take his estate. His intent that by this document they should do so then and later, as the case might be, is borne out by the fact that when he handed the document to Mrs. Dison he said, "This is my will. Take care of it." He did not limit its preservation by Mrs. Dison to any particular time; in fact all of his conduct points to the inference that he meant for her to keep it until he died, whenever that might be. Upon his release from the hospital he lived with the Disons for 3½ months. He at no time subsequent to April 14, 1955 discussed the will with them again. He did not ask for the document's return even though he was closely associated with them, nor did he execute any other will or revoke the one dated April 14, 1955, all of which is favorable to the absolute character of the document. The instrument shows on its face that he intended to dispose of his entire estate and at no place in the document, or otherwise, did he make any alternative disposition of his property, which is indicative that he did not intend the language used to constitute a condition. There is an abundance of evidence pointing to the absolute character of this instrument and nothing in the record to show why decedent would have intended his will to be conditional. There is little question that Del Val died in the belief that his estate would go to the Disons under the document he entrusted to Mrs. Dison.

Appellant contends that decedent made a declaration to a friend, Stephan Kun,

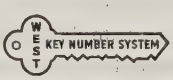
after he was released from the White Memorial Hospital which is inconsistent with the absolute character of the will. Mr. Kun testified that decedent saw him one day and said, "Well, Steve I did it." Not understanding what he meant, he questioned him and Del Val answered, "I put my money in Western Federal." At that time Kun then told him it "was very advisable for him to have a will drawn out legally by law * * *", in response to which the decedent laughed or smiled and said, "Sure, I should." It is not too clear from the language itself what impression the decedent intended to convey and his statement is subject to a variety of interpretations. It is the function of the trial court to pass upon the evidence and the weight to be given to it and if its interpretation thereof is reasonable a reviewing court will not disturb the trial court's determination in the matter. The response, "Sure, I should" does not necessarily imply that the decedent did not have a will. Many persons are reluctant to discuss matters relating to death or the disposition of property in that event. Others feel that wills and to whom and how they intend to leave their property are matters of such a personal nature that they have no wish to discuss them with others, even close friends. This is often true, particularly when the person has already executed such a document and does not wish to disclose to whom he is leaving his money. Del Val, believing he had already drawn a will to his satisfaction, may have felt no occasion to discuss it with Kun other than to agree that he "should" execute such a document in order to avoid further discussion. Obviously the trial court was not impressed with this bit of testimony and was justified in not believing such a declaration to be inconsistent with the absolute character of the will. The fact that Del Val executed no subsequent will seems to negate any such inference in the testimony of the witness Kun.

[5] In the light of all the circumstances surrounding the execution and delivery of the document in question, the decedent's subsequent conduct and the document itself, the trial court's construction of the language in question to be merely a narration of an approaching event inducing or motivating the making of the will is entirely reasonable. It is clear from the record that a fair inference arising from the use of the phrase "if there is anything happen to me tonight" is that the decedent intended it to serve only as a reason why he was making the will at that time to become effective whenever he might die.

We find the will to be absolute. The trial court did not commit error as a matter of law in upholding the admission to probate and the evidence is sufficient to support the finding that the document was not a conditional will.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



159 Cal.App.2d 316

Richard JONES, Respondent,

v.

David BLONDER, etc., Appellant.

Civ. 5748.

District Court of Appeal, Fourth District, California.

April 10, 1958.

Action for declaratory relief seeking adjudication of plaintiff's rights as holder of promissory note. From an order of the Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., denying defendant's motion for change of venue, the defendant appealed. The District Court of Appeal, Waite, J. pro tem., held that error, if any, in denying defendant's motion for change of venue was waived by later submission of demurrer to complaint on behalf of defendant.

Order affirmed.

Venue ⇐17

Error, if any, in denying defendant's motion for change of venue was waived by later submission of demurrer to complaint on behalf of defendant. West's Ann.Civ. Code, § 3516; West's Ann.Code Civ.Proc. § 963.

Herbert Colden, Los Angeles, for appellant.

Marshall L. Miles, San Bernardino, for respondent.

WAITE, Justice pro tem.

Respondent filed this action for declaratory relief seeking an adjudication of his rights as holder of a promissory note, the execution of which was followed by a general assignment for the benefit of creditors. This assignment was made by the promisor of the note and consented to by respondent as holder of said note. Appellant, who is the assignee under the general assignment, demurred to the complaint and moved for change of venue to Los Angeles county, that being the county of appellant's residence. The motion for change of venue was heard and denied on July 5, 1957, and on July 16, 1957, appellant's counsel sent the following letter to the trial judge:

"Dear Judge Curtis:

"In connection with the hearing on defendant's demurrer set for July 19, 1957, we wish to advise you that this office is willing to submit the matter on the demurrer and points and authorities in support thereof, without oral argument on the part of the demurring parties.

"Very truly yours,

"Herbert Colden."

On July 19, 1957, the demurrer was submitted and overruled, appellant being granted 15 days within which to answer. Appellant did not file an answer, but instead, on August 9, 1957, twenty-one days after the ruling on the demurrer and thirty-five days after the order was entered denying change of venue, filed this appeal from the latter order.

Although the question of defendant's right to have the action tried in the county of his residence is raised in this appeal, it is apparent that the controlling question here is whether the error, if any, in denying change of venue was waived by later submission of the demurrer on behalf of appellant. In view of the conclusion we have reached that the error, if any, was waived, a discussion of the right to a change of place of trial is unnecessary.

Counsel have not cited, nor have we been able to find, any case which decides the exact point here under consideration. However, analogy and reasoning lead us to the conclusion that where, as here, an order appealable under section 963 of the Code of Civil Procedure is entered, later submission to rulings of the court constitutes a waiver of objection to the appealable order. Had the case been tried on its merits within the time allowed for appeal from the order, appellant would have been precluded from such appeal and further would have been foreclosed from raising the point on an appeal from the judgment. Chard v. O'Connell, 48 Cal.App.2d 475, 120 P.2d 125.

Upon denial of the motion for change of venue on July 5, 1957, appellant had the right to file his notice of appeal which would have stayed all further proceedings in the trial court. Had he desired more time to consider the advisability of an appeal, he could have asked that the demurrer be taken off calendar, and if such request had been refused, appellant could have declined to participate in the hearing on the demurrer. Instead of following any of these courses, appellant chose to participate in the hearing by waiving oral argument and submitting the matter on the points and authorities then on file. By so doing appellant acquiesced in any error attending the denial of the motion for change of venue and thereby lost the right of objecting to it. Civ.Code, Sec. 3516; Allin v. International Alliance of Theatrical Stage Employes, 113 Cal.App.2d 135, 247 P.2d 857.

Had appellant's demurrer been sustained, respondent would have been bound by the court's ruling, and it would not be equitable to hold that appellant could profit by a favorable ruling on the demurrer without being bound by an unfavorable ruling.

The order denying the motion for change of venue is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



159 Cal.App.2d 330

Doris WILSON, Plaintiff and Respondent,

v.

James Gordon WILSON, Jean Butkus, Anna E. Wilson, and Doris Seligman (appearing herein as Doe One), Defendants,

James Gordon Wilson, Appellant.

Civ. 22646.

District Court of Appeal, Second District, Division 1, California.

April 10, 1958.

Hearing Denied June 11, 1958.

A divorce action. From a judgment of the Superior Court, Los Angeles County, the husband appealed and wife moved to dismiss the appeal. The District Court of Appeal, White, P. J., held, inter alia, that where by decree which granted wife divorce on ground of extreme cruelty trial court awarded portion of community property to wife but awarded to husband an automobile which had been used in the business and relieved husband of burden of paying his share of community obligation to wife's mother, which obligation was for amount in excess of $20,000, husband by accepting benefits of judgment in his favor was estopped from appealing from the final judgment.

Appeal dismissed.

Opinion, 319 P.2d 108, vacated.

1. Appeal and Error ⇐161

Voluntary acceptance of benefit of judgment or order is a bar to prosecution of appeal therefrom, but acts relied upon to create bar must clearly and unmistakably show acquiescence and be unconditional, voluntary and absolute.

2. Divorce ⇐249(1)

Where wife was entitled to divorce on ground of extreme cruelty, trial court could have awarded the wife all of community property. West's Ann.Civ.Code, § 146, subd. 1.

3. Divorce ⇐178

Where wife had been granted divorce on ground of extreme cruelty, the portion of community property awarded to wife furnished no basis for determination of whether husband acquiesced in that portion of judgment disposing of the community property so as to preclude his prosecution of appeal therefrom, but husband's acquiescence must be determined from what he did rather than from what was allowed to the wife. West's Ann.Civ.Code, § 146, subd. 1.

4. Appeal and Error ⇐164

A party may waive his right to appeal from a judgment or order by acts which are wholly inconsistent with assertion of the right, so that if all provisions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of judgment as are in his favor, and appeal from part which is against him.

5. Appeal and Error ⇐161

Acceptance of fruits of a judgment and retention of right to appeal therefrom are not concurrent but are wholly inconsistent and an election of either is a waiver and renunciation of the other.

6. Divorce ⇐178

Where by decree which granted wife divorce on ground of extreme cruelty trial court awarded portion of community property to wife but awarded to husband an automobile which had been used in the busi-

ness and relieved husband of burden of paying his share of community obligation to wife's mother, which obligation was for amount in excess of $20,000, husband by accepting benefits of judgment in his favor was estopped from appealing from the final judgment. West's Ann.Civ.Code, § 146, subd. 1.

Smith, Van Dyke & Hildreth, Los Angeles, for appellant.

Belcher, Kearney & Fargo, Los Angeles, for respondent.

WHITE, Presiding Justice.

Respondent Doris Wilson instituted this action on June 12, 1953 when she filed her complaint seeking a divorce from appellant James Gordon Wilson on the ground of extreme cruelty. Following trial of the action, the superior court, in 1955, granted an interlocutory decree of divorce to respondent Doris Wilson from her husband appellant James Gordon Wilson, upon the ground of grievous mental cruelty. Upon conclusion of the trial, the court, made findings of fact wherein was set forth the community property of the parties. Following conclusions of law based on these findings the court provided in the interlocutory decree of divorce that the division of certain named community property would be deferred until the final judgment. A portion of this property consisted of two business enterprises, known as Tri-Color Laboratories, and Tri-Color Multiprint, and conducted under the name of Tri-Color Laboratories (hereinafter referred to as "business"). It was provided that during the interlocutory year appellant husband was to have the management and control of the business. The latter appealed from the interlocutory decree, but it was affirmed by this court (Wilson v. Wilson, 143 Cal.App.2d 53, 299 P.2d 318.)

On December 11, 1956, the court granted a final judgment of divorce. By the terms thereof, custody of the minor children of the parties was awarded to respondent wife with certain privileges of visitation and actual temporary custody to appellant husband. The residence owned by the parties, together with the furniture and equipment therein contained, was also awarded to respondent wife. The final decree also ordered and adjudged that the foregoing business be awarded to respondent wife, save and except a "comparatively new Mercury auto, presently a part of the business", which vehicle was awarded to appellant husband. The final decree also provided that appellant husband "* * * be awarded, as his sole and separate property and estate a lien in the sum of Twenty-Five Thousand Dollars ($25,000.00) upon those certain businesses hereinabove referred to as Tri-Color Laboratories and Tri-Color Multiprint and the assets thereof, which said lien shall be discharged and paid by the plaintiff Doris Wilson at the rate of Two Hundred Dollars ($200.00) per month commencing on January 1, 1958 for twelve (12) consecutive months thereafter, and at the rate of Three Hundred Dollars ($300.00) per month commencing on January 1, 1959 and for twelve (12) consecutive months thereafter, and at the rate of Four Hundred Dollars ($400.00) per month commencing on January 1, 1960 and monthly thereafter until the full amount of said sum of $25,000.00 has been paid;".

It was further provided in the final decree "that the plaintiff Doris Wilson shall assume and pay and hold defendant James Gordon Wilson harmless from any and all community obligations to Mrs. Ora Kimball, and that the defendant James Gordon Wilson shall assume and pay and hold harmless plaintiff Doris Wilson from any and all community obligations to defendants Anna E. Wilson and Doris Seligman." The final decree then makes provision for the payment of income taxes, together with interest and penalties thereon presently due by the payment of one-half thereof by each of the parties. The final decree then directs payments to be made by appellant husband for the care and support of the two minor children and awards two policies of insurance on the life of appellant hus-

band to respondent wife with the proviso that the latter shall assume and pay all future premiums becoming due thereon.

Appellant husband has appealed as stated in his notice of appeal, "* * * from those portions of the judgment (Final Judgment of Divorce) therein entered in said Superior Court on the 11th day of December, 1956, in favor of the plaintiff and against the said defendant as follows". Then follows a narrative of the portions of the judgment from which the appeal is taken. No appeal is taken from that portion of the judgment wherein appellant is awarded the "comparatively new Mercury auto" or from that portion of the judgment by which respondent wife was ordered to assume, pay and hold appellant husband harmless from all community obligations due to Mrs. Ora Kimball, mother of respondent, and amounting to in excess of $20,000.

Appellant has filed his opening brief and respondent now moves to dismiss the appeal upon the following grounds:

1. That the appeal has become moot, appellant having accepted the benefits of the judgment appealed from.

2. That appellant is estopped from prosecuting the appeal, having accepted the benefits of the judgment appealed from.

3. That appellant is in contempt of the judgment appealed from.

4. That the appeal is frivolous.

5. That appellant failed to pursue the appeal and to file an opening brief within the time fixed by the rules on appeal.

[1] The first question presented, and the one we feel is determinative of the present motion is, should the appeal be dismissed under the well established rule that the voluntary acceptance of the benefits of a judgment or order is a bar to the prosecution of an appeal therefrom, or does the instant appeal come within the modification of this rule, which provides that the right of appeal is not forfeited unless the acts of an appellant which are relied upon are such as to clearly and unmistakably show acquiescence and that such acquiescence must be unconditional, voluntary and absolute (Gudelj v. Gudelj, 41 Cal.2d 202, 214, 215, 259 P.2d 656).

[2, 3] In the case now engaging our attention, since the trial court could have awarded respondent wife all of the community property, upon the grounds of extreme cruelty found to be true (Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289; Hellman v. Hellman, 108 Cal.App.2d 588, 594, 239 P.2d 458; Civil Code, sec. 146, subd. 1), it is manifest that the portion of the community property awarded to respondent wife furnishes no basis whatsoever for a determination of whether or not appellant husband acquiesced in that portion of the judgment disposing of the community property. His acquiescence must be determined from what he did rather than from what was allotted to respondent wife.

Appellant husband urges that the different portions of the judgment herein are severable and that by accepting the fruits of one portion thereof, he does not estop himself to attack other and severable portions thereof on appeal (Preluzsky v. Pacific Co-operative Cafeteria Co., 195 Cal. 290, 293, 232 P. 970).

[4–6] However, we are persuaded that in the case at bar, the judgment represents the complete award allowed to the prevailing party by the court, and disposes of the whole issue. In other words, the provisions of the judgment are interdependent, and an appellate tribunal cannot properly reverse the judgment as to the part complained of and permit the remainder to stand (Sun Oil Co. v. Union Drilling, etc., Co., 208 Cal. 114, 119, 280 P. 535). As was said in Guho v. City of San Diego, 124 Cal. App. 680, 684, 13 P.2d 387, 388: "'A party may also waive his right to appeal from a judgment or order by acts which are wholly inconsistent with the assertion of the right. Thus, if all the provisions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of the judg-

ment as are in his favor, and appeal from the part which is against him.'" The law seems well settled that acceptance of the fruits of a judgment and retention of the right to appeal therefrom, are not concurrent, but are wholly inconsistent. An election of either is a waiver and renunciation of the other. Except for the judgment herein, appellant husband would not have been entitled to receive the automobile and to be relieved of the burden of paying his share of the community obligations to respondent wife's mother, and which obligation was for an amount in excess of $20,000. Strikingly similar to the issue here presented to us is the case of Storke v. Storke, 132 Cal. 349, 64 P. 578. There, as here, the defendant lost, but the court nevertheless awarded her a small money judgment ($250 for alimony and $200 for attorney's fees and costs), which was paid and accepted. Thereafter the defendant moved for a new trial but the proceedings therefor were dismissed, the court saying (132 Cal. at pages 352, 353, 64 P. at page 580): "Defendant accepted the part of the judgment that was beneficial to her. It was a final judgment, and by its terms gave her $450. This sum was based upon the findings, and was the result of the litigation. Defendant took the $450, and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. The amount of this judgment was not large, but the principle is the same. * * * The principle is well settled that a party accepting and receiving the portion of the judgment beneficial to him cannot appeal from it."

What we have herein stated finds support in a long and unbroken line of decisions, including Conlin v. Southern Pacific R. Co., 40 Cal.App. 743, 747, 182 P. 71; Giometti v. Etienne, 5 Cal.2d 411, 415, 55 P.2d 216; Swallers v. Swallers, 89 Cal.App. 2d 458, 462, 201 P.2d 23; McLachlan v. McLachlan, 98 Cal.App. 203, 205, 276 P. 627; McCaleb v. McCaleb, 32 Cal.App. 648, 649, 163 P. 1045; Schubert v. Reich, 36 Cal.2d 298, 299, 223 P.2d 242; San Bernardino County v. Riverside County, 135 Cal. 618, 620, 67 P. 1047; In re Estate of Shaver, 131 Cal. 219, 221, 63 P. 340; Dickenson v. Kallusch, 91 Cal.App. 141, 142, 266 P. 816; Union Lithograph Co. v. Bacon, 179 Cal. 53, 57, 175 P. 464; Walnut Irrigation Dist. v. Burke, 158 Cal. 165, 166, 110 P. 517; Graham v. Alchian, 51 Cal.App. 263, 264, 197 P. 134.

In view of the foregoing, it becomes unnecessary to consider or decide other issues tendered on this motion.

The appeal is dismissed.

FOURT, J., and DRAPEAU, J. pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



159 Cal.App.2d 444

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert Joseph KOSTAL, Defendant and Appellant.

Cr. 5989.

District Court of Appeal, Second District, Division 2, California.

April 17, 1958.

Rehearing Denied May 7, 1958.

Hearing Denied June 11, 1958.

Defendant was convicted of armed robbery. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment and order denying motion for new trial, and the defendant appealed from the judgment and order. The District Court of Appeal, Fox, P. J., held that evidence tending to show that defendant burglarized gunshop and stole automatic the night before the robbery, for which he was on trial, was properly admitted, where there was a reasonable inference that defendant stole the automatic in order to have a weapon with which to commit the armed robbery.

Judgment and order affirmed.

1. Criminal Law ⇐627½
Witnesses ⇐379(4)

In prosecution for armed robbery, police report made by prosecuting witness could not be used by defendant to impeach testimony of prosecuting witness, in absence of prima facie showing that prosecuting witness had either written or signed statement, or that he had adopted or approved it, or had otherwise acknowledged its correctness, and, in absence of proper foundation having been laid therefor, it was neither error nor abuse of discretion for trial court to deny defendant's request to see police report. West's Ann.Pen. Code, § 211.

2. Robbery ⇐17(1)

Information alleging that defendant did wilfully, unlawfully, feloniously, and by force and fear take from person, possession, and immediate presence of prosecuting witness certain described property, stated a public offense. West's Ann.Pen.Code, §§ 211, 951, 952.

3. Criminal Law ⇐369(2)

Though evidence of other crimes is ordinarily inadmissible in a criminal case, such evidence is admissible, if it is relevant to prove commission of crime charged.

4. Criminal Law ⇐369(2)

General test of relevancy of evidence of other crimes is whether evidence tends logically, naturally, and by reasonable inference to establish any fact material for the People or to overcome any material matter sought to be proved by the defense, and, if the evidence does so, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar.

5. Criminal Law ⇐369(2)

In prosecution for armed robbery, evidence tending to show that defendant burglarized gunshop and stole automatic the night before the robbery, for which he was on trial, was properly admitted, where there was a reasonable inference that defendant stole the automatic in order to have a weapon with which to commit the armed robbery. West's Ann.Pen.Code, § 211.

6. Criminal Law ⇐351(9)

In prosecution for armed robbery, evidence showing escape of defendant from custody immediately after his arraignment on robbery charge was admissible as tending to show defendant's consciousness of guilt, over objection of defendant that the escape from custody was too remote because it occurred some two months after commission of the robbery, and over objection that it was defendant's second flight in connection with the same robbery charge. West's Ann.Pen.Code, § 211.

7. Criminal Law ⇐351(9)

Fact that escape of defendant from custody was defendant's second flight after alleged commission of armed robbery made it doubly indicative of defendant's consciousness of guilt of charge of armed robbery and justified admission of evidence of escape in prosecution for armed robbery. West's Ann.Pen.Code, § 211.

8. Constitutional Law ⇐80(1)
Criminal Law ⇐1206(1)

Indeterminate Sentence Law, which prohibits courts, in imposing sentence, from fixing term or duration of period of imprisonment is not unconstitutional, on ground that it deprives the Superior Court of its constitutional grant of jurisdiction to proceed to a final determination of the rights of the defendant before it, or on ground that it confers judicial powers on the Adult Authority, which is a nonjudicial body. West's Ann.Pen.Code, § 1168.

9. Constitutional Law ⇐250, 270
Criminal Law ⇐1206(1)

The Indeterminate Sentence Law does not violate the due process and equal protection clauses of the federal Constitution. West's Ann.Pen.Code, § 1168.

10. Criminal Law ⇐635

Defendant was not denied his constitutional right to a public "trial" of armed robbery prosecution because of the fact that he had to appear before the Adult Authority at a private meeting for the fixing of his term of imprisonment, since

his appearance before the Adult Authority was not a "trial" but was merely an "administrative proceeding" to determine what sentence, within limits prescribed by law, defendant should be required to serve. West's Ann.Pen.Code, §§ 211, 1168.

See publication Words and Phrases, for other judicial constructions and definitions of "Administrative Proceeding" and "Trial".

11. Criminal Law ⇐991(1)

Where all prior convictions of defendant had been for robbery, and in all instances indeterminate sentences had been imposed, but for one of his prior robbery convictions Adult Authority fixed sentence at life imprisonment, action of trial court in ordering that indeterminate sentence in subsequent prosecution for armed robbery should run consecutive to prior sentence did not violate provision of Penal Code that if punishment is "expressly prescribed" to be life imprisonment, then terms of imprisonment on other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term, since term "expressly prescribed" means expressly prescribed by statute. West's Ann.Pen.Code, §§ 211, 669, 671, 3020.

See publication Words and Phrases, for other judicial constructions and definitions of "Expressly Prescribed".

Joseph M. Rosen, Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., John A. Vander Lans, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of armed robbery. He was charged with and admitted three prior convictions, which resulted in his imprisonment. Defendant's motion for a new trial was denied and he was sentenced to the state penitentiary, the prior and present sentences to run consecutively. Defendant has appealed from the order denying his motion for a new trial and from the judgment.

Defendant escaped from Folsom Penitentiary on November 21, 1956. He came to the Los Angeles area where he remained until November 29th. Shortly before midnight on November 25th John Barkley's gunshop in Van Nuys was burglarized and two automatic pistols were stolen. On November 26th, at approximately 8:45 p. m., John B. Hood, manager of Rand's Round-Up, a restaurant located on Wilshire Boulevard in Los Angeles, was seated in a booth at the right of the cash register facing the door; he observed defendant enter the restaurant so he arose and went behind the cash register. Defendant was dressed in army fatigue clothes and was wearing a fatigue cap. When Hood reached the cash register defendant was within an arm's length of him. Defendant pulled a gun and said to Hood: "Give me everything you've got." Hood stepped aside and told him to help himself. Defendant reached into the cash register and took $385. Defendant had a .45 caliber automatic, which was the same type as that previously taken from the Barkley gunshop. Hood described defendant as approximately 6 feet tall, 35 years old, "kind of a sleepy-eyed sort of person," and weighing 135 to 140 pounds.

George H. Hardy was in the cafe, and while approaching the cash register to buy dinner tickets, observed defendant in front of the register speaking to Hood. When Hardy was 3 or 4 feet from the two men defendant turned toward him, pointed a gun at him, and told him to step back. He obeyed and raised his eyes to the ceiling. He did not see defendant leave the restaurant. Hardy's observation of defendant covered a period of from 10 to 15 seconds. He described defendant as approximately 6 feet tall, weighing 180 pounds, dressed in olive drab fatigue clothes, and wearing a cap of the same color. Both Hood and Hardy identified defendant from photographs that were shown them by the police officers.

Defendant was apprehended in Kansas City, Missouri, about the middle of January, 1957. The property custodian of the Kansas City police department turned over

to Deputy Sheriff Lightner of Los Angeles a .45 caliber automatic which had been found in the possession of the defendant when he was arrested. Officer Lightner observed that "The safety, which is on the left rear portion of the gun lever, had been wired down with real small wire." He asked defendant why the wire was on the safety. The defendant took the gun and stated: "This safety will fall out if it is not wired down, so I had to wire it down to keep it from falling out." Defendant "demonstrated it by taking the revolver and shaking it and turning it on its left side and showing how the lever did fall out." Defendant, however, declined to explain, when the officer asked him, where he had obtained the gun. The defendant stated: "I don't wish to discuss anything regarding it."

Defendant was arraigned on the charge herein on February 11, 1957, in Department 41 of the superior court. Immediately following arraignment defendant and some other prisoners forced their way out of the detention tank and defendant escaped. Some days later he was located at a home in Whittier, California, and was rearrested.

Defendant denied any connection with the robbery of Rand's Round-Up. According to his testimony, he spent the evening in question at a theater in Los Angeles which was showing foreign films. He claimed to have been with a friend, Arthur Watson, who was confined in the county jail at the time of the trial. Defendant also denied any connection with the breaking into and entering of Barkley's gunshop. He refused to answer questions relative to his possession of a Colt .45 automatic at the time of his arrest in Kansas City on the ground that his answer might tend to incriminate him. Defendant is 5 feet 11 inches in height; his normal weight varies from 170 to 180 pounds.

William Meyer, an inmate of San Quentin Prison, was at liberty in Los Angeles on November 26, 1956. Meyer testified that at approximately 9:00 p. m. on that date he entered Rand's Round-Up on Wilshire Boulevard wearing a green, army fatigue jacket, trousers and a cap, and that he had in his possession a .45 caliber automatic which he later disposed of in Tijuana. He further testified that he approached the counter where the cash register was located and asked the manager for the money from the register, but he refused to state whether he exposed his gun on the ground that his answer might tend to incriminate him. He further stated that some people had told him he had "sleepy eyes" and others that he had "marijuana eyes." His weight was approximately 185 pounds, and he was 6 feet 2 inches in height. He further stated that he had been convicted six times.

Defendant "does not question the sufficiency or weight of the evidence" to sustain his judgment of conviction. His position is that "if the errors complained of had not occurred it is reasonable to believe that the jury could have accepted the facts favorable to defendant and returned a verdict of not guilty."

Defendant's first contention is that the court erred and abused its discretion in denying his request for examination of the police reports of the crime to determine whether a disparity existed between Hood's statement to the police and his testimony at the trial. In support of this contention he relies on People v. Riser, 47 Cal.2d 566, 305 P.2d 1. That case, however, does not reach defendant's point. The court stated, 47 Cal.2d on pages 585–586, 305 P.2d on page 13: "The decisions of this court have always impliedly recognized that on a proper showing a defendant in a criminal case can compel production when it becomes clear during the course of trial that the prosecution has in its possession relevant and material evidence. Production has been denied, not on the ground that there was never any right to it, but because the requirements justifying production had not been met in the particular case. [Citation.]" The court cited with approval People v. Glaze, 139 Cal. 154, 72 P. 965, and pointed out that the court there refused to order production of a statement

that appeared to the court to be inadmissible for any purpose, even for impeachment, since "[t]he witness had neither signed the statement nor adopted it in any way." 47 Cal.2d on page 586, 305 P.2d, on page 14. In the Glaze case, the court delineated the circumstances under which a statement could be used for the purpose of impeaching a witness by showing that he had made statements out of court inconsistent with testimony given by him on the trial. The court stated (139 Cal. on page 157, 72 P. on page 966): "The only statements that can be used for that purpose, if in writing, are statements made by the witness himself, either directly in his handwriting or over his signature, or indirectly by his adoption of, or admission of, the correctness of a written report of his statements made by some other person. He cannot be held responsible for a statement taken down by another, purporting to be a report of his oral declarations, unless he has been made acquainted with the contents of such statement, and directly or indirectly admitted that it was correct."

[1] From these authorities it is clear that the police report of the robbery by Hood could not be used for purposes of impeaching his testimony in the absence of a prima facie showing that he had either written or signed the statement, or that he had adopted or approved it, or otherwise acknowledged its correctness. In the absence of a proper foundation having been laid therefor, it was neither error nor an abuse of discretion to deny defendant's request to see the police report in question.

Defendant's second contention is that "The court was without jurisdiction in that the information was fatally defective." He argues that "the facts stated did not constitute a public offense in that the Information failed to allege ownership or possession of the property taken was in someone other than the defendant." Section 211 of the Penal Code defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accompanied by means of force or fear." This same point was raised in People v. Wade, 71 Cal.App.2d 646, 163 P.2d 59. In rejecting the defendant's contention, the court stated (71 Cal.App.2d on page 658, 163 P.2d on page 66): "It is perfectly clear under numerous recent authorities that the information is amply sufficient in this respect, particularly in view of the 1927 amendment to Penal Code sections 951 and 952, liberalizing the rules of pleading, and in the light of the fact that the gravamen of the offense of robbery is the deprivation of possession and not ownership. [Citations.]" To the same effect, see People v. Covington, 1 Cal.2d 316, 318–320, 34 P.2d 1019; People v. Voiler, 2 Cal.App.2d 724, 726, 38 P.2d 833.

The information herein as amended alleged that defendant "did willfully, unlawfully, feloniously and by force and fear take from the person, possession and immediate presence of John Hood" certain described property.

[2] From the foregoing, it is clear that the amended information stated a public offense. The cases relied upon by defendant no longer state the law in light of the 1927 amendment to Penal Code sections 951 and 952.

[3–5] Defendant's third contention is that the trial court erroneously permitted the prosecution to introduce evidence of other crimes committed by him which were unrelated to the crime for which he was being tried. He first complains of the evidence tending to show that he burglarized Barkley's gunshop and stole a .45 caliber automatic the night before the robbery for which he was on trial. Defendant had the gun in his possession when he was arrested in Kansas City. While it is true that evidence of other crimes is ordinarily inadmissible in a criminal case, it is well settled that such evidence is admissible if it is relevant to prove the commission of the crime charged. People v. Dabb, 32 Cal.2d 491, 499, 197 P.2d 1. "The general test of relevancy is whether the evidence

tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar." People v. Dabb, supra, 32 Cal.2d on page 500, 197 P.2d on page 6; see, also, People v. Sykes, 44 Cal.2d 166, 170, 280 P.2d 769; People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924, and cases cited therein. It is clear that the aforementioned evidence tended to establish that defendant committed the robbery in question. Hood testified that the stolen gun was similar to the one which defendant carried when he committed the robbery. It was a reasonable inference that defendant had stolen the gun in order to have a weapon with which to commit the robbery shortly thereafter. The probative value of this evidence far outweighed any prejudicial effect it might have had upon the jury.

[6, 7] Secondly, defendant complains of the evidence showing his escape from custody immediately after his arraignment on the robbery charge. This evidence of flight was clearly admissible as tending to show defendant's consciousness of guilt. People v. Ellis, 188 Cal. 682, 692–693, 206 P. 753; see, also, People v. Santo, 43 Cal.2d 319, 330, 273 P.2d 249; People v. Hoyt, 20 Cal.2d 306, 313, 125 P.2d 29. Defendant asserts that his escape from custody was too remote because it occurred some two months after the commission of the robbery. This argument was properly rejected in the Ellis case. Defendant also asserts that evidence of his escape was immaterial because it was his *second* flight in connection with this same robbery charge; he had fled to Kansas City shortly after the commission of the robbery and before he was taken into custody. But the fact that the escape from custody was defendant's second flight makes it doubly indicative of his consciousness of guilt.

[8] Defendant's next contention is that the judgment of conviction is void and unconstitutional. He presents four arguments in support of this claim. He first argues that the portion of the indeterminate sentence law which prohibits the court in imposing sentence from fixing the "term or duration of the period of imprisonment" (Penal Code, § 1168) is unconstitutional because it deprives the superior court of its constitutional grant of jurisdiction to proceed to a final determination of the rights of the party before it. He also argues in this connection that the indeterminate sentence law confers judicial powers upon a nonjudicial body (the Adult Authority), thereby rendering the law unconstitutional. Both of these arguments are answered by the following discussion in In re Lee, 177 Cal. 690, 692–693, 171 P. 958, 959: "It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing. Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong. If the purpose of the law is to mitigate the punishment, the law is not *ex post facto*, unless it can clearly be seen that, notwithstanding the beneficence of the law, it may result in the individual case in depriving the prisoner of some well-defined right. It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. [Citations.] In answering the claim that the authority vested by the indeterminate sentence law in the board of prison directors [now replaced by the

Adult Authority] is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the indeterminate sentence law. The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character, and properly exercised by an administrative body." See, also, In re Larsen, 44 Cal.2d 642, 647, 283 P.2d 1043, appeal dismissed, Larsen v. People of the State of California, 350 U.S. 928, 76 S.Ct. 312, 100 L.Ed. 811. It is clear from the foregoing that the indeterminate sentence law neither prevents the superior court from making a full determination of the rights of the defendant nor confers judicial powers upon a nonjudicial body. The judicial function is complete when the court has imposed upon the defendant the sentence provided by law for the crime for which he has been convicted. The function of carrying out that sentence is administrative rather than judicial, and the Adult Authority may properly supervise that function. People v. Leiva, 134 Cal.App.2d 100, 103, 285 P.2d 46.

[9] There is clearly no merit in defendant's argument that the indeterminate sentence law violates the due process and equal protection clauses of the United States Constitution. A judgment pursuant to that law is both definite and certain, and meets the requirements of due process and equal protection. In re Larsen, supra, 44 Cal.2d on page 648, 283 P.2d on page 1046; In re Lee, supra, 177 Cal. on page 693, 171 P. on page 959; People v. Leiva, supra, 134 Cal.App.2d on page 103, 285 P.2d on page 48.

[10] Defendant's fourth argument in relation to the validity of the judgment is that he is denied his constitutional right to a public trial since he will have to appear before the Adult Authority at a private meeting for the fixing of his term of imprisonment. This argument overlooks the fact that defendant's appearance before the Adult Authority is in no sense a trial. Defendant's trial terminated upon his being convicted and sentenced. His hearing before the Adult Authority will be simply an administrative proceeding to determine what sentence within the limits prescribed by law the defendant should be required to serve.

[11] Defendant's final contention is that the trial court erred in ordering his present sentence to run consecutive to his prior sentence. Defendant was already serving sentences at the time of his instant conviction. Since the Adult Authority in 1952 fixed his term of imprisonment for one of his robbery convictions at "life," defendant argues that his present sentence is invalid in that it has been set to run consecutive to a life sentence. Penal Code section 669 authorizes the trial court to direct that sentences shall run consecutively, with the provision that "if the punishment * * * is expressly prescribed to be life imprisonment * * *, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term." All of defendant's prior convictions have been for robbery, and in all of them indeterminate sentences have been imposed. The punishment for robbery is not *expressly prescribed* to be life imprisonment; therefore, the pertinent exception in section 669 does not prevent any of defendant's sentences from running consecutively. See In re Quinn, 25 Cal.2d 799, 803–804, 154 P.2d 875. This result is not affected by the fact that the Adult Authority later fixed defendant's sentence at life imprisonment because the terms "expressly prescribed" in section 669 mean expressly prescribed by statute. See People v. Rivas, 85 Cal.App.2d 540, 542, 193

P.2d 151. Any later action by the Adult Authority has no effect in this regard.

Defendant argues that the 1951 amendment to section 671 of the Penal Code "expressly prescribes" that indeterminate sentences without fixed maximums shall be the equivalent of life imprisonment. That section now reads: "Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, punishment of such offender shall be imprisonment during his natural life subject to the provisions of Part 3 of this code." Before the amendment in 1951 section 671 read as follows: "Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed." It seems obvious from a comparison of the two provisions that the purpose of the amendment was to remove from the trial court the discretion to fix the term of the defendant's incarceration and to place such discretion in the Adult Authority (through the provisions of Part 3 of the Penal Code). Although indeterminate sentences with no maximums are now deemed to be equivalent to a sentence of imprisonment for the natural life of the defendant, the Adult Authority is given the right to determine and redetermine the length of time he is to be imprisoned. Pen.Code, § 3020. It is thus clear that such sentences are to be considered life sentences for a limited purpose only and were not meant to come within the proviso in section 669. To apply defendant's interpretation would prevent convictions from running consecutively when the first conviction was for one of the more serious crimes (i.e., one where there is no fixed maximum penalty), and would have the effect of overruling such cases as In re Quinn, supra; People v. Rivas, supra; and People v. Collins, 99 Cal. App.2d 780, 222 P.2d 686. The court in the Quinn case stated (25 Cal.2d on pages 800–801, 154 P.2d on page 876): "Certainly an indeterminate sentence without a fixed maximum is regarded for certain purposes as having the effect of a life sentence until and unless the prison term board [now replaced by the Adult Authority] has acted and fixed a term for years [citing cases] but this proposition of law does not preclude our recognizing the reality that, in the absence of action by the board, an indeterminate sentence *is an indeterminate sentence.* It is neither a life sentence nor a fixed term sentence; it is entitled to recognition as a distinct *species intelligibilis.* The fact that for some purposes it has the legal effect of a life sentence does not mean that it must be regarded as the equivalent of a life sentence for all purposes. [Citation.] A defendant against whom such a judgment has been pronounced may or may not be required to spend the entire term of his natural life in prison." We do not feel that the views expressed in the Quinn case are altered by the fact that later the Adult Authority may in fact fix a defendant's previous sentence at life. The sentence is subject to constant redetermination by that body and is thus not irrevocably a "life sentence" either before or after the Adult Authority's initial determination. Moreover, as we have already suggested, the previous sentence does not come within the purview of the exception in section 669 regardless of any later action taken by the Adult Authority. We are convinced that the legislature, in amending section 671, did not intend the result for which defendant argues.

The case upon which defendant relies, People v. Pearson, 150 Cal.App.2d 811, 821–822, 311 P.2d 142, is not in point. There the defendant previously had been adjudged an habitual criminal under Penal Code section 644, which expressly prescribes the punishment of life imprisonment. The proviso in Penal Code section

669 was therefore applicable to his subsequent convictions.

The judgment and order are affirmed.

ASHBURN and HERNDON, JJ., concur.



159 Cal.App.2d 472

Crules R. CHEEK, as Trustee In Bankruptcy of Herbert L. Whiston, a bankrupt, Plaintiff and Appellant,

v.

Herbert L. WHISTON, also known as H. L. Whiston, Midway McKittrick Oil Company, a corporation, Frank Goldman, Petroleum Supply Company, a corporation, et al., Defendants and Respondents.

Civ. 5635.

District Court of Appeal, Fourth District, California.

April 17, 1958.

Proceeding by trustee in bankruptcy to establish existence of a constructive trust in an oil royalty interest, to quiet title, and for an accounting. From adverse judgment of the Superior Court of Kern County, Norman F. Main, J., trustee appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that deceased bankrupt, prior to filing of bankruptcy proceedings more than 20 years prior thereto, had effectively transferred title to overriding royalty interest by execution of quitclaim deed, and evidence as to fact deed was lost, was sufficient to permit oral testimony of execution and contents of deed.

Affirmed.

1. Mines and Minerals ⇐55(8)

In proceeding by trustee of bankrupt to establish the existence of a constructive trust in an overriding oil royalty interest, to quiet title and for an accounting, evidence sustained finding that deceased bankrupt, before filing of bankruptcy proceedings more than 20 years prior thereto, had divested himself of oil royalty interest by execution of quitclaim deed.

2. Evidence ⇐183(1), 187

If deed has been lost, proof of its loss must be first made before evidence can be given of its contents, and whether a satisfactory accounting of the document has been made is primarily a question for the trial court. West's Ann.Code Civ.Proc. §§ 1855, 1919, 1937.

3. Evidence ⇐183(15)

In proceeding by trustee in bankruptcy to establish existence of a constructive trust in oil royalty interests, to quiet title, and for an accounting, evidence as to fruitless search made for quitclaim deed from deceased bankrupt to another before bankruptcy proceedings were filed by bankrupt was sufficient to permit oral testimony of the execution and contents of deed. West's Ann.Code Civ.Proc. §§ 1855, 1919, 1937.

Pines & Walsh, Los Angeles, for appellant.

Hawkins & Hawkins, Los Angeles, for respondent Midway McKittrick Oil Co.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondents Frank Goldman and Petroleum Supply Co.

MUSSELL, Justice.

This is an action to establish existence of a constructive trust in an oil royalty interest, to quiet title, and for an accounting. The trial court rendered judgment that plaintiff take nothing by his complaint and he appeals therefrom, claiming that the evidence is not sufficient to support the findings and judgment.

In 1922, the United States issued an oil and gas prospecting permit, covering oil lands in Kern county, to T. J. Wisecarver, and on January 18, 1922, Wisecarver entered into an operating agreement with de-

fendant Midway McKittrick Oil Company whereby the latter agreed to develop part of the lands described in said permit. An overriding royalty was reserved to Wisecarver. On September 17, 1928, Midway McKittrick Oil Company entered into an operating agreement with H. L. Whiston covering portions of the property described in the permit and containing definite drilling commitments and a time limit for such exploration. This operating agreement was in turn assigned by Whiston on May 24, 1930, to California Oil Producers, a corporation, but Whiston omitted from this assignment certain property which he retained. On February 11, 1930, Wisecarver assigned and transferred to Whiston a certain proportion of the royalty owned and reserved to Wisecarver in the agreement with Midway McKittrick Oil Company dated January 18, 1922, amounting to 1% of all oil and gas produced on premises known as "A acreage" under and subject to the terms of said agreement of January 18, 1922. On February 20, 1930, Whiston and his wife, who then owned 1% of all oil and gas produced from the Wisecarver permit under the terms of the agreement of February 11, 1930, between Wisecarver and Whiston, transferred 7/12 of this said 1% to various persons and on February 24, 1930, the Whistons transferred an additional 1/12 of said 1% to one H. P. Walls. After these transfers the Whistons still owned and retained ownership of 1/3 of 1% royalty interest and it is this 1/3 of 1%. interest which is involved in this action and which plaintiff claims is held in trust for his benefit.

In 1929 and 1930 Whiston drilled two dry wells on the Wisecarver property. Petroleum Supply Company and Frank Goldman furnished Whiston with oil well supplies and equipment for these wells and the indebtedness therefor was approximately $18,000 to Petroleum Supply Company and $5,000 to Frank Goldman.

In 1933 Goldman became interested in getting a well drilled on the permit lands. Whiston had been served with a notice of default in March, 1933, and later in that year Goldman talked to Whiston regarding "taking over" the permit. Goldman also talked to Nick Gerard and Harry Bergman, who were also interested. Goldman and Gerard went to talk to Wisecarver, who was president of Midway McKittrick Oil Company and had charge of the negotiations of deals for the company. The company offices were in Modesto, California. Goldman's first trip to Modesto in this connection was in late January or early February of 1934. Goldman and Bergman discussed with Wisecarver the proposition of getting some people to finance development of the permit. They were told that in order for Goldman to get an operating agreement in place of Whiston they would have to remove any interest that Whiston had in the permit; that they would have to get certain quitclaims from anybody else who had any interest in the Whiston operating agreement; and that then Goldman would be given a working agreement to complete a well within one or two years. Goldman and Bergman were further informed that the company had already served notice on Whiston that he was in default and that it looked like it was going to be quite a time before they could get the permit back in the hands of the company; that if he (Goldman) could get Whiston's interest in the permit and any other default that was existing on the permit, he (Goldman) could then get an operating agreement.

After this conversation with Wisecarver and between the 15th and 25th of February, 1934, Goldman, Gerard and Bergman went to see Whiston at his office in Fruitvale. Goldman testified in this connection:

> "I talked to Herb and told him that we were trying to get the title of the property in condition so that we could make an operating agreement with Midway McKittrick, and I said that Nick Gerard had Mr. Marks prepare a quitclaim deed of all his right, title and interest to me and that I had $500.00 that I would give him if he would sign it, and he wanted a thousand dollars, and I gave him $500.00; and about a

week or ten days later I gave him the other $500.00."

Goldman further testified that Gerard had the quitclaim with him at the time; that "it was a general quitclaim deed whereby he said he quitclaim all his right, title and interest in the Wisecarver permit, with the serial number of the permit, to me"; and that the quitclaim deed was signed by Whiston at that time.

On March 15, 1934, Whiston filed a petition in bankruptcy. He did not list the overriding royalty in the bankruptcy schedules, it was not administered as an asset of his estate, and the bankruptcy proceedings were closed as a "no asset" estate.

On March 23, 1934, Midway McKittrick gave Goldman an operating agreement and on the same day an agreement was executed by Wisecarver, Tillson and Whiston, parties of the first part, and Midway McKittrick, party of the second part. This agreement provided for the division of royalties, in which it was provided, inter alia, that Whiston, his heirs and assigns were to receive ⅓ of 1%. On October 31, 1946, Whiston executed a written instrument purporting to assign Whiston's ⅓ of 1% interest to Goldman, and on September 16, 1947, Midway McKittrick Oil Company assigned said ⅓ of 1% to Goldman.

In August of 1947, Pacific Western Oil Company, under an assignment from Petroleum Supply Company, went on the land and found oil. One Hausen had worked with Goldman and Petroleum Supply Company and as a result of several visits to Modesto in 1946, he discovered that the ⅓ of 1% interest involved was carried on the books of the Midway McKittrick Company in Whiston's name. Goldman then got in touch with Whiston and secured another assignment of this interest. In the latter part of 1954 one of Whiston's bankruptcy creditors discovered the existence of the royalty involved and upon its petition, the bankruptcy proceedings were reopened. Plaintiff was appointed and qualified as trustee in bankruptcy and this action was filed.

[1] Plaintiff states that his case is predicated upon the premise that title to the royalty involved was vested in Whiston's creditors at all times since the bankruptcy proceedings were filed on March 15, 1934, subject to administration by Whiston's trustee in bankruptcy; that no assignment to defendant Frank Goldman in 1946 or 1947 could effectively have transferred title without an appropriate order of the bankruptcy court. However, the trial court found, inter alia, that it was not true that on March 1 or March 15, 1934, Whiston was the owner of the ⅓ of 1% overriding royalty involved; that it was true that he had disposed of said royalty to Goldman prior to March 15, 1934. These findings are supported by substantial evidence, for in addition to the testimony of Goldman relative to the transfer to him by Whiston of the interest involved between the 15th and 25th day of February, 1934, there was the testimony of Harry Bergman who went with Goldman and witnessed the transaction with Whiston. Bergman testified that he saw Goldman pay Whiston $500 in cash and that Goldman told Whiston he would pay the balance of $500 in about two weeks, to which Whiston replied that that was "o. k."; that Whiston signed a quitclaim deed to Goldman, which had been prepared by Abe Marks; that the deed was given to Goldman when the $500 was paid to Whiston and that he (Bergman) read the deed; that it contained one page and that it was an assignment "quitclaiming from Herb Whiston to Frank Goldman all his interest"; that "it said that Herb Whiston quieted title and assigned all his right, title and interest of whatsoever nature and kind there may be in and to the Wisecarver permit."

At the time of the trial herein Whiston, Wisecarver, Gerard, Abe Marks and John Heard were all dead and it was stipulated by plaintiff's counsel that Whiston testified in the case of Hausen v. Goldman, 124 Cal.App.2d 25, 267 P.2d 852, and that in that case he testified that he "had agreed to sell, had given a quitclaim deed of some sort to Mr. Goldman prior to the bank-

ruptcy"; that Whiston further testified that he received $1,000 consideration and immunity or something approaching it for his debts. In this connection it may be observed that Hausen v. Goldman, 124 Cal. App.2d 25, 267 P.2d 852, supra, decided by this court, was an action by Hausen to determine the ownership of the ⅓ of 1% royalty involved herein and it was there claimed by Hausen that he had a 50% interest in said royalty by reason of an agreement with Goldman in 1943. Judgment for defendant was affirmed on appeal. In that case Goldman testified that he had obtained quitclaims to the Whiston interest; that he paid Whiston $1,000 therefor and at the time he told Whiston he would cancel all indebtedness which Whiston had with Petroleum Supply Company. Whiston testified that he was indebted to Goldman and Petroleum Supply Company for various sums; that in 1934 he sold all his interest to Goldman for $1,000 and Goldman waived any claim he might have for bills incurred; that he recalled signing some kind of an agreement assigning his interest to Goldman but that he was unable to find the document and that later Goldman brought him papers which he signed. In that case it was held that the evidence was sufficient to permit parol testimony of the lost document.

In the instant case appellant contends that the finding of a lost deed is not supported by substantial evidence. We do not agree with this contention. Goldman testified that he gave the Whiston quitclaim deed to Nick Gerard, who took it over to Abe Marks; that he did not know what happened to it afterward; that he had looked among his papers to see if he could find it; that he and Mr. Heard, who had approved the document, spent two hours going through Heard's records and were unable to locate it; that Heard tried to find out something from the files of Abe Marks but could not find the files.

[2] Section 1937 of the Code of Civil Procedure provides that an original writing must be produced and proved except as provided in sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Whether there has been a satisfactory accounting of the document is primarily a question for the trial court and, as is said in Hausen v. Goldman, supra, 124 Cal.App.2d at page 30, 267 P.2d at page 855:

> "The rule is established in California that the sufficiency of the preliminary proof of the loss of a document before testimony as to its contents is received is addressed to the sound discretion of the trial judge (Citation.), and that the determination of the trial judge that substantial evidence has been introduced to show the loss or destruction of the original document will not be disturbed by an appellate court, in the absence of a showing that the proof of loss or destruction was manifestly insufficient (Citations.)"

[3] We conclude that the evidence herein was sufficient to permit oral testimony of the execution and contents of the quitclaim deed from Whiston to Goldman before the bankruptcy proceedings of March 15, 1934, were filed by Whiston. Furthermore, it appears from the record that testimony in this connection was admitted without objection in the trial court. Since the trial court determined that Whiston transferred whatever interest he had in the royalty involved prior to the bankruptcy, it follows that the trustee in bankruptcy did not acquire such interest.

In view of what we have heretofore said, it is not necessary to pass upon the question whether there was substantial evidence to support the finding of laches and the bar of the statute of limitations.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

159 Cal.App.2d 622

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alexander L. PIASCIK and William H. Weese, Defendants,

Alexander L. Piascik, Appellant.

Cr. 1138.

District Court of Appeal, Fourth District, California.

April 22, 1958.

Hearing Denied June 17, 1958.

Defendant was convicted of violating the fictitious check statute. The Superior Court of San Bernardino County entered judgment of conviction, and defendant appealed therefrom and from order denying new trial. The District Court of Appeal, Griffin, J., held that evidence raised question for jury as to whether the checks filled in by defendant were the same ones cashed by accomplice and whether the defendant aided and abetted in the commission of the crime.

Affirmed.

1. False Pretenses ⇐51

In prosecution for violation of fictitious check statute, evidence raised question for jury as to whether the checks filled in by defendant were the ones cashed by accomplice and whether defendant aided and abetted in the commission of the crime. West's Ann.Pen.Code, §§ 31, 476, 971, 972.

2. Criminal Law ⇐511(1)

In prosecution for violation of fictitious check statute, the testimony of accomplice was sufficiently corroborated. West's Ann. Pen.Code, § 476.

3. Criminal Law ⇐741(5)

In criminal prosecution where accomplice testifies, the weight to be given to the corroborative evidence is for the jury.

4. Criminal Law ⇐507(4)

One who under direction of officer of law or on his own initiative and without criminal intent feigns complicity in a crime merely to detect the perpetrator with a view to prosecution is not an accomplice in the crime charged.

5. Criminal Law ⇐369(2)

In prosecution for violation of fictitious check statute, evidence that false drivers' licenses were manufactured for the purpose of, and were in fact being used for, identification in the check passing scheme was admissible. West's Ann.Pen.Code, § 476.

6. Criminal Law ⇐395

Where officers followed defendant, knowing that he was engaged in the falsification of operators' licenses and was concerting with another in their preparation and in the preparation of checks to be issued and passed, and officers obtained this information from informant and they had a right to rely upon it, and officers were invited by tenant to enter and search room into which defendant went and the defendant's jacket was found to contain some of the evidence of which the officers had knowledge, and the defendant apparently gave a false report as to how he obtained it, the evidence secured from the jacket was not illegally obtained and was properly received in evidence.

Lionel Richman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant Alexander Piascik was charged with defendant William H. Weese with violating section 476 of the Penal Code (fictitious checks). Count one involved a check for $108.91, dated January 20, 1956, and cashed in San Bernardino County. It was purportedly signed by one George C. Coates, a fictitiously named person, and was given to one Tolles, of the "Food Bank Market". It was drawn on the Bank of America in San Bernardino. Count two involved a similar check in the same amount delivered to one Gorian, of "Paul's Market". Count three was similar

and the check was cashed by the "Mount Vernon Highway Store". It was further charged that appellant had suffered a prior conviction of robbery and burglary and served separate prison terms in San Quentin. He pleaded not guilty as to each count and admitted the prior convictions. A jury trial resulted in a conviction of appellant Piascik on all three counts and a not guilty verdict as to defendant Weese. After denial of a motion for new trial Piascik appealed from the order and judgment claiming (1) That the evidence was insufficient to support the judgment; (2) No corroboration of the testimony of the accomplice; (3) Erroneous instruction; (4) Evidence improperly admitted as to other offenses; and (5) That certain evidence was improperly admitted which was obtained by illegal search and seizure.

The salient facts show that about December 17, 1955, one Briggs, a bellman at a hotel in Los Angeles, and who also operates a portrait studio, met appellant at a bar in that city. After some conversation, appellant asked him if he (Briggs) could photograph an application for a driver's license and make up a California driver's license from it. Briggs told appellant he would let him know. Briggs immediately called the Los Angeles police, told them about the request of appellant. They gave him certain instructions and told him to make up the driver's license as requested by appellant. For some time thereafter the police kept appellant under quite constant surveillance. About January 16, 1956, a person who identified himself as appellant telephoned to Briggs and asked to meet him at "Major's Cafe" in Los Angeles, and said he would need a straight pen and black India ink. Briggs informed the police about this request and told them the address. They went there and parked near by. Briggs there met appellant and defendant Weese, the operator of the premises. Apparently the pen brought by Briggs was not satisfactory to appellant so he and one Johnson, an ex-convict, left to obtain another one. They returned and appellant asked Briggs to wait at the bar until he could get the material ready for him. Appellant and Johnson went to a back room and later came out, placed the material in Briggs' car, with the remark not to touch it "because it would smudge". It was a negative of a California driver's license and bore the signature of a "Francis W. Heney" and No. "B.9167483". On instruction from the police, Briggs copied it and delivered it to appellant for the agreed price of $15. Later, Briggs prepared others for appellant, who paid him for them.

On January 20th, a check made payable to "Francis W. Heney" was received from Johnson and cashed by Tolles at the "Food Bank Market". The check was endorsed "Francis W. Heney" and signed "George C. Coates" as maker. Other checks mentioned in the information were similarly passed. One contained the number B.9167-483, as the identification of the operator's license presented by Johnson. Other similar checks which were cashed were received in evidence. On February 10, 1956, Briggs again called the officers and they saw appellant obtain additional driver's licenses Briggs had prepared for appellant for the sum of $30. The officers followed appellant to a room on Seventh Street. They knocked at the door and one Ross opened it. After identifying themselves they asked if they could enter and search the premises. The answer was "Yes, you can look at anything in this room". Appellant was seated on a couch. He was asked to take everything out of his pockets. He did so. In a pocket of a jacket belonging to appellant, found lying on a chair, was an envelope containing four California operator's licenses which were sealed in an envelope. Appellant said he found this envelope near some restaurant. At the trial he testified Briggs gave it to him. It was established that George C. Coates was a fictitiously named person and there were no bank accounts in his name nor that of the maker in the bank on which they were drawn.

Johnson testified at the trial that he was introduced to appellant by defendant Weese; that they went into a back room

at Weese's place and appellant took with him a bundle of blank checks he secured from his car and started to type out some checks, showing the date and name; that appellant used a check protector to fill in the amount, and he and appellant stamped the checks "Insured"; that Johnson signed the name "Francis W. Heney" on a plain chauffeur's license and also placed his thumb print on it; that the name "George C. Coates" already appeared on at least five of the checks as maker; that there were about 20 checks written for exactly $108.91, and several others; that he cashed at least three of the checks in San Bernadino county and later cashed seven the next night; that he then returned and gave the money he obtained on them to Weese's wife; that subsequently he and appellant got into an argument over the "split" of the money.

Appellant testified when he first met Briggs, Briggs told him he had connections with the Motor Vehicle Department and could obtain operators' licenses; that he purchased four to six driver's licenses from Briggs and that he then resold them, including one to Johnson; that he met Johnson about January, 1956, but had not seen him since; that from Christmas, 1955, to February, 1956, appellant's right arm was in a sling from an injury and the sling was never removed during that period; that he typed nothing, signed no checks, had never seen them, and he was not guilty of the crime charged. There was evidence that appellant did not have his right arm in a sling at the time he was apparently typing out the driver's licenses and stamping the checks. The officers corroborated Briggs' story about reporting appellant's request for photographs of operators' licenses, and testified they were stationed in cars near Major's cafe at the time Johnson said appellant used a typewriter in the back room. They said they saw appellant and Briggs enter the place and that later Johnson and appellant left in a car; that they followed them and they later returned to the cafe; that when stationed near there they subsequently saw appellant and Johnson walk out; that Johnson was carrying a portable typewriter; that he put it in a car which appellant drove away; that Johnson returned to the cafe; that several "undercover" police cars had followed appellant on many occasions and saw him, together with Johnson and others; and that following them was the result of information furnished by Briggs.

Handwriting experts testified that certain exhibits in evidence were in the handwriting of appellant. Witnesses who cashed the checks here involved identified Johnson as the one who presented them. They stated he endorsed the name "Francis W. Heney" on them, exhibited an operator's license issued to such a named person, and that they cashed the checks which were later returned by the named bank unhonored.

[1] As to the first claim on appeal, it is argued that although the evidence might reasonably show that appellant assisted in forging operators' licenses and selling them, there was no evidence that he actually signed, endorsed or passed the checks as charged; that although there was evidence he did type and stamp some blank checks there was no evidence that the checks actually passed were the ones he typed and stamped. We see no merit to this argument. Section 476 of the Penal Code makes it a crime to attempt to or to make, pass, utter or publish, with intent to defraud, a check, knowing it to be fictitious. From the facts related it is clear that the jury was justified in believing these elements had been established and that the checks filled in by appellant were the same ones cashed by Johnson and that appellant aided and abetted in the commission of the crimes charged. Secs. 31, 971 and 972, Penal Code; People v. Gutkowsky, 100 Cal.App. 2d 635, 224 P.2d 95; In re Lamey, 85 Cal. App.2d 284, 288, 193 P.2d 66.

[2, 3] As to the second claim, the testimony of the accomplice Johnson was sufficiently corroborated. People v. Griffin, 98 Cal.App.2d 1, 28, 219 P.2d 519; People v. Channell, 107 Cal.App.2d 192, 196, 236 P.2d

654; People v. Payton, 36 Cal.App.2d 41, 52, 96 P.2d 991; People v. Temple, 102 Cal.App.2d 270, 277, 227 P.2d 500. The weight to be given to the corroborative evidence was for the jury. People v. Trujillo, 32 Cal.2d 105, 112, 194 P.2d 681.

[4] As to the third claim, it is the rule that one who, under the direction of an officer of the law or on his own initiative, and without criminal intent, feigns complicity in a crime merely to detect the perpetrator with a view to prosecution, is not an accomplice in the crime charged. People v. Griffin, supra, 98 Cal.App.2d at page 22, 219 P.2d at page 532. The claim that the evidence showed Briggs to be an accomplice or that it was a question of fact to be determined by the jury was not sufficiently established so as to prevent the trial judge from giving the instruction complained of, i. e., that Briggs was not an accomplice. Even assuming he was, there was other competent evidence corrborating his testimony. No prejudicial error appears.

[5] As to the fourth claim that evidence of other crimes, forgery and sale of operators' licenses, were not admissible under the evidence here produced, we see no merit. The evidence clearly shows the false drivers' licenses were manufactured for the purpose of, and were in fact being used for, identification in a check-passing scheme. This evidence was clearly admissible. People v. Kynette, 15 Cal.2d 731, 746, 104 P.2d 794.

[6] As to the fifth complaint, the evidence secured from the appellant's jacket, when appellant was found in the room, was properly received in evidence. It was not illegally obtained. The officers followed appellant, knowing he was engaged in the falsification of operators' licenses, and was concerting with Johnson in their preparation, and in the preparation of checks to be issued and passed. They obtained this information from the informant Briggs and they had a right to rely upon it. They were invited to enter and search the room by the tenant. Appellant's jacket was found to contain some of the evidence of which the officers had knowledge, and apparently appellant gave a false report as to how he obtained it. No objections were made at the time as to the admissibility of such evidence on the ground that it was illegally obtained. There is no showing that, as a matter of fact, the officers did not have a search warrant at the time appellant was arrested. Under these circumstances there was no legitimate reason for applying the exclusionary rule. People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Beard, 46 Cal. 2d 278, 280, 294 P.2d 29; People v. Mann, 148 Cal.App.2d 851, 854, 307 P.2d 684.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



159 Cal.App.2d 543

Irving KING and Thelma King, Plaintiffs and Respondents,

v.

George E. GOLDBERG et al., Defendants, George E. Goldberg, Appellant.

Civ. 23022.

District Court of Appeal, Second District, Division 2, California.

April 18, 1958.

Proceeding on motion to dismiss appeal from judgment of the Superior Court, Los Angeles County, Thomas P. O'Donnell, J. The District Court of Appeal, Ashburn, J., held that where action for wrongful eviction was based on a complaint containing two counts and a judgment was entered on count one in favor of plaintiff but a new trial on issue of damages as to count two was ordered, there was no appealable final judgment.

Appeal dismissed.

1. Action ⇐53(2)
Appeal and Error ⇐80(6)

Where both counts of complaint sought relief based on wrongful eviction of tenant, there was a splitting of a single cause of action and in determining whether there had been a final judgment entered, both counts would be considered as a single cause of action.

2. Appeal and Error ⇐80(6)

Where tenants brought action for wrongful eviction based on complaint containing two counts and judgment was entered on count one in favor of tenants but a new trial was ordered on issue of damages only as to count two, there was no appealable final judgment.

3. Appeal and Error ⇐803

Statute providing that dismissal of appeal is in effect an affirmance of judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal, is designed to preserve right to a new appeal from judgment or order subjected to dismissal. West's Ann. Code Civ.Proc. § 955.

4. Appeal and Error ⇐803

Where an attempt to appeal from a judgment which was not final was dismissed, rulings sought to be canvassed on abortive appeal could be reviewed on appeal from judgment entered after final determination of cause. West's Ann.Code Civ. Proc. § 955.

5. Appeal and Error ⇐1231

Where an appellant attempted to appeal from a judgment of the Superior Court which was not final, upon dismissal of appeal matter of appellant's exoneration of his stay bond on appeal was for the Superior Court. West's Ann.Code Civ. Proc. § 942.

Low & Stone, Beverly Hills, and Albert G. Bergman, Los Angeles, for appellant.

Buchalter, Nemer, Coyle & Cooper, Los Angeles, Leon Savitch and Joseph Weissman, Los Angeles, of counsel, for respondents.

ASHBURN, Justice.

Motion to dismiss appeal from judgment. Plaintiffs sued defendant Goldberg and five other defendants in a four-count complaint upon causes of action growing out of alleged wrongful eviction of plaintiffs from certain premises which they held as lessees. By the time the jury's verdict was rendered the cause had been narrowed, by orders not challenged herein, to the first two counts of the complaint, to proceed against defendant Goldberg only.

The first count sought recovery of a $40,000 deposit made by plaintiffs' predecessor as security for the rents, and the second prayed for damages for wrongful eviction. The trial judge directed a verdict for plaintiffs upon the first count and the jury rendered verdict thereon in said sum of $40,000. Upon the second count the jury found for plaintiffs and awarded actual damages of $95,000 and exemplary damages in the sum of $5,000. The clerk entered judgment in the same form.

Upon motion for new trial the judge conditionally denied same as to the first count, the condition was duly performed by plaintiffs and counsel agree that the denial of new trial as to that count thereupon became effective (36 Cal.Jur.2d § 175, p. 392). As to the second count the court granted the motion for new trial upon the sole issue of damages, expressly declaring the evidence to be insufficient to sustain the verdict.

Thereupon the defendant appealed from the judgment. No attempt was made to appeal from the order granting a partial new trial. The case has not been retried. Respondents move to dismiss upon the ground that there is no final judgment from which an appeal will lie.

[1] Preliminarily it is to be noted that both counts of the complaint seek relief based upon wrongful eviction of the tenant, and to that extent there was a splitting of a single cause of action. The trial judge has found in effect that defendant is liable upon both counts and the

only issue thrown open for retrial is that of the amount of damages.

[2] In this aspect of the case, considering the two counts as stating a single cause of action, the case is governed by Universal Film Mfg. Co. v. Kerrigan, 47 Cal.App. 255, 190 P. 475. The trial court granted a new trial upon the issue of damages and denied it as to all other issues. Defendant undertook to appeal "from the whole of the said judgment, except the part and portion thereof vacated by the order of the said court in granting in part defendant's motion for a new trial," etc. The court of its own motion dismissed the appeal because of absence of an appealable judgment, saying in part (47 Cal.App. at page 256, 190 P. at page 475): "The order for retrial of the issue as to amount of damages, necessarily set aside the judgment. This is an action at law, wherein the judgment is single and indivisible, for it consists of only the one order that the plaintiff recover from the defendant so much money. Taking out that recovery, nothing effective as a judgment remains in existence." 47 Cal.App. at page 257, 190 P. at page 475: "But it is a necessary incident to the finality of the order, to the extent that it provided for a new trial, that the whole judgment was set aside, because the specified issue could not be tried after judgment and while the judgment remained in force.

"It is true that certain findings of fact have been left undisturbed. When the issue selected for retrial has been tried, and findings thereon have been made, and a new judgment entered, the appeal, if any be taken, will come as an appeal from that judgment, and may include a review of the entire record."

In dismissing an appeal taken under circumstances similar to those at bar the Supreme Court said, in Mather v. Mather, 5 Cal.2d 617, 618, 55 P.2d 1174: "It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments. It is at once apparent that no *final* judgment was entered in the action until March 14, 1935. The judgment of January 4, 1935, was not a final judgment and is not appealable under the terms of section 963 of the Code of Civil Procedure, or otherwise."

The Universal Film rule, supra, applies equally to a complaint which states several different causes of action in as many separate counts. The basic principle is that there can be but one judgment between the same parties in a single action.

Bank of America v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357, 360: "These arguments are all predicated upon a fundamental fallacy. They assume that there can be a piecemeal disposition of the several counts of a complaint. They assume, when there is more than one count in a complaint, and a demurrer is interposed and sustained, and a judgment of dismissal entered, that there are as many separate judgments as there are counts in the complaint. That is not the law. There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains."

Greenfield v. Mather, 14 Cal.2d 228, 233, 93 P.2d 100, 103. Referring to Mather v. Mather, supra, the court said: "The above recital of proceedings had in the prior action demonstrates the error of the trial court's conclusion in the present cause that the judgment of March 14, 1935, was a final judgment. Obviously that judgment was in no better position than the judgment of January 4th. It disposed of the first two counts of the complaint, whereas the latter judgment disposed of the third count thereof. The reasoning which this court employed in determining the character of the one judgment (Mather v. Mather, supra) is equally applicable to fix the character of the other.

"The fact that the judgment of March 14th was the second judgment to be entered did not cloak it with finality because it did

not purport to embrace a final disposition of the entire cause. By express terms it was confined to only counts one and two, and erroneously failed to include a recital with respect to the disposition of count three. It did not affect count three. The appeal from the purported judgment on that count was pending; that purported judgment, being void, was in effect no judgment. Therefore, if count 3 in fact stated a cause of action, that cause remained pending in the trial court after the entry of the judgment on counts 1 and 2."

Murphy v. Fong Shuck, 151 Cal.App.2d 64, 311 P.2d 80. The complaint in this case consisted of twelve counts. Nonsuit was granted as to all but three of them. The clerk's minute order granting nonsuits made no mention of the other three counts and the judgment which was rendered upon the latter after trial by jury did not refer to the nonsuits. On Motion to dismiss an appeal from the order granting nonsuits because there was no final and appealable judgment, the court said, 151 Cal.App.2d at page 69, 311 P.2d at page 83: "The document entitled 'Judgment' and filed July 13, 1955, is not a final judgment. It did not purport to embrace a final disposition of the entire cause. By its express terms, it was confined to the three counts that had been submitted to the jury. It erroneously failed to include a recital with respect to the disposition of the other counts as to which nonsuits had been granted. Being so expressly confined to mere recitals of the jury action upon the three counts submitted to the jury and not purporting to make disposition of the counts that had been subject to nonsuit, it cannot be held to have affected those counts." 151 Cal.App.2d at page 70, 311 P.2d at page 84: "What we have said concerning the purported 'Judgment' following the jury verdicts applies to the order granting nonsuit as entered in the clerk's minute book, for it, too, does not purport to be a final judgment nor did it end the suit in the court in which it was entered." 151 Cal.App.2d at page 71, 311 P.2d at page 84: "Basic to every count in the complaint was the charge of breach of contract, and the gravamen of that charge was the failure to live up to the wage scale. Such a case cannot be determined in the manner here attempted. Neither the nonsuit orders nor the jury verdicts recited in the 'Judgment' can be considered as final judgments. To do so would permit piecemeal disposition of the action, with multiple appeals, in violation of the rule of final judgment on appeal as expressed in the statute. For the reasons given, we hold there has been no final judgment in this action." To the same effect, see, Bank of America v. Lamb Finance Co., 145 Cal.App.2d 702, 715, 303 P.2d 86; Vallera v. Vallera, 64 Cal.App.2d 266, 270, 148 P.2d 694; 3 Cal.Jur.2d § 40, p. 455.

[3, 4] The cited authorities require a holding that there is no appealable judgment in the case at bar.

Appellant requests that in case of dismissal of the appeal same be made without prejudice pursuant to § 955, Code of Civil Procedure,[1] "so that Appellant will not be prejudiced and will be permitted to file an appeal at the appropriate time." The section is not applicable; it is designed to preserve the right to a new appeal from the judgment or order subjected to dismissal,—in this case a judgment which is not final. It follows as a matter of course that the rulings sought to be canvassed upon this abortive appeal may be reviewed upon appeal from the judgment entered after final determination of the cause. Schlyen v. Schlyen, 102 Cal.App.2d 742, 743, 228 P.2d 55; Schlyen v. Schlyen, 43 Cal.2d 361, 367, 273 P.2d 897; David v. Goodman, 89 Cal.App.2d 162, 170–171, 200 P.2d 568; Squire's Department Store, Inc., v. Dudum, 115 Cal.App.2d 320, 331, 252 P.2d 418. The judgment entered after retrial of the issue of damages should be in such form as to dis-

1. Code Civ.Proc. § 955: "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."

pose of all issues on both counts of the complaint.

[5] Appellant also asks that this court, in event of dismissal, order an exoneration of his $42,000 stay bond on appeal. That is a matter for the superior court. We have no such bond here. We assume it was given pursuant to § 942, Code of Civil Procedure, and covers costs incident to the dismissal of the appeal.

Appeal dismissed.

FOX, P. J., and HERNDON, J., concur.



STOCKTON THEATRES, Inc., a corporation, Plaintiff and Appellant,

v.

Emil PALERMO and Forrest E. Macomber, Defendants and Respondents.*

Civ. 9312.

District Court of Appeal, Third District, California.

April 18, 1958.

Rehearing Denied May 2, 1958.

Hearing Granted June 17, 1958.

Action for restitution. From an order of the Superior Court, San Joaquin County, George F. Buck, J., disallowing as an item of cost on appeal the premium paid on a corporate surety bond filed to continue in force an attachment pending appeal the plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that evidence that although judgment debtor withdrew large sums of money out of his bank account in California and placed money in bank safety deposit box in Nevada and thereafter carried his bank accounts in his brother's name to avoid attachment, owned unencumbered realty in a value in excess of $100,000 upon which judgment was a lien was sufficient to support findings that it was unnecessary to file a corporate surety bond for preservation of attachment on appeal, and hence trial court properly disallowed as item of cost on appeal the premium paid on corporate surety bond filed to continue in force attachment pending appeal.

Affirmed.

Peek, J., dissented.

* Opinion vacated 333 P.2d 10.

1. Costs ⇐169

The premiums on any surety bond, including one for undertaking on attachment, may be recovered as costs unless trial court determines as a question of fact, that bond was unnecessary. West's Ann.Code Civ. Proc. § 1035.

2. Costs ⇐264

Evidence that although judgment debtor withdrew large sums of money out of his bank account in California and placed money in bank safety deposit box in Nevada and thereafter carried his bank accounts in his brother's name to avoid attachment, he owned unencumbered realty in a value in excess of $100,000 upon which judgment was a lien was sufficient to support findings that it was unnecessary to file a corporate surety bond for preservation of attachment on appeal, and hence trial court properly disallowed as item of cost on appeal the premium paid on corporate surety bond filed to continue in force attachment pending appeal. West's Ann.Code Civ. Proc. §§ 946, 1035.

3. Costs ⇐207

Where claim is made for disbursement, the necessity for which is doubtful, and the item is properly challenged by motion to tax costs, burden is on claimant to establish necessity for disbursement. West's Ann. Code Civ.Proc. §§ 946, 1035.

4. Appeal and Error ⇐984(1)
Costs ⇐12

The allowance of a disbursement which is properly challenged by motion to tax costs is within discretion of trial court, and if no abuse of discretion is shown, action of trial court will not be disturbed. West's Ann.Code Civ.Proc. §§ 946, 1035.

Freed & Freed, San Francisco, for appellant.

Smith & Zeller, Stockton, for respondents.

WARNE, Justice pro tem.

This is an appeal from an order disallowing as an item of cost on appeal the premium paid on a corporate surety bond filed to continue in force an attachment pending appeal.

In this action for restitution, the appellant, Stockton Theatres, prayed for judgment in the sum of $130,000 and caused an attachment to be levied on the respondent Palermo's bank accounts and real property owned by him. Stockton Theatres received judgment in the sum of $13,658.75. Both parties appealed from the judgment. Stockton Theatres claimed on appeal that it was entitled to $116,341.25 additional and in accordance with the provisions of Section 946 of the Code of Civil Procedure concurrently filed a bond in double that amount to preserve the attachment during the pendency of the appeal. The bond premiums amounted to a total sum of $6,980.49. When the remittitur came down, Stockton Theatres filed its memorandum of costs and disbursement on appeal. This memorandum included the amount of $6,980.49 for the premium on the bond to preserve the attachment on appeal as an item of cost. Palermo objected to the inclusion of the bond premium as an item of cost. The court granted Palermo's motion to tax costs on appeal as to this item on the ground that Section 1035 of the Code of Civil Procedure did not apply to costs on appeal. On appeal, the order was reversed and the trial court directed "to determine the necessity for the bond required to preserve the attachment pending appeal, and, if it determined that such bond was necessary, allow the amount of the premium paid." Stockton Theatres, Inc., v. Palermo, 47 Cal.2d 469, 478–479, 304 P.2d 7, 12. Pursuant to the Supreme Court's directive, the trial court, after taking evidence, determined it was unnecessary to file the corporate surety bond for the preservation of the attachment on appeal and ordered that the $6,980.49, costs of premiums, be stricken from the cost bill.

Stockton Theatres contends that it was legally necessary that a bond in double the amount of the debt claimed by it be filed in order to preserve the attachment on appeal, since Section 946 of the Code of Civil Procedure in part provides:

> "* * * An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained."

[1–4] However, the fact that an undertaking was required to preserve the attachment on appeal does not mean that, as a matter of law, the surety bond filed herein was necessary within the meaning of said Section 1035 of the Code of Civil Procedure. If it were, the Supreme Court certainly would have so held instead of remanding the case to the trial court for determination of the necessity of the bond. We think it clear that under the ruling of the Supreme Court in the instant case, Section 1035 of the Code of Civil Procedure must be construed as providing that the premiums on any surety bond, including one for an undertaking on attachment, may be recovered as costs unless the trial court determines, as a question of fact, that the bond was unnecessary. In the instant matter the trial court has determined that question and found that "it was unnecessary to file the corporate surety bond herein for the preservation of the attachment on appeal." While the evidence shows that Palermo withdrew large sums of money out of his bank accounts in this state and placed the money in a bank safety deposit box in Reno, Nevada, and thereafter carried his bank accounts in his brother's name to avoid attachment, it also shows that he owned unencumbered real property of a value in excess of $100,000 upon which the

Stockton Theatres judgment was a lien. We believe this latter evidence is sufficient to support the findings. The trial court presumably found such security to be ample. The appellant was not required to file his surety bond but might have filed a personal bond for which no premium would have been required. Christenson v. Cudahy Packing Co., 84 Cal.App. 237, 239, 257 P. 906. Further, as stated in Stenzor v. Leon, 130 Cal.App.2d 729, 735, 279 P.2d 802, 806:

> "* * * It is well settled that where a claim is made for a disbursement the necessity for which is doubtful, and the item is properly challenged by motion to tax costs, the burden is on the claimant to establish necessity for the disbursement; its allowance is within the discretion of the trial court and if no abuse of discretion is shown the action of the trial court will not be disturbed. [Citing cases.]"

While the evidence is such that the trial court could have arrived at a different conclusion it does not necessarily follow that the court abused its discretion.

No other points require discussion.

The order is affirmed.

VAN DYKE, P. J., concurs.

PEEK, Justice.

I dissent. I can attach no meaning to section 1035 other than precisely what it says, that the costs allowed to the prevailing party "* * * shall include the premium on any surety bond * * * unless the court determines that the bond was unnecessary." Nor can I attach any meaning to section 946 of the same code other than what it says, that "* * * an appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant * * *" as therein provided. Although I know of no case in this state wherein the word "unnecessary" has been defined, our courts have held that its converse, the word "necessary" may mean "* * * something which in order to accomplish a given object cannot be dispensed with * * *". Westphal v. Westphal, 122 Cal.App. 379, 382, 10 P.2d 119, 120. Thus, in the present case for the plaintiff to accomplish the object of its attachment, to maintain the security for the judgment it had obtained, it was necessary for it, under the mandatory provisions of section 946, to execute and file an undertaking. And since the bond was necessary, how then can it be said to have been unnecessary?

The majority, while noting the provisions of sections 946 and 1035, holds that it does not follow that a bond was required, otherwise "* * * the Supreme Court certainly would have so held instead of remanding the case to the trial court for determination of the necessity of the bond."

It is difficult for me to attribute such meaning to the words used by the Supreme Court in that opinion. Rather I take it to mean that in view of the somewhat unique wording of the exceptive clause of section 1035, all the Supreme Court was saying was that by reason of that clause the trial court was compelled to specifically find if the proceeding came within that class of case wherein a bond was not required to maintain the status quo as provided in section 946, and hence for that reason a bond would be unnecessary. Illustrative of such a case would be an appeal from a judgment quieting title wherein a bond is not required as distinguished from the present one where a bond is specifically required under section 946 to maintain the attachment. I am convinced that to give to the word "unnecessary" a meaning so broad as to include all cases and thereby give to the trial court the discretionary hindsight to conclude otherwise in a case coming squarely within the mandatory provisions of section 946 is to defeat the very purpose of section 1035.

The practical effect of the majority opinion is to say to the attorney and his client although section 946 compels you to file a bond in a proper case, nevertheless you do so at your peril since at some future date a judge may determine that *necessary* means *unnecessary*. It is true, as the majority says, a litigant may file a personal bond for

which no premium is required. But how many persons in the first place could qualify in an action where the demand was comparable to that sought by plaintiff herein, and secondly, even if qualified persons could be found, how many would be willing to do so?

The judgment which plaintiff recovered in the original proceeding (see Stockton Theatres v. Palermo, 121 Cal.App.2d 616, 264 P.2d 74) was only one-tenth of the amount which it sought. There can be little question that under the facts disclosed therein plaintiff had every reason to believe that it was entitled to a substantially greater recovery. Its judgment lien against defendants' property was somewhat in excess of $13,000, but it had no lien for the additional sum of approximately $30,000 which was allowed by this court on appeal. Furthermore during the course of the present appeal Palermo could have disposed of his real property and thereby thwarted any attempt by plaintiff to collect the full amount of its judgment. Even in the absence of any activity on the part of Palermo the property could have been destroyed through various means. In light of such possibilities and the admitted activities of Palermo in placing all possible assets beyond the reach of plaintiff, certainly its apprehensions and the necessity for a bond were more than adequately substantiated. Surely the Legislature had no intent in adopting section 1035 to place a litigant in such an impossible situation. Nor can I bring myself to the conclusion that such is the meaning of the Supreme Court decision.

However, even if the majority be correct in its holding that the portion of section 1035 here in issue casts upon the trial court the discretionary power to determine in any given case, irrespective of the provisions of section 946, as a factual question, the necessity of an undertaking to continue the attachment in force pending the appeal, the determination by the trial court herein should not be upheld. Palermo admittedly removed $27,000 from a checking account in one Stockton bank and $10,000 from a safe deposit box in another and placed the entire amount in a safe deposit box in a Reno, Nevada, bank. He was most vague as to what was ultimately done with these funds. He further testified he opened a commercial account, as well as a savings account, in the name of an incompetent brother. Except for the testimony that at one time the checking account held as much as $4,000, there was no evidence as to what transactions went through this account. Palermo gave no testimony concerning the savings account, but an officer of the bank testified that the largest balance at any one time in this account was approximately $15,000. It was Palermo's further testimony that the building, which was obviously a one-purpose building, had a value of from $100,000 to $110,000 when this action was instituted in 1948; however, it was appraised at $33,000 at the time of his father's death in 1941; that the residence had a value of $10,000 in 1951, and although it had increased in value, he sold the same in 1955 for the identical amount. Additionally it should be noted that in the previous case (121 Cal.App.2d 616, 264 P.2d 74) it appeared that Palermo had sold all of the equipment in the theater to one Rowan and had rented the same back for $25 per month.

If the bond premium was not necessary as a matter of law (as I believe it was) and hence a proper and allowable item of costs under section 1035, but to the contrary its necessity as the majority holds was a question of fact for determination by the trial court, then it would be my further conclusion that under the facts as presented to the trial court, it cannot be said that a bond was unnecessary and hence the judgment should be reversed.

Rehearing denied: PEEK, J., dissenting.

159 Cal.App.2d 566

Ben W. SIMMONS and Mary E. Simmons, Plaintiffs and Appellants,

v.

BANK OF AMERICA, N. T. & S. A., a corporation, Defendant and Respondent.

Civ. 5640.

District Court of Appeal, Fourth District, California.

April 18, 1958.

Rehearing Denied May 12, 1958.

Hearing Denied June 17, 1958.

Action against escrow holder for failure to record chattel mortgage. From judgment of the Superior Court of Kern County, Norman F. Main, J., in favor of defendant after sustaining a demurrer without leave to amend, plaintiff appealed. The District Court of Appeal, Griffin, J., held that where written escrow agreement (unsigned by escrow holder), which expressly provided that escrow holder should be liable only for gross negligence or willful misconduct, was pleaded in its entirety, allegations of facts showing gross negligence or willful misconduct would be necessary to state cause of action for breach of written contract, for breach of alleged oral contract or for tort.

Affirmed.

1. Escrows ⇐14(1)

Where escrow agreement, providing that escrow holder should be liable only for gross negligence or willful misconduct, was pleaded in its entirety, in action predicated upon escrow holder's failure to record chattel mortgage, it would have to be so considered.

2. Limitation of Actions ⇐46(6)

Cause of action against escrow holder for failing to record chattel mortgage, if any, arose at time of negligent act, misconduct or alleged breach. West's Ann. Code Civ.Proc. §§ 337, subd. 1, 339, subd. 1.

3. Pleading ⇐252(1)

Pleaded waiver, destructive of cause of action, could not be avoided by omitting allegations with regard thereto in amended complaint.

4. Escrows ⇐14(1)

Where written escrow agreement (unsigned by escrow holder), which expressly provided that escrow holder should be liable only for gross negligence or willful misconduct, was pleaded in its entirety, allegations of facts showing gross negligence or willful misconduct would be necessary to state cause of action for breach of written contract, for breach of alleged oral contract, or for tort.

5. Escrows ⇐14(1)

Complaint against escrow holder insufficiently alleged cause of action predicated upon gross negligence or willful failure to record mortgage. West's Ann.Code Civ.Proc. § 338, subd. 4.

Vizzard, Baker & Sullivan, Jere Sullivan, Bakersfield, for appellants.

Samuel B. Stewart, George Chadwick, Jr., and Eldon C. Parr, San Francisco, for respondent.

GRIFFIN, Justice.

It is alleged in plaintiffs' amended complaint that on April 14, 1953, defendant bank, as escrow agent, plaintiffs, as mortgagees and vendors, and Lloyd A. Underwood and wife, as mortgagors and vendees, entered into a sale and chattel mortgage transaction denominated "Bulk Sale Escrow Instructions" (A copy of the written instructions are attached to and made a part of the amended complaint); that the chattel mortgage referred to was duly executed and plaintiffs and vendees duly complied with the terms of the escrow; that by its terms (paragraph 4) defendant bank agreed to record the chattel mortgage but failed to do so (Apparently defendant turned over to plaintiffs the unrecorded mortgage, together with the note, at the close of escrow); that it was not until November 10, 1954, plaintiffs discovered it had not been recorded; and that plaintiffs recorded it on November 10, 1954. The Underwoods, the vendees, were adjudicated bankrupt on February 7, 1955, and the

referee determined that the chattel mortgage was not then a lien against the property; that vendees had paid plaintiffs $1,800 in principal and interest on the note for $9,661, leaving a balance of $8,546.61; that plaintiffs received $685.85 from the trustee in bankruptcy on November 22, 1955, as a result of their filed claim; that it was necessary to employ the services of attorneys to represent plaintiffs in said bankruptcy proceeding; that $800 was paid for this purpose; that due to the failure of said bank to record said chattel mortgage, as provided in said escrow agreement, plaintiffs lost said property to the bankrupt estate in June, 1955, and accordingly were damaged in the sum of $8,660.76.

As a second cause of action they incorporated certain paragraphs of the first cause of action and alleged that on November 10, 1954, plaintiffs first discovered defendant had negligently and wilfully failed to record said mortgage and sought damages in the amount set forth.

The third cause of action pleaded, with more particularity, claimed gross negligence and wilful misconduct in not recording said mortgage; that such gross negligence and wilful misconduct constituted actual or constructive fraud or mistake and consisted of defendant counselling with plaintiffs in reference to the legal transaction and giving erroneous advice; in practicing law without a license (a misdemeanor) and in not recording said mortgage; that this fact was not discovered until November 10, 1954; and that plaintiffs were damaged thereby in the sum of $8,660.76.

Defendant demurred to this amended complaint on the grounds it did not state sufficient facts to constitute a cause of action and that the causes of action did not accrue within two years next preceding the filing of the original complaint, it being filed on September 26, 1956. The demurrer was sustained as to all claimed causes of action without leave to amend.

On this appeal from the judgment plaintiffs argue that the first cause of action was an action on a written contract and that section 337, subdivision 1 of the Code of Civil Procedure (4 years) applied or that it was a breach of an oral contract and that the time did not run under the two-year provision of section 339, subdivision 1 of the Code of Civil Procedure until the discovery of said breach. The written escrow agreement was not signed by defendant's escrow agent, although it was typewritten by him showing "Cordier" as Escrow Officer. It was directed to the defendant Bank of America National Trust and Savings Association. It contained the following wording:

> "In consideration of your acting as escrow holder herein, it is agreed that you shall in no case or event be liable for the failure of any of the conditions of this escrow or damage caused by the exercise of your discretion in any particular manner, or for any other reason, except gross negligence or willful misconduct with reference to the said escrow * * *"
>
> "It then provided for the execution of a bill of sale of stock in trade, etc. of a bakery business in Bakersfield; that the Underwoods would hand it a promissory note for $9,661.00 and chattel mortgage "* * * all of which you are authorized and instructed to accept, hold and dispose of as follows:
>
> "1. Record the notice (s) * * *
>
> "3. Hold the Bill of Sale, cash deposited * * * until Tuesday, the 28th day of April, 1953 * * *
>
> "4. At the expiration of said time * * * deliver said Bill of Sale * * * to the vendee * * * deliver to Vendor * * * the note secured by the Chattel Mortgage * * * *Record the Chattel Mortgage,* if any, in the Office of the County Recorder * * *"

The escrow agreement is signed only by the Simmons and Underwoods.

Plaintiffs contend that although the written escrow instructions were only signed by the parties indicated, the bank became bound by this written agreement and that an action was maintainable thereon against it on the theory of breach of agreement to record the mortgage, or at least it was a factual question whether it was intended thereby to bind the bank in the fulfillment of its obligations thereunder, it having accepted the benefits of it, citing such authority as Minton v. Mitchell, 89 Cal.App. 361, 370, 265 P. 271; Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 802, 164 P. 792; California Jewelry Co. v. Provident Loan Association, 6 Cal.App.2d 506, 510, 45 P.2d 271; and Weiner v. Mullaney, 59 Cal.App.2d 620, 634, 140 P.2d 704.

[1–4] Under the theory that it was an executed written agreement of the bank to record the chattel mortgage, such action would not be barred by the two-year period of limitation pleaded in the demurrer. But if this agreement signed by plaintiffs was binding on defendant in this respect it was equally binding on the same parties in respect to the waiver of damages for any negligence on the part of the bank arising out of such agreement, except gross negligence or wilful misconduct. Washer v. Bank of America, 21 Cal.2d 822, 829, 136 P.2d 297, 155 A.L.R. 1338; Bashford v. A. Levy & J. Zentner Co., 123 Cal.App.2d 204, 11 P.2d 51; Alphonzo E. Bell Corporation v. Bell View Oil Syndicate, 46 Cal.App. 2d 684, 116 P.2d 786. The pleadings do not show sufficient facts to bring it within this exception. The agreement is pleaded in its entirety and must be so considered. Therefore, no actionable cause of action is there stated upon which plaintiffs could recover and no factual question remained for the trier of fact. The cause of action, if any, arose at the time of the negligent act, misconduct or alleged breach. Wood v. Currey, 57 Cal. 208; Lattin v. Gillette, 95 Cal. 317, 30 P. 545; Howard v. Security Title Insurance & Guarantee Co., 20 Cal.App.2d 226, 66 P.2d 1247; Shumaker v. Rippy, 138 Cal.App.2d 815, 292 P.2d 536. The escrow was closed within the thirty days provided.

If plaintiffs relied upon the breach of an oral contract they would be met with the same conclusion and waiver alleged. This bar or waiver, pleaded by plaintiffs in their verified complaint, which is destructive of the cause of action, could not be avoided by omitting these allegations in a further amendment. Gaglione v. Coolidge, 134 Cal.App.2d 518, 286 P.2d 568. In Werner v. Knoll, 89 Cal.App.2d 474, 201 P.2d 45, it was held that contracts seeking to relieve individuals from the results of their own ordinary negligence are not invalid as contravening public policy under Civil Code, § 1668. See also Barkett v. Brucato, 122 Cal.App.2d 264, 275, 264 P.2d 978; Stephens v. Southern Pacific Co., 109 Cal. 86, 95, 41 P. 783, 29 L.R.A. 751, 50 Am.St. Rep. 17.

In 39 Cal.Jur.2d p. 195, sec. 134, it is said: "A general demurrer is proper where there is apparent on the face of the complaint a defect or defense that will defeat the plaintiff's present right to recover, in whole or in part." Here, plaintiffs pleaded in their verified amended complaint and as part of their alleged cause of action the written agreement signed by plaintiffs which contained a complete defense to any cause of action by plaintiffs against defendants for "any * * * reason" except gross negligence or wilful misconduct in "reference to said escrow". The only duty of defendant to record said chattel mortgage arose out of the escrow agreement. Any action for breach of that duty or alleged negligence in connection therewith would be subject to the defense therein provided. Apparently, from the record, it was upon this theory that the trial court, in reference to the original complaint, sustained the demurrer as to the first cause of action with the right to amend. This agreement was again pleaded in the amended complaint. Under the circumstances, the demurrer was properly sustained to this alleged cause of action, without leave to amend.

[5] The second cause of action merely pleads negligence of defendant in wilfully failing to record said chattel mortgage and that the cause of action based thereon did not arise until plaintiffs discovered that a loss resulted by reason of such negligence. In pleading this cause of action plaintiffs incorporate the allegations in respect to the first cause of action, including the escrow agreement mentioned. This claimed cause of action did arise out of a breach of the terms of said escrow agreement. The allegations do not justify the conclusion of the pleader that the claimed negligence of defendant in connection with this escrow amounted to a wilful failure to record the mortgage. Therefore, the same result must be reached as was held in respect to the first cause of action.

The third cause of action likewise incorporates the allegations of the first cause of action, including the escrow agreement, and concludes that by reason thereof and the facts stated defendant was guilty of gross negligence and wilful misconduct; that gross negligent representations amount to constructive fraud under section 338, subdivision 4 of the Code of Civil Procedure, and Neet v. Holmes, 25 Cal.2d 447, 467, 154 P.2d 854; and Scott v. Delta Land & Water Co., 57 Cal.App. 320, 207 P. 389; and that accordingly the three-year statute of limitations did not run until the date of its discovery by the plaintiffs.

From the transaction we conclude that there was no sufficient allegation of gross negligence or wilful misconduct amounting to grossly negligent representations such as would constitute constructive fraud and remove the cause of action from the operation of the waiver of liability agreed to by plaintiffs. From these conclusions it will be unnecessary to consider the question of the statute of limitations and the method by which it was pleaded.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

159 Cal.App.2d 527

Margie WILLIAMS, Plaintiff and Appellant,

v.

GENERAL ELECTRIC CREDIT CORPORATION, a New York Corporation, and Marvin Hughes, Defendants and Respondents.

Civ. 22838.

District Court of Appeal, Second District, Division 1, California.

April 18, 1958.

Hearing Denied June 17, 1958.

Action by conditional buyer of a television set for damages caused by alleged trespass of a credit adjuster of the conditional seller in entering the home of a buyer in order to repossess a television set after a default in payments. Judgment for the seller in the Superior Court of Los Angeles County, C. A. Paulsen, J., and the buyer appeals. The District Court of Appeal, White, P. J., held that the failure to give an instruction on an implied permission from the language of the conditional sales contract for the purpose of repossessing the television set was not prejudicial where if such an instruction had been given the same result probably would have been reached by the jury.

Judgment affirmed.

1. Trespass ⇐25

One with permission of the resident to enter his home is not a "trespasser".

See publication Words and Phrases, for other judicial constructions and definitions of "Trespasser".

2. Evidence ⇐5(2)

It is common knowledge that televisions are kept in homes, and almost never could any person take possession of a television set without entering into a home.

3. Licenses ⇐46

Under a conditional sales contract that the sellers could take possession of the television sold, buyer intended in event of her failure to make the agreed payments to permit the sellers' entry into her home

for that purpose whenever her home could be entered without force, violence or breach of the peace.

4. Searches and Seizures ⇐7(26)

A person's right to be free from searches and seizures in his home is subject to his own agreement.

5. Searches and Seizures ⇐7(26)

Where a conditional buyer of a television set agreed that the seller could take possession thereof in event of the buyer's failure to make the agreement payments, entry into the home by credit adjuster of the seller to repossess the set on default in payments was not a violation of the buyer's right to be free from searches and seizures. U.S.C.A.Const. Amend. 4; West's Ann. Const. art. 1, § 19.

6. Licenses ⇐51

Where conditional sales agreement authorized seller to take possession of television set sold on default in payment, permission implied from the language of the agreement to enter the home of the buyer was for the sole purpose of repossessing the television set, and any entrance into portions of the buyer's home beyond those reasonably entered in order to repossess the set were not warranted by the buyer's implied permission. West's Ann.Civ.Code, § 1643.

7. Appeal and Error ⇐1170(9)

In action by conditional buyer for damages caused by alleged trespass of conditional seller in attempting to repossess a television set sold for default in payments, failure to give an instruction that permission implied from the language of conditional sales agreement to enter home of the buyer was for sole purpose of repossessing set and that any entrance into portions of buyer's home beyond those reasonably entered in order to repossess set were not warranted by buyer's implied permission was not prejudicial, where the same result probably would have been reached by the jury if instruction had been given. West's Ann.Const. art. 6, § 4½.

Haskell Shapiro, Los Angeles, for appellant.

Betts, Ely & Loomis, Ingall W. Bull, Jr., Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff appeals from the judgment entered upon the verdict against her and for the defendants, General Electric Credit Corporation, a New York corporation, and its agent Marvin Hughes, in her action for compensatory and punitive damages caused by an alleged trespass.

Plaintiff and her husband purchased a Packard Bell television set through the defendant General Electric Credit Corporation and agreed to pay for it in monthly instalments of $12.25. Six payments were made, each being late from six days to six weeks and the last payment on February 6, 1956 covering the instalment due December 21, 1955. On May 29, 1956, there were five payments totaling $61.25 past due.

The printed agreement provided:

"Undersigned Seller hereby sells and undersigned Buyer hereby purchases subject to the terms and conditions hereunder and on the reverse side hereof set forth, the merchandise described below. * * *

"The merchandise shall remain personal property and title thereto shall not pass to Buyer until the Time Balance has been fully paid in cash. * * * If Buyer shall default in payment * * * the entire unpaid balance shall at once become due and payable, at the option of the Seller, or Seller may, without notice or demand, by process of law or otherwise, take possession of said equipment, removing so much thereof as Seller in its sole discretion may determine, and retain all monies paid for the reasonable use of said Equipment. Seller may thereupon sell said Equipment at public or private sale and apply the proceeds after deducting expenses and liens, to the payment of said indebtedness, and pay the surplus, if any, to Buyer. In case of a deficiency Buyer will pay the same at once. All rights and remedies

herein contained are cumulative and not alternative.

Time is of the essence hereof. * * *"

Respondent Marvin Hughes, a credit adjuster of the respondent General Electric Credit Corporation, about 9:30 a. m. on May 29, 1956, came to appellant's home. There he met Frank Sam, a neighborhood grocer, who told appellant that no one answered the door bell, that he had been ringing it for about five minutes, that he had sold appellant groceries and accepted her check for $10, and had been informed by the Bank that the check was worthless, that before he came to the house he had phoned several times and received no answer on the telephone. Hughes then rang the bell. He heard it ring and no one answered. He then pounded on the front door. Still nobody answered. A neighbor came out on the upstairs porch and asked what the trouble was. He told Hughes and Sam that Mrs. Williams still lived there and he had heard her there earlier in the morning. Hughes and Sam then looked around the rear of the premises, pounded on the back door for about two minutes, and there was no reply. Hughes then turned the knob and opened the back door. Both men called out, "Is anybody home". There was no reply. From the opened door Hughes could see across the small room into which the back door opened into the adjoining living room, where there was a television set with its back toward him. Hughes and Sam entered the house, called again "Anybody home", and again there was no answer. Hughes checked the TV Serial Number and Sam looked in the kitchen for the groceries he had sold to the appellant. Hughes found the telephone in the small hallway between the living room and bedrooms and started to telephone his company for instructions. Appellant then made her presence known. She had been in bed in one of the bedrooms. She put on a robe and met them in her living room. Hughes then told her who he was and that he had come to collect for the television or to repossess it. She recognized Sam and exchanged $10 in cash for the $10 check which she had given him for groceries.

She then ordered Hughes to leave. Hughes was not discourteous, did not touch or threaten appellant. She told him to leave and telephoned the police that he was there. He left.

As to the detailed sequence of events just before and after appellant made her presence known, there is considerable conflict. Appellant testified that she was first awakened by the opening and closing of the kitchen cupboards. She thought it was her brother and paid no attention. Then she became aware of some one in the room in which she was sleeping, that she heard him, and remained very still in fear, took the covers off her head and saw defendant Hughes' back as he was leaving the room; that the door to the room in which she was sleeping was closed, someone banged on the door, opened it and said, "Are you a man"; that she did not answer, and when she uncovered her head she saw Hughes' back as he was leaving the room; that she got up, put on her little girl's robe and went into the hall where Hughes was using the telephone on the hall floor; that he was kneeling and she had to step over his legs to get by and go to the other bedroom to get her own robe.

Hughes testified that he was in a kneeling position in the hall using the telephone, when appellant rushed up to him, took the telephone from him, and told him he could not use it. That he then waited in the living room until appellant came in there.

Sam testified that he and Hughes went together into the hall so that Hughes could use the telephone. That Hughes was kneeling or squatting down to use the phone and he was standing near him, when appellant called out from the bedroom "shut the door"; that he shut the door and he and Hughes went into the living room to wait for appellant. Both Hughes and Sam testified that they entered and left appellant's premises together.

Appellant urges that the court committed error in giving the following instructions:

1. "You are instructed that where goods are sold to a possessor of land by a conditional sale, as the television set here involved was sold to plaintiff, there is inferred as one of the terms of the conditional sale, the consent of said possessor of land to an entry on his or her premises for the purpose of retaking the goods upon default in the instalment payments. The sale having been made in reliance on said consent to enter, there is created *a privilege to enter and remove the goods* irrespective of any subsequent withdrawal of the consent by the possessor of the land."

2. "You are hereby instructed that under the conditional sale contract under which plaintiff contracted to purchase the television set, that defendant General Electric Credit Corporation and its agent, Mr. Hughes, had the right to take possession of the television set after the default in payments, *and this included the right to enter the premises of plaintiff for the purpose of retaking possession,* provided that said entry was at a reasonable time and made in a reasonable manner, and further provided that said entry was peaceable." (Emphasis added.)

In appellant's opening brief, the issue is stated as follows: "Where the vendee in a conditional sales contract has agreed that upon default of payment the vendor may take possession of the chattel without process of law, is the vendor thereby privileged, without vendee's further consent, to open the outside door of the vendee's private dwelling by turning the knob and to enter said dwelling?"

Only one California decision pertinent to the issue is cited by appellant. It is Van Dorn v. Couch, 21 Cal.App.2d Supp. 749, 64 P.2d 1197. That decision, 21 Cal.App. 2d Supp. at pages 754–755, 64 P.2d at page 1200, held an apartment house manager who had entered a furnished apartment during the plaintiff's absence and removed personal property therefrom to secure the payment of rent was not guilty of trespass because "The statutory provision (C.C.1861a) giving the landlord a lien on the tenant's property, 'with the right to possession,' by implication authorizes the landlord to enter the tenant's apartment for the purpose of assuming that possession, provided he can do so without a breach of the peace".

The facts of the Van Dorn case, supra, differ only slightly from those now engaging our attention. In the Van Dorn case the plaintiff was out of her apartment at the time of the entry, while in the instant action the plaintiff was at home in bed and failed to answer the telephone, front and back doorbells, knocking on the front and back doors, and the calls of two men from outside and inside the back door of the apartment. In the Van Dorn case, the defendant possessed and was accustomed to use a pass key to enter the apartment for various purposes, while in the instant action the defendant Hughes turned the knob and entered the back door which was not locked. In the Van Dorn case, the defendant landlord had a statutory lien with the right to the possession of the personal property to be found in the plaintiff's apartment, which was held by implication to authorize the landlord to enter the apartment for the purpose of assuming the possession to which he was entitled. In the instant action, the defendant General Electric Credit Corporation had a conditional sales agreement by which it retained title and plaintiff was given possession of the television set with the understanding and agreement that, upon plaintiff's default, defendant "may, without notice or demand, by process of law or otherwise, take possession of said Equipment, removing so much thereof as Seller in its sole discretion may determine * * * ." In the instant action defendant Hughes did not repossess the television set and there is evidence from which it might have been found that he did not confine his movements to the portion of the apartment appropriate for that purpose.

[1] One who has the permission of the resident to enter his home is not a tres-

passer. See People v. Avas, 144 Cal.App.2d 91, 99, 300 P.2d 695. It is urged by respondents that the language of the agreement constitutes permission for defendants to enter plaintiff's home, and that the instructions cited by appellant as error and hereinbefore quoted are a fair statement of the law of California as shown by the Van Dorn decision, supra, and Silverstin v. Kohler & Chase, 181 Cal. 51, 183 P. 451, 9 A.L.R. 1177.

The case of Silverstin v. Kohler & Chase, supra, involved the repossession of a piano obtained by plaintiffs from defendants' assignor on conditional sales contract. Plaintiffs' action sought the value of the piano on the theory that it belonged to them and had been converted by defendants, and punitive and actual damages because of personal injuries resulting from the forcible repossession of the piano. The judgment was for $350, the value of the piano, and $150 actual damages for personal injuries. On appeal the judgment was modified and affirmed as to the $150 for personal injuries only, the court stating, 181 Cal. at page 54, 183 P. at page 452, that upon the purchasers' default the defendants "had a right, under the terms of the contract, to retake possession" and "were only justified in taking possession of the property without process of law, where such possession could be secured peaceably". While it appears that the piano was taken from the home of the plaintiffs, no trespass is discussed.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties". Civil Code, § 1643.

[2, 3] The provision of the agreement in the instant action that "Seller may * * by process of law or otherwise, take possession of said equipment" is presumed to have been intended by the parties thereto to mean what it says. It is a matter of common knowledge that televisions are kept in homes and almost never could any person "take possession" of a television set without entry into a home. From plaintiff's agreement that defendants may take possession of said equipment we must therefore assume that she intended, in the event of her failure to make the agreed payments, to permit defendants' entry into her home for that purpose, whenever her home could be entered without force, violence or breach of the peace, none of which is involved in the instant action.

[4, 5] Appellant urges that in the instant case respondent Hughes' entry into her home was a violation of the Fourth Amendment to the Constitution of the United States and a violation of Article I, section 19, of the Constitution of California. This argument ignores appellant's implied consent to such entry. A person's right to be free from searches and seizures in his home is subject to his own agreement. People v. Davis, 48 Cal.2d 241, 249, 309 P.2d 1 and cases there cited.

[6, 7] We are convinced that the instructions cited on the instant appeal as grounds for reversal were actually a fair statement of the law, as far as they went. The evidence in the instant action, however, is that respondent Hughes, after proceeding into plaintiff's home from its outside door to the television set and checking the serial number on said television, instead of taking possession of said television and leaving by the way he had come, searched for and started to use her telephone; and for that purpose he walked further into plaintiff's home, entering the hall beyond the living room, and possibly entering one or more of the bedrooms. The jury might well have been instructed that the permission implied from the language of the conditional sale contract was for the sole purpose of repossessing the television set and that any entrance into portions of plaintiff's home beyond those reasonably entered in order to repossess the television were not warranted by plaintiff's implied permission. No such instruction was requested at the trial, and its absence is not mentioned in the briefs on appeal. From the record as a whole it appears that, had such an instruction been given, the same result probably would have been reached by the jury, and

that there has been no miscarriage of justice in the instant action. Unless there appears to have been a miscarriage of justice, a judgment should not be reversed. Cal.Const., Art. 6, sec. 4½.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



159 Cal.App.2d 572

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Larry Eugene DAY, Defendant and Appellant.

Cr. 1343.

District Court of Appeal, Fourth District, California.

April 18, 1958.

Defendant was convicted in the Superior Court of San Diego County, Philip Smith, J., of giving false name and address in connection with narcotics prescription, and he appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Barnard, P. J., held that evidence sustained conviction.

Affirmed.

1. Poisons ⇐9

Evidence supported conviction of giving false name and address in connection with prescribing of a narcotic. West's Ann. Health & Safety Code, § 11170.5.

2. Criminal Law ⇐1170½(1)

In prosecution for giving false name and address in obtaining narcotic prescription, alleged error in refusing to permit impeachment of physician by showing that physician issued unusually large number of narcotics prescriptions and hence would seek to protect himself was not prejudicial where evidence of guilt was strong and physician's identification of defendant was supported by other witnesses.

3. Criminal Law ⇐1036(2)

In prosecution for giving false name and address in obtaining narcotic prescription, where no objection was made to questions on cross-examination indicating that defendant associated with known narcotic users, claim of error in such connection could not be made on appeal.

4. Criminal Law ⇐1170½(5)

In prosecution for giving false name and address in obtaining narcotic prescription, cross-examination of defendant on his association with known narcotic users was not prejudicial where defendant denied such association and officer's testimony in rebuttal was by way of impeachment.

5. Poisons ⇐9

In prosecution for giving false name and address in obtaining narcotics prescription, testimony of narcotics officer that price of particular drug was greater on black market than when purchased from druggist was admissible.

Barton C. Sheela, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 11170.5 of the Health & Safety Code in that on March 21, 1957, he gave a false name and a false address in connection with the prescribing of a narcotic. A jury found him guilty as charged, his motion for a new trial was denied, and he was sentenced to prison. He has appealed from the judgment and from an order denying his motion for a new trial. The attorney who represented him at the trial was appointed by this court to represent him on this appeal.

A practicing physician in San Diego testified that the defendant came to his office on March 21 complaining of severe headache and nausea, and that he had not been able to sleep the preceding night; that the defendant said he had been taking treatments for this headache for several years and had been using pantopon; that he diagnosed this as a migraine headache and gave the defendant a prescription for 40 pantopon tablets, each containing ⅓rd of a grain; that pantopon is a derivative of opium but "more refined"; that the defendant said his name was James C. Connor and that he lived at 2030 32nd Street in San Diego, and he wrote this name and address in the prescription; and that he made the prescription in triplicate, giving two copies to the defendant and keeping the other copy in his book. He further testified that this occurred sometime after 12:00 noon that day, or a very short time before 12:00, and that he was not positive as to the exact time.

The original prescription was introduced in evidence and it was stipulated that the name on the prescription, James C. Connor, was not the name of the defendant and that he had never lived at 2030 32nd Street. A clerk in a pharmacy testified that the defendant came in on March 21 and handed her this prescription, which she gave to the pharmacist; that she told the defendant that it would take about five minutes to fill the prescription; and that the defendant waited for it. In reply to a question as to whether she could recall the approximate time this occurred she replied "I would say it was middle afternoon. I am not sure, but I would say it was."

The pharmacist testified that he saw the defendant in this pharmacy on March 21; that this clerk handed him this prescription and he placed his mark on it; that he filled the prescription and handed the narcotic to the defendant, keeping the original prescription and a duplicate; and that three or four days later he identified a picture of the defendant. When asked what time it was when he delivered the narcotic to the defendant he replied "I am not sure. I believe it was in the afternoon." When asked if there was any way he could estimate the approximate time, he replied "I can't tell you for sure what time of the day he was in. I don't know."

The defendant testified that he was in San Diego on the morning of March 21 and that he left San Diego between 11:00 and 12:00 A.M. on that day; that he had never used the name or address given on this prescription; that he had never visited this doctor; that he had never been in this pharmacy; and that he did not obtain any pantopon drugs at this pharmacy on March 21 or on any other day. He also admitted two prior convictions of a felony. The owner of a motel in Gardena testified that the defendant registered at her motel on March 21; that she had ascertained from her record that he checked in at 3:00 P.M. on that day; that she wrote 3:00 P.M. on the card but had no independent recollection of seeing the defendant there at that time; and that in the normal course of business she put down the time of registration within five minutes either way. She also testified that her motel was located some 125 miles from San Diego, and that it had taken her a little bit over three hours to drive the distance that day.

The appellant contends that the court erred in refusing to allow certain cross-examination of this doctor for the purpose of developing a motive on his part to falsely identify the appellant as the person who obtained this prescription, and in refusing the appellant permission to examine and introduce into evidence the doctor's narcotic register in order to prove motive affecting that witness' credibility. It is argued that if the doctor was in the habit of negligently issuing narcotics to addicts he would have a motive to cooperate with the officers by identifying a picture shown to him by the officers as being the person to whom he had issued a narcotic prescription, rather than by identifying a person to whom he had actually issued the prescription: It is also argued that the refusal to allow him to examine and introduce into evidence the doctor's narcotic register deprived him of

a fair trial, citing Powell v. Superior Court, 48 Cal.2d 704, 312 P.2d 698; People v. Riser, 47 Cal.2d 566, 305 P.2d 1.

The doctor was asked on cross-examination how many opium derivatives he had dispensed during March, 1957. This was objected to as immaterial. Out of the presence of the jury the court asked the purpose of this question. The appellant's attorney replied that he had reason to believe that this doctor would issue narcotics to anyone who said he wanted it, and would have a motive to identify the wrong person in order to save his own skin; and that he thought he was entitled to show that this doctor had issued a great number of narcotic prescriptions and that he therefore had a motive to come in and testify to what the officers believed. The court stated that, because the defense was that this defendant was not the person who received the prescription, he would allow the doctor to be questioned as to how many prescriptions he had issued on that particular day, but nothing more. After the recess, in reply to questions, the doctor testified that he could not tell how many prescriptions he had written on March 21 without looking at his book; that he did not have the book with him; that the book was downstairs in this building; that he had given the book to the district attorney; and that he could refresh his recollection from that book. Appellant's attorney then said "I wonder if we could call for the production of that book?" The district attorney said that he had no objection to the witness going downstairs and refreshing his recollection from the book. Appellant's attorney then said he would like to see the book in court. The court stated that the book was not in court, and that the witness could refresh his memory later on by looking at the book and testify again. After ten more pages of cross-examination the appellant's attorney said he had no further questions. The court then asked "Are you both through with the doctor" and the district attorney replied "Unless he would like that other information, if he wants to go down and refresh his recollection, I have no objection." The attorney then said he would rather see the book here in court. The attorney then asked the doctor if he was shown that book that morning in court, and the doctor replied that it was not shown to him. The appellant's attorney then said: "I can't force them to bring it up here then, Your Honor, in that case."

[1, 2] It does not too clearly appear that material evidence was improperly excluded and, in any event, it does not appear that a sufficiently definite request for the production of the doctor's book was made. No subpoena had been issued and the only thing in the nature of an offer of proof was counsel's statement that he thought he was entitled to show that this doctor had issued a great number of narcotic prescriptions, more than the average for his type of practice. If it be assumed that any such evidence was improperly excluded, the question would remain whether it was sufficiently prejudicial to require a reversal. While it was held in People v. Riser, supra, that evidence in connection with certain documents was improperly excluded, it was also held that whether or not the error was prejudicial depended upon whether there was a reasonable probability that the jury would have reached a different verdict had the defendant been allowed to obtain and introduce in evidence the documents in question. It was there held that in view of the other evidence of guilt the error in this connection would not justify a reversal. In the instant case, three witnesses positively identified the appellant as the person who had acted in connection with this prescription. The evidence was amply sufficient to support the verdict if the jury believed those witnesses. The attempted proof of an alibi was not very convincing. Assuming that the appellant registered in the motel in Gardena within a few minutes of 3:00 P.M., the trip from San Diego could well have been made in considerably less than three hours. The time when the prescription was obtained was not definitely established, and it is not surprising that the three witnesses were unable, several months later, to remember the exact time.

If it be assumed that the evidence as to the number of such prescriptions issued by this doctor was admissible, and that if produced it would have been material on the question of his credibility, this was only one thing to be considered in that connection, and it would have in no way affected the credibility of the other two witnesses who positively identified the appellant as the person who had the prescription filled. Irrespective of any possible error in this connection it is not reasonably probable that the jury, in the face of the evidence as a whole, would have brought in a different verdict had this evidence been admitted.

[3, 4] It is next contended that the court erroneously admitted evidence that the appellant associated with known narcotic users. In response to questions on cross-examination the appellant stated that he had had some conversation with the officer who returned him to San Diego from Porterville. He was then asked whether during this trip he had not told this officer that most of his associates were users of narcotics, and he replied "No". Subsequently, this officer testified in rebuttal that on this trip the appellant told him "I'll admit that a lot of my friends, or most of them that I have been down there with are narcotic users." No objection was made to any of these questions and a claim of error in this connection may not now be made. People v. King, 104 Cal.App.2d 298, 231 P.2d 156; People v. Farrell, 133 Cal.App.2d 427, 284 P.2d 29. Moreover, no great prejudice resulted from the questions themselves, which brought forth a denial, and the officer's testimony in rebuttal was by way of impeachment. Under the circumstances, no reversible error appears.

[5] Finally, it is contended that the court erred in permitting the prosecution "to use an expert witness to establish motive of the defendant to commit the crime." A narcotic officer of the San Diego police department was permitted to testify that the price of the drug pantopon was greater on the black market than when purchased from a druggist. It is argued that when the perpetration of an offense is brought home to a defendant the motive is immaterial and should be excluded, and that this tended only to show a motive which would be general to all narcotic users, and not to this specific defendant. No error appears in this connection. People v. Planagan, 65 Cal.App.2d 371, 150 P.2d 927; People v. O'Brand, 92 Cal.App.2d 752, 207 P.2d 1083.

The judgment and order denying a new trial are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Plaintiff and Appellant,

v.

HO SING and Ho Lum Shee, Defendants and Respondents.*

Civ. 17545.

District Court of Appeal, First District, Division 2, California.

April 16, 1958.

Hearing Granted June 11, 1958.

Action by city and county against defendants to recover indemnity for the amount the plaintiffs were compelled to pay pedestrian for injury received when he fell over a defective skylight in a sidewalk in front of the premises owned by the defendant. Judgment sustaining demurrers in the Superior Court, City and County of San Francisco, John B. Molinari, J., and the plaintiffs appealed. The District Court of Appeal, Dooling, J., held that the city was entitled to indemnity.

Judgment reversed with instructions.

1. Municipal Corporations ⇐814

Where an adjoining property owner for exclusive benefit of its own property

* Opinion vacated 330 P.2d 802.

places in a public street or sidewalk an artificial structure and the city is compelled to pay damages to a member of the public injured thereby, the city and the property owner are jointly liable to the member, and each is directly liable for his own wrong and each may be held liable for the entire damage suffered.

2. Indemnity ⇐13(1)

Where an adjoining property owner for exclusive benefit of his own property places in a sidewalk some artificial structure and the city is compelled to pay damages to a pedestrian injured thereby, city has a right over against the landowner to be indemnified for the amount which the city is compelled to pay to the pedestrian.

3. Common Law ⇐11

In the absence of some conflict with California's constitutional or statutory law, the common law is the rule of decision in the courts of California.

4. Indemnity ⇐13(2)

Where an adjoining property owner for exclusive benefit of his own property places in a sidewalk some artificial structure, and city is compelled to pay damages to a pedestrian injured thereby, two bases of liability on landowner to indemnify the city exist in the relation between the landowner and the city, as distinguished from relation between both and injured user of street, and when courts use expression such as "primary" and "secondary" "active" and "passive" "not in pari delicto", they do so with relation between landowner and city in mind, and as indicating that landowner owes a duty to city to keep installation free from danger, while city owes no such duty to landowner.

5. Indemnity ⇐1

"Indemnity" is distinguishable from "contribution" in that the former shifts the entire loss to the one bound to indemnify. West's Ann.Code Civ.Proc. § 875(f).

See publication Words and Phrases, for other judicial constructions and definitions of "Indemnity" and "Contribution".

6. Courts ⇐97(1)

A duty rests on the California courts to determine California law.

7. Indemnity ⇐3

Where an adjoining property owner for his own exclusive benefit places in a sidewalk some artificial structure and the city pays damages to a pedestrian injured thereby, allowing city indemnity against the property owner is not improper as defeating the purpose of the public liability act. West's Ann.Gov.Code, § 53051.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

DOOLING, Justice.

Plaintiff City and County of San Francisco brought this action against the defendants to recover by way of indemnity the amount which plaintiff had been compelled to pay to a pedestrian for injuries received by him when he tripped and fell over a defective skylight in the sidewalk in front of premises owned by the defendants. The skylight furnished light to a sub-sidewalk basement in said premises and had been originally constructed by defendants' predecessor in title. The pedestrian recovered judgment for $15,000 against both plaintiff and defendants, and plaintiff paid $5,000 and defendants $10,000 in satisfaction of such judgment.

The trial court sustained a demurrer without leave to amend to a complaint alleging these facts and plaintiff appeals from the judgment which followed.

The question which was expressly left open in Peters v. City and County of San Francisco, 41 Cal.2d 419, 430–431, 260 P.2d 55, is here squarely presented: Where an adjoining property owner for the exclusive benefit of his own property places in a public street or sidewalk some artificial structure and a city is compelled to pay compensation in damages to a member of the pub-

lic injured thereby may the city recover the amount so paid from the property owner by way of indemnity?

[1] We need go no further than the Peters case, above cited, for the rule that in such circumstances the city and the property owner are jointly liable to a member of the public injured as a result of negligence in the construction or maintenance of such a structure. The property owner is liable because "the dangerous condition * * * was created by him or his predecessors in title for the benefit of the private property to serve a use apart from the ordinary use for which sidewalks are designed." Peters v. City and County of San Francisco, supra, 41 Cal.2d at page 428, 260 P.2d at page 61. "[T]he liability of the city depends upon a showing that it had notice of the dangerous condition and failed to remedy it within a reasonable time." Id. "With regard to persons who are injured by such a condition, the city and the landowner are joint or concurrent tort-feasors; each is directly liable for his own wrong and each may be held liable for the entire damage suffered." Id., 41 Cal.2d at page 429, 260 P.2d at page 61.

[2, 3] As between the landowner and the city, however, the courts throughout the United States are in agreement that the city has a right over against the landowner to be indemnified by him for the amount which it is compelled to pay to the party injured by the dangerous or defective condition of the work installed in the street by the landowner for the benefit of his own property. Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 16 S.Ct. 564, 40 L.Ed. 712; Chicago City v. Robbins, 2 Black 418, 67 U.S. 418, 17 L.Ed. 298; Robbins v. Chicago City, 4 Wall. 657, 71 U.S. 657, 18 L.Ed. 427; Inhabitants of Lowell v. Boston and Lowell Railroad Corporation, 23 Pick. (Mass.) 24; Village of Port Jervis v. First National Bank, 96 N.Y. 550; Trustees of Village of Canandaigua v. Foster, 156 N.Y. 354, 50 N.E. 971, 41 L.R.A. 554; City of New York v. Corn, 133 App.Div. 1, 117 N.Y.S. 514; Town of Waterbury v. Waterbury Traction Co., 74 Conn. 152, 50 A. 3; City of Corsicana v. Tobin, 23 Tex.Civ.App. 492, 57 S.W. 319; City of Des Moines v. Des Moines Water Co., 188 Iowa 24, 175 N.W. 821; City of Pawtucket v. Bray, 20 R.I. 17, 37 A. 1; McDaneld v. Logi, 143 Ill. 487, 32 N.E. 423; Wickwire v. Town of Angola, 4 Ind.App. 253, 30 N.E. 917; City of Topeka v. Central Sash & Door Co., 97 Kan. 49, 154 P. 232; City of Louisville v. Nicholls, 158 Ky. 516, 165 S.W. 660; City of Wabasha v. Southworth, 54 Minn. 79, 55 N.W. 818; City of Omaha v. Philadelphia Mortgage & Trust Co., 88 Neb. 519, 129 N.W. 996; Baltimore & O. R. Co. v. Howard County Com'rs, 111 Md. 176, 73 A. 656, 40 L.R.A., N.S., 1172; Hart Tp. v. Noret, 191 Mich. 427, 158 N.W. 17, L.R.A.1916F, 83; Kilroy v. City of St. Louis, 242 Mo. 79, 145 S.W. 769; City of Springfield v. Clement, 205 Mo.App. 114, 225 S.W. 120; Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070; City of Astoria v. Astoria & C. R. Co., 67 Or. 538, 136 P. 645, 49 L.R.A.,N.S., 404; Hillyer v. City of East Cleveland, 155 Ohio St. 552, 99 N.E.2d 772; Byne v. Mayor, etc., of City of Americus, 6 Ga.App. 48, 64 S.E. 285; City of Seattle v. Puget Sound Imp. Co., 47 Wash. 22, 91 P. 255, 12 L.R.A., N.S., 949; Salt Lake City v. Schubach, 108 Utah 266, 159 P.2d 149, 160 A.L.R. 809; Prosser on Torts, 2d ed., § 46, p. 250; 1 Harper & James, The Law of Torts, § 10.2, p. 724; 1 Cooley on Torts, 4th ed., § 89, p. 296; 19 McQuillin, Municipal Corporations, 3rd ed., § 54.19, pp. 91–94; 4 Dillon, Municipal Corporations, 5th ed., § 1728, p. 3032; 42 C.J.S. Indemnity §§ 22, 27 b, pp. 598, 609. The question has not been passed upon in California (as we have noted it was expressly left open in Peters v. City and County of San Francisco, supra, 41 Cal.2d 419, 260 P.2d 55), but with such unanimity of decision in the other courts of this country we must accept it as the prevailing rule at common law (Callet v. Alioto, 210 Cal. 65, 68–69, 290 P. 438; Strong v. Shatto, 45 Cal.App. 29, 33, 187 P. 159). In the absence of some conflict with our constitutional or statutory law the common law is the rule of decision in the courts of this state. Civ-

il Code § 22.2; Cole v. Rush, 45 Cal.2d 345, 355, 289 P.2d 450, 54 A.L.R.2d 1137.

We might well end the discussion here with the conclusion that the common law is so well settled, as indicated by the uniform holding of the courts of other jurisdictions on the subject, that it is our duty to follow the common law principle as so consistently declared.

Respondents, however, argue strenuously that because, as they contend, these decisions are based upon reasoning inconsistent with the decisions of our courts this uniform current of decision should not be followed in this state. Some of the decisions, as respondents point out, say that the liability of the landowner is primary and that of the city only secondary but, say respondents, in Peters, supra, 41 Cal.2d 419, 260 P.2d 55, our Supreme Court held that both are primarily liable to the injured party. But it was pointed out by the Supreme Court in that case that "[t]he opinions in those cases, however, recognize that the city has an independent duty to correct dangerous conditions of which it has notice, regardless of who created them, and the term 'secondary' is not used therein to indicate that the city is merely liable vicariously for the negligence of the landowner. Instead, it appears that the term is used as a means of indicating that, in the jurisdiction where the case arose, a city has a right to be indemnified by a landowner in the event it is compelled to pay damages resulting from a dangerous condition he created or maintained and for which he would be liable to pedestrians." 41 Cal.2d at page 430, 260 P.2d at page 62. The court added at pages 430–431 of 41 Cal.2d, at page 62 of 260 P.2d: "Even if such a right to contribution or indemnity were recognized, however, it would not mean, as asserted by the city, that its liability to pedestrians is merely dependent or derivative from that of the landowner and not joint or direct. As noted above, the rule against contribution between joint tortfeasors admits of some exceptions, and a right of indemnification may arise as a result of contract or equitable considerations and is not restricted to situations involving a wholly vicarious liability, such as where a master has paid a judgment for damages resulting from the voluntary act of his servant."

As pointed out by our Supreme Court in the passage just quoted the use of the words "primary" and "secondary" in these decisions is not intended by the courts to mean that *as to the injured third party* the landowner and the city are not both primarily and independently liable, but rather that *as between the landowner and the city* the landowner's duty is primary, or to put it in another fashion that the landowner owes a duty to the city as well as to the users of the street to keep the work which he has installed in the street in a safe condition. Other cases express the same idea in another manner by saying that the city and the landowner are not *in pari delicto*. (E.g., Washington Gaslight Co. v. District of Columbia, supra, 161 U.S. 316, 327–328, 16 S.Ct. 564; Inhabitants of Lowell v. Boston and Lowell Railroad Corporation, supra, 23 Pick. (Mass.) 24, 32. Here again the cases rest on the basis that while both are equally liable to the injured party, as between themselves the landowner is the more at fault in that he violates a duty laid upon him toward the city as well as to the users of the street to take proper care of the installation which he has placed in the street for his own private benefit.

The matter is clearly stated in City of Spokane v. Crane Co., 98 Wash. 49, 167 P. 63, 64 (quoted in Salt Lake City v. Schubach, supra, 159 P.2d 149, 155): "But the person who actually created or maintained for his own use the dangerous condition is, *as between the city and himself, still primarily liable* on elementary principles * * * simply because the dangerous condition was the result of his own personal negligence. *As between him and the city,* his was the active negligence, while that of the city was merely passive."

[4] The true basis of the liability on the landowner to indemnify the city is found in the relation *between the landowner*

and the city, as distinguished from the relation between both and an injured user of the street, and when the courts use the various expressions: "primary" and "secondary," "active" and "passive," "not *in pari delicto*," they do so with the relation between the landowner and the city in mind, and as indicating that the landowner owes a duty to the city to keep the installation free from danger while the city owes no such duty to the landowner; although both owe that duty to the public.

The position is made clear by those courts which point out that in making a secondary use of the street for the benefit of his own property, as distinguished from the primary use for public passage, the landowner is exercising a privilege to which he is not entitled as a legal right and acts under a license, express or implied, from the city and that an implied condition of that license is that the landowner will exercise due care for the safety of the public. Village of Port Jervis v. First Nat. Bank, supra, 96 N.Y. 550, 556–557; Chicago City v. Robbins, supra, 2 Black 418, 425, 67 U.S. 418, 425, 17 L.Ed. 298; City of Des Moines v. Des Moines Water Co., supra, 175 N.W. 821, 823, 825; Salt Lake City v. Schubach, supra, 159 P.2d 149, 152, 157; City of Omaha v. Philadelphia Mortgage & Trust Co., supra, 129 N.W. 996; City of Wabasha v. Southworth, supra, 55 N.W. 818, 819; City of Ft. Scott v. Pen Lubric Oil Co., 122 Kan. 369, 252 P. 268, 269; cf. Jessen v. Sweigert, 66 Cal. 182, 183, 4 P. 1188.

[5] We find nothing inconsistent between our decisions that one joint tort feasor may not have contribution from another joint tort feasor at common law (Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 P. 24; Dow v. Sunset Telephone & Telegraph Co., 162 Cal. 136, 121 P. 379; Adams v. White Bus Line, 184 Cal. 710, 195 P. 389) and the rule that one who makes a special use of the street for his private benefit is impliedly bound to indemnify the city for loss occasioned to it by his negligence in such private use. Indemnity is distinguishable from contribution in that the former shifts the entire loss to the one bound to indemnify (Prosser on Torts, 2d ed., § 46, p. 249) and it must, in every case, depend upon some special relation between the two tort feasors. The recently adopted contribution sections of the Code of Civil Procedure recognize the distinction, it being provided in section 875(f): "This title shall not impair any right of indemnity under existing law, and where one tort feasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."

[6] If there is anything inconsistent with this conclusion in Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., D.C., 141 F.Supp. 833, we are not bound by that decision. The duty rests on the courts of this State to determine California law. It may be added that the United States District Judge who wrote that opinion did not have before him the precise question presented to us in this case.

[7] Respondents further argue that if a city is allowed indemnity against the property owner it will defeat the purpose of the Legislature in enacting the Public Liability Act. Government Code, § 53051. We fail to see the force of this argument. The city's liability to an injured member of the public is not affected in any way by holding that the city has a right over for indemnity against the property-owner in this type of case.

We can see no valid reason to disregard the host of decisions from other jurisdictions on this subject and thereby to set this State apart as denying a right of indemnity to the city which practically all other courts in the Union have allowed.

Judgment reversed with directions to the trial court to overrule the demurrer.

KAUFMAN, P. J., and DRAPER, J., concur.

159 Cal.App.2d 365

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

ONE 1955 OLDSMOBILE HARDTOP, Serial No. 558K11477, License No. AGX 919, Defendant,

American Trust Company, Clara M. Estrada and Melvin J. Estrada, Claimants,

American Trust Company, Respondent.

Civ. 9310.

District Court of Appeal, Third District, California.

April 15, 1958.

Hearing Denied June 11, 1958.

Proceeding by the people to forfeit interest of the registered owner and the legal owner of automobile on ground that it was used for illegal transportation. From portion of a judgment of the Superior Court, San Joaquin County, R. M. Dunne, J., the plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that where there was no evidence to show that automobile conditional seller's assignee made any investigation concerning the moral responsibility, character and reputation of purchaser and investigation concerned only purchaser's financial standing or credit rating, such investigation, as matter of law, was not sufficient to constitute a reasonable investigation as required by statute, and hence assignee's interest in automobile used for transporting narcotics was forfeitable to the state.

Portion of judgment appealed from reversed.

1. Forfeitures ⇐5

An investigation into financial standing or credit rating of automobile buyer is not a sufficient investigation of the "moral responsibility, character, and reputation of the purchaser" to protect conditional vendor's assignee's interest against forfeiture because of unlawful use of automobile to transport narcotics. West's Ann.Health and Safety Code, §§ 11610 et seq., 11620.

2. Forfeitures ⇐5

Where there was no evidence to show that automobile conditional seller's assignee made any investigation concerning the moral responsibility, character and reputation of purchaser and investigation concerned only purchaser's financial standing or credit rating, such investigation, as matter of law, was not sufficient to constitute a reasonable investigation as required by statute and hence assignee's interest in automobile used for transporting narcotics was forfeitable to the state. West's Ann.Health and Safety Code, §§ 11610 et seq., 11620.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for appellant.

Brobeck, Phleger & Harrison, by Totton Heffelfinger, II, San Francisco, for respondent.

WARNE, Justice pro tem.

This proceeding was instituted by the State under Section 11610 et seq. of the Health and Safety Code to forfeit the interest of Clara M. Estrada and Melvin J. Estrada, the registered owners, and American Trust Company, the legal owner, of the defendant automobile, on the ground that said vehicle was unlawfully used to keep, deposit, conceal, convey, carry and transport narcotics (marijuana) contrary to the provisions of the Health and Safety Code, supra. Clara M. Estrada and Melvin J. Estrada filed an answer denying the charge. Their interest in the automobile was ordered forfeited to the state and they have not appealed from the judgment.

Laverone Motors had sold the automobile to Clara M. Estrada by a conditional contract of sale and on the day following the sale transferred all its interest, title and right in the contract and automobile to American Trust Company. American Trust Company answered, claiming a bona fide interest in the vehicle and alleged that its interest was created by a reasonable investigation of the moral responsibility,

character and reputation of Clara M. Estrada and without knowledge that the vehicle was being used for the purpose charged.

The trial court found that the Oldsmobile "was used to unlawfully keep, deposit, convey, carry and transport narcotics, to-wit * * * marijuana"; that such acts were done with the "knowledge of one Melvin Estrada who at said time was in possession and control of said defendant vehicle"; that at the time defendant vehicle was in his possession and control with the consent of Clara Estrada, the registered owner; "that on the date of the seizure * * * American Trust Company was the legal owner of defendant vehicle pursuant to the terms of a conditional sales contract executed by Clara M. Estrada on the 28th day of March, 1956, between the said Clara M. Estrada and Laverone Motors"; that the contract was assigned to and accepted by American Trust Company on the 29th day of March, 1956 and "that the interest of claimant American Trust Company in defendant vehicle was acquired after a reasonable investigation of the moral character, moral responsibility and moral reputation of Clara M. Estrada." The court concluded that the vehicle should be declared forfeited to the state subject to a prior lien against defendant vehicle in favor of American Trust Company. Judgment was entered accordingly. From that part of the judgment in favor of American Trust Company the state appeals.

Appellant contends that the evidence is insufficient as a matter of law to support the finding that American Trust Company made a sufficient and reasonable investigation of the moral character, responsibility, and reputation of the purchaser, Clara M. Estrada, prior to the bank's lien. We feel that there is merit in this contention.

The evidence shows that American Trust Company purchased the conditional sales contract for the sale of the defendant vehicle to Mrs. Estrada on March 29, 1956. It also shows that the only investigation made by American Trust Company prior to the purchase of the contract and the creation of the bank's interest in the automobile consisted of a review by a Mr. Horsley, a loan officer of the bank, of the bank's own records with respect to three prior loan transactions with Mrs. Estrada. These transactions consisted of an FHA loan for $61 made in June of 1951, a loan made in November, 1951 for the purchase of a TV set for $200, and the purchase by the bank of an automobile contract which was paid off in May, 1954, and that at the time that Mrs. Estrada purchased the TV set she called at the bank and was interviewed by one of the bank's loan officers in connection with the loan. Upon the subject matter Mr. Horsley testified as follows:

"Q. Mr. Horsley, prior to the time this contract was purchased from Laverone Motors, did you do any sort of an investigation of Clara Estrada? * * * A. Yes we did.

"Q. Would you describe that please. A. Well, we have had quite a bit of loan experience with Mrs. Estrada in the past. Discovered at the time the application was submitted, the American Trust Company was given as a reference, and I looked up the old file and found that we had made her three loans prior to the time of this last one, and she has been a very good loan customer of ours, and paid all of her loans in a very good manner. All of them have been given an AA rating. I also discovered at the time that she had been in the office and had been interviewed in connection with one of the loans by our Mr. Murray Warren who was making loans at that time in connection with one other purchase of a TV set.

"Q. Did you make inquiries of anybody else in this connection? A. Yes we did. We ordered a credit report from the credit bureau which was very favorable and brought out the information. * * *

"Q. Now, I show you what purports to be a credit report covering Clara Estrada. Can you tell me—did you make this, in-

cidentally. A. No, that's prepared by one of our girls at the office who communicated with the credit bureau.

"Q. Is this part of the permanent records of the American Trust Company? A. Yes, it is.

"Q. And it's made in the ordinary course of your business? A. It is. * * *

"By Mr. Strader: Q. I notice on this report labeled telephone report there is a date April 4, 1956. Is this the date on which the report was made? A. That's the date the report was given back to our credit girl by the credit bureau.

"Q. By the credit bureau? A. Yes. * * *

"Q. Now, your statement was that you relied on this credit report together with your prior experience with Clara Estrada? A. Yes.

"Q. And on that basis you made this loan, is that correct? A. That is correct. * * *

"Q. As a matter of fact then, you didn't inquire as to who was going to get the original title of this automobile, did you? A. I did not.

"Q. And as a matter of fact, you made no inquiry then concerning the moral character, reputation, of Melvin Estrada? A. Did not. * * *

"By the Court: Q. Well, when these other loans were made was there any additional investigation made of Clara Estrada? A. Yes, Your Honor.

"Q. As to her moral character or any—what was done? What do your records show? A. Our records indicate that a credit report was ordered on the first loan, which was dated May, 1951, indicating a very satisfactory credit report and AA credit rating.

"Q. Well, do you know about what was stated in the report? Is there anything stated about what her occupation was? A. Not in this report. However, Your Honor, in this here report we received it indicated that she was a widow and had income from child care in her home. I should say child care. I just presume it would be in her home."

Exhibit B is a telephone report which contains the following information: "Surname—Estrada; First Name—Clara; Date—April 4 '56; File Since—10–52; Last Check—4–56; Employment—Child Care—in home"; and so far as pertinent, "3–A–Rating".

[1] There is no evidence in the record to show that any investigation was made concerning the moral responsibility, character and reputation of the purchaser. It appears that the investigation concerned her financial standing or credit rating only. "'An investigation into the financial standing or the credit rating of the car purchaser is not sufficient—the law requires an investigation of the "moral responsibility, character, and reputation of the purchaser."'" People v. One 1952 Ford Sedan, 146 Cal.App.2d 183, 188, 303 P.2d 832, 836; People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, 548, 161 P. 2d 264. Certainly the statement on the credit report, Exhibit B, "Employment—Child Care—in home", standing alone, does not indicate a reasonable investigation.

[2] We are of the opinion that the investigation here made, as a matter of law, was not sufficient to constitute a reasonable investigation of the moral responsibility, character, and reputation of the purchaser as required by Section 11620 of the Health and Safety Code. Therefore, the finding "That the interest of claimant American Trust Company in defendant vehicle was acquired after a reasonable investigation of the moral character, moral responsibility and moral reputation of Clara M. Estrada", finds no ample support in the record.

The portion of the judgment appealed from is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

159 Cal.App.2d 595

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond S. BALTAZAR, Defendant and Appellant.

Cr. 1176.

District Court of Appeal, Fourth District, California.

April 21, 1958.

Defendant was convicted of possession of marijuana. A. D. Mitchell, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Mussell, J., held that affidavit of owner of barbershop, in which defendant worked, stating that owner knew that defendant had swept floor before arresting officers came into shop and that he saw defendant take up something from floor was contradictory to testimony given by owner at trial that he did not remember whether defendant had swept the shop the evening of his arrest, evidence in affidavit would not have been likely to cause jury to reach a different conclusion regarding guilt of defendant, who had been found to have a part of marijuana cigarette in his hand at time of his arrest, and denial of defendant's motion for new trial on ground of such newly discovered evidence was not improper.

Affirmed.

1. Poisons ⇐9

While it is essential to crime of possession of narcotics that defendant have physical or constructive possession coupled with knowledge of presence and narcotic character of substance possessed, conduct of parties, admissions or contradictory statements and explanations are frequently sufficient to show such knowing possession. West's Ann.Health & Safety Code, § 11500.

2. Poisons ⇐9

Statement of defendant who at time of his arrest had a "roach" or part of a burned marijuana cigarette in his hand, that he knew what it was and defendant's attempt to get rid of "roach" before he was placed under arrest were sufficient to establish knowing possession of narcotic. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836, subds. 1, 3.

3. Arrest ⇐63(3, 4)

A police officer may, without a warrant, arrest a person when public offense is committed or attempted in his presence or when felony has been committed and officer has reasonable cause for believing person arrested to have committed it. West's Ann. Pen.Code, § 836, subds. 1, 3.

4. Arrest ⇐63(4)

An arrest may be made by police officers acting solely on advice of a reliable, confidential informant. West's Ann.Pen. Code, § 836, subds. 1, 3.

5. Arrest ⇐63(4)

In prosecution for possession of a narcotic, evidence established that informants who informed police officer that sale of narcotics was going on in vicinity of barbershop in which defendant worked, and that defendant was selling narcotics in barbershop area were known to police officer to be reliable. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836, subds. 1, 3.

6. Criminal Law ⇐338(1)

Trial court has wide discretion in determining relevancy of evidence.

7. Poisons ⇐9

In prosecution for possession of marijuana, admission of testimony as to type of container or manner in which marijuana is kept or packaged was not an abuse of discretion. West's Ann.Health & Safety Code, § 11500.

8. Criminal Law ⇐945(1)

In prosecution for possession of marijuana by defendant who, when arrested, had part of marijuana cigarette in his hand and who claimed that he had picked up cigarette from floor of barbershop in which he worked, barbershop owner's affidavit

that he knew defendant had swept floor before officers came in and that he saw defendant pick up something from the floor was contradictory to owner's testimony given at trial that he did not remember whether defendant had swept shop on evening of his arrest, would not have been likely to cause jury to reach a different conclusion regarding guilt of defendant, and denial of motion for new trial on the basis of such newly discovered evidence was not improper. West's Ann.Health & Safety Code, § 11500.

Thorne & Bailin, Harold A. Bailin, Upland, for appellant.

Edmund G. Brown, Atty. Gen., and Carl Boronkay, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was accused in an information of the crime of possession of a narcotic, a felony, in that on or about February 27, 1957, in the County of San Bernardino he did wilfully, unlawfully and feloniously possess the narcotic cannabis sativa, also known as marijuana, in violation of section 11500 of the Health and Safety Code. The information also charged appellant with having suffered a prior felony conviction of selling a narcotic, and also a prior felony conviction of tampering with marks on certain firearms (Pen.Code, Sec. 12090). Appellant admitted the prior convictions and a jury returned a verdict finding him guilty of the crime of possession of a narcotic, as charged in the information. His motion for a new trial and application for probation were denied and he was sentenced to imprisonment in the state prison for the term prescribed by law.

On or about February 15, 1957, officer James E. Willis, assigned to the vice and narcotic division of the San Bernardino sheriff's office, received information from a reliable informant to the effect that the appellant was using narcotics and that he was selling narcotics in a barber shop where he was employed in Cucamonga. On or about February 24, 1957, this same informant again advised Willis that the sale of narcotics was going on in the vicinity of the barber shop and, on February 27, 1957, another reliable informant advised Willis and detective Alter of the San Bernardino police department that appellant was selling narcotics in the barber shop area in Cucamonga, that appellant had narcotics in his possession at that time, and that he had received a large quantity thereof from Mexico. Willis had used information furnished by these two informants on previous occasions and made several arrests based on information furnished by them.

After receiving the said information from the second informant, on February 27, 1957, Willis, accompanied by detective Shepherd of the San Bernardino sheriff's office and detective Alter of the San Bernardino police department, drove to the barber shop in Cucamonga. They arrived there about 8:00 p. m. and, after observing a man and a small boy leaving the shop, they entered the premises through the front door. Willis walked over to the appellant and said, "Hello, Raton". Appellant made no reply to this greeting and Willis then said, "Raton, I understand that you have got narcotics on you. You are under arrest." Appellant then reached to his right hand shirt pocket in a rapid manner and then put his hand "down along the side of his trousers leg." Willis grabbed appellant's hand and said, "What have you got, Raton, what do you have in your hand?" Appellant opened his hand and Willis found therein a small newspaper-wrapped parcel which contained a hand-rolled cigarette, which was partially burned. Willis asked appellant what the object was and the latter replied that it was a "roach" —part of a burned marijuana cigarette. When asked where he got it, appellant stated he had found it on the floor. Willis then said, "Well, Raton, if you found it on the floor, you must know what it was when I walked in, otherwise you wouldn't have tried to get rid of it." The appellant then said, "Yes, I knew what it was, I knew

it was my ass if I got caught, you know, I am on parole." Willis placed the "roach" in an envelope and later delivered it to a chemist who examined it microscopically and chemically and found that it consisted of the leaf and plant of cannabis sativa, more commonly known as marijuana.

Appellant testified at the trial that at the time of his arrest he was working in a barber shop in Cucamonga owned by Arthur Ayala; that when officer Willis entered the shop he (appellant) was "thumbing a piece of paper I had in my hand"; and that he had picked it up from the floor about five minutes before the officers arrived.

Arthur Ayala, the owner of the barber shop testified that Willis and two other officers came into the shop about 9:30 p. m. and that he did not see appellant pick up anything from the floor.

[1, 2] Appellant first contends that the evidence was insufficient to support a finding and judgment of guilty. He does not argue that the evidence fails to show that he had actual physical possession of marijuana but he argues that there is nothing in the evidence to support an inference that appellant had either examined or knew what the object he had in his hand contained. However, appellant stated to the officers that the object was a "roach" or part of a burned marijuana cigarette and that he knew what it was. The evidence also indicates that appellant tried to get rid of the roach before he was placed under arrest. While it is essential to the crime of possession of narcotics that defendant have physical or constructive possession coupled with knowledge of the presence and narcotic character of the substance possessed, it has been held that the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient to show such knowing possession. People v. Denne, 141 Cal.App.2d 499, 510–511, 297 P.2d 451. In People v. Tennyson, 127 Cal. App.2d 243, 246, 273 P.2d 593, 595, the court said: "Insofar as knowledge of the illegal nature of the contraband is concerned, that required element was sufficiently shown by the conduct and behavior of the appellant in attempting to secrete the narcotics. (Citations.)" In People v. Rumley, 100 Cal. App.2d 6, 8, 222 P.2d 913, 915, it is said: "The issue as to whether an accused had knowledge of the presence of the narcotic in his clothing, sleeping apartment or automobile, is one for the determination of the trial court and its finding when supported by substantial evidence will not be reversed." The evidence herein is amply sufficient to establish knowing possession of narcotic as found by the jury.

[3–5] Appellant next contends that the court committed prejudicial error in admitting evidence procured as a result of illegal search and seizure. This contention is without merit. A police officer may, without a warrant, arrest a person for a public offense committed or attempted in his presence or when a felony has been committed and the officer has reasonable cause for believing the person arrested to have committed it. Pen.Code, sec. 836, subds. 1 and 3. An arrest may be made by police officers acting solely on the advice of a reliable, confidential informant. People v. Dean, 151 Cal.App.2d 165, 167, 311 P.2d 85; People v. Hood, 150 Cal.App.2d 197, 200, 309 P.2d 856. In the instant case the evidence shows that both informants were known to Willis to be reliable. He had had previous experiences with them and the information which they had conveyed to him was sufficient to justify the arrest of appellant. In Trowbridge v. Superior Court, 144 Cal.App.2d 13, 18, 300 P.2d 222, it was held that a search and seizure following an arrest were legal and proper where the informer who was known to the policeman told him about an hour before the arrest that the defendant (describing her accurately) lived at a certain address, that it was her habit to keep marijuana in her apartment, and that a day or two previously the informer had seen marijuana in the apartment. The record in the instant case also shows that the offense charged was committed in the presence of the officers.

[6, 7] It is further argued by appellant that the court erred in failing to reject irrelevant and prejudicial testimony. The criticized testimony related to the type of container or manner in which marijuana is kept or packaged. The trial court has wide discretion in determining the relevancy of evidence. People v. MacArthur, 125 Cal.App.2d 212, 219, 270 P.2d 37. We find no prejudicial error in this connection.

[8] Finally, appellant contends that the court erred in denying his motion for a new trial. This motion was made on the grounds of newly discovered evidence and was based on an affidavit of Arthur Ayala in which he stated that while he had testified at the trial that he did not remember whether the appellant had swept the shop the evening of his arrest, he (Ayala) had been thinking it over and that he now knew that the appellant had swept the floor before the officers came in and that he saw appellant pick up something from the floor. In People v. Peyton, 47 Cal.App.2d 214, 224, 117 P.2d 683, 688, it is said that:

"The rule is well established that courts will not grant new trials under subdivision 7 of section 1181 of the Penal Code except upon clear and satisfactory showings that alleged newly discovered evidence is material, not cumulative, previously unknown to the defendant and that he is not guilty of lack of diligence in failing to produce it at the trial. It must also appear to the court that the evidence relied upon would have been likely to have caused the jury to reach a different conclusion regarding the guilt of the defendant. It is said in 8 California Jurisprudence, section 452, at page 427, in that regard:

" 'The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence.' "

In the instant case the newly discovered evidence would be contradictory to that given by the witness at the trial and it does not appear that the evidence relied upon would have been likely to have caused the jury to reach a different conclusion regarding the guilt of the defendant.

Judgment and order denying motion for new trial affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



The FLYING TIGER LINE, Inc., a Delaware corporation, Plaintiff and Respondent,

v.

The COUNTY OF LOS ANGELES and The City of Burbank, Defendants and Appellants.*

Civ. 22415.

District Court of Appeal, Second District, Division 3, California.

April 11, 1958.

Hearing Granted June 4, 1958.

Action against county and city to recover personal property taxes paid under protest. The Superior Court of Los Angeles County, Arnold Praeger, J., held that taxpayer was entitled to refund, and city and county appealed. The District Court of Appeal, Shinn, P. J., held that where county board of equalization, a fact finding body, denied reduction of assessment upon grounds that only question involved in proceeding was one of law and that law was as taxing authorities had stated it to be, and disregarded testimony of taxpayer's representatives, taxpayer

* Opinion vacated 333 P.2d 323.

was deprived of a fair hearing by the board, but that court erred in undertaking to equalize the disputed assessment.

Reversed with directions to trial court to remand matter to board for further consideration in accordance with opinion.

1. Taxation ⇐493(8)

County board of equalization is fact finding body designated to remedy an excessive assessment and, as a general rule, its findings are final and conclusive upon the facts involved in a disputed assessment, and are not subject to review by courts. West's Ann.Rev. & Tax.Code, § 1601 et seq.; West's Ann.Const. art. 13, § 9.

2. Taxation ⇐493(1)

A taxpayer must be accorded the substance as well as the form of a hearing before county board of equalization and where procedure adopted by board constitutes a denial of due process of law, the taxpayer is not limited to his administrative remedy, but may seek judicial relief. West's Ann.Rev. & Tax.Code, § 1601 et seq.; West's Ann.Const. art. 13, § 9.

3. Taxation ⇐493(7)

In action to recover personal property taxes paid under protest, evidence established that county board of equalization denied taxpayer a reduction of its assessment upon ground that only question involved in proceedings was one of law and that law was as taxing authorities had stated it to be. West's Ann.Rev. & Tax. Code, § 1601 et seq.; West's Ann.Const. art. 13, § 9.

4. Constitutional Law ⇐284(2)
Taxation ⇐486

Where county board of equalization, a fact finding body, denied taxpayer reduction of its assessment upon ground that only question involved in proceeding was one of law and that law was as taxing authorities had stated it to be, and disregarded testimony of taxpayer's representatives, taxpayer was deprived of a fair hearing by the board. West's Ann. Rev. & Tax.Code, § 1601 et seq.; West's Ann.Const. art. 13, § 9.

5. Taxation ⇐493(9)

Where county board of equalization's ruling with respect to application for reduction of allegedly excessive assessment of personal property taxes was a nullity, court should have remanded proceedings to board for further determination upon basis of evidence submitted to it, and court should not have undertaken to equalize the disputed assessment. West's Ann. Rev. & Tax.Code, § 1601 et seq.; West's Ann.Const. art. 13, § 9.

6. Taxation ⇐98

The state of home port of roaming, migratory property and state of commercial domicile of owner thereof has power to tax such property on basis of its full value unless another jurisdiction or jurisdictions have acquired power to tax.

7. Commerce ⇐72
Constitutional Law ⇐283
Taxation ⇐102

Where jurisdictions other than home port and commercial domicile of roaming migratory property have acquired power to tax on an apportioned basis, the full power of home base to tax is diminished to extent, but only to extent that such other jurisdictions have by regular, recurring physical contacts acquired power to tax, and such method of apportionment does not offend the due process or commerce clauses of the constitution.

8. Taxation ⇐488

In hearing before county board of supervisors, sitting as board of equalization, on petition for a redetermination of assessment of airline's personal property taxes, factual questions to be decided by board were whether, in their interstate and foreign operations, airplanes maintain sufficient regular business contact with other states or foreign countries to subject them to an apportioned tax therein, and, if so, board should have made its own determination with respect to proper basis of

apportionment of value as between county and other jurisdictions. West's Ann.Rev. & Tax.Code, § 1601 et seq.; West's Ann. Const. art. 13, § 9.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, Los Angeles, and Alfred Charles De Flon, Deputy County Counsel, Hollywood, for appellants.

Hill, Farrer & Burrill, by Carl A. Stutsman, Jr., Leon S. Angvire, Los Angeles, for respondent.

SHINN, Presiding Justice.

The present action is against the County of Los Angeles and the City of Burbank to recover 1953 personal property taxes paid under protest. The interests of Burbank are the same as those of the county, since the county assesses property in Burbank and collects taxes on behalf of the city. Trial was to the court, which made findings and awarded plaintiff a refund of $38,642.70. Defendants appeal from the judgment.

Plaintiff is a commercial airline chartered by the State of Delaware. Its principal place of business is in Los Angeles County, the home port of its planes and its repair terminal being located at the Lockheed Air Terminal in Burbank. During the assessment year commencing in March 1953, plaintiff operated twenty-seven C–46 aircraft in interstate commerce under a certificate issued by the Civil Aeronautics Board and according to a flight schedule approved by said board. Plaintiff also operated eleven DC–4 aircraft. Six of the latter planes were owned by the United States of America and the planes, themselves, were not taxed; the other five were owned by the airline.

The five DC–4s were primarily engaged in the transportation of passengers and freight from Travis Air Force Base, California, to Haneda Air Force Base, Tokyo, Japan, as part of the Pacific Airlift, which was instituted after the outbreak of the Korean war in 1950. Stops were made enroute at Honolulu and Wake Island, where plaintiff maintained ground facilities for servicing the planes. This operation of the Flying Tiger Line was under a contract with the United States Government and the flight schedule for the DC–4s was made up a month in advance by the Military Air Transport Service. From November 1, 1952 to May 14, 1953, the planes were present in Los Angeles County only 36.37% of the time. In addition to the airlift, the DC–4s were engaged in other foreign and domestic commerce; the foreign operations, distinct from the airlift, were undertaken after permission or exemption had been obtained from the Civil Aeronautics Board.

On the first Monday in March 1953, the Los Angeles County Assessor determined the value of plaintiff's aircraft, engines and flight equipment for the purpose of an ad valorem personal property tax; the amount of the assessment was $1,291,090. Approximately one-quarter of the total figure represented the C–46s and plaintiff's leasehold interest in the six DC–4s which were owned by the government. These were assessed on an apportioned basis, viz., at a percentage of their value equivalent to the percentage of time the planes were present in the county during the first week in March. The validity of this part of the assessment is not in dispute. The remainder of the assessment represented the five DC–4s owned by the airline. These were assessed at $985,290, their full cash value, the assessor's reason being that their operation was not scheduled by the Civil Aeronautics Board.

Plaintiff thereupon filed a petition for redetermination of the assessment with the County Board of Supervisors, sitting as a board of equalization. Rev. & Tax.Code § 1601 et seq. The airline sought a reduction of $816,190 in the assessment. Its petition alleged that the five DC–4s were improperly assessed at their full value and were taxable on the same apportioned basis as the other planes. The board con-

sidered the application at two equalization sessions held on July 13th and 21st, 1953. After hearing testimony and argument by representatives of the airline and several assessor's deputies, the board made certain immaterial adjustments in the assessment and denied the application for relief. A tax of $79,578.91 was imposed. Plaintiff paid the tax under protest and commenced the present action.

The matter was tried on a second amended complaint and the answer thereto. Plaintiff alleged in its complaint that the assessor erroneously and illegally attributed the full value of the five DC–4s to Los Angeles County for the reason that they were not being used in operations scheduled by the Civil Aeronautics Board, notwithstanding the fact that the planes were operating in interstate and foreign commerce and were present in the county only 21.5% of the time during the preceding tax year. It was also alleged that uncontradicted testimony before the Board of Supervisors showed that the planes were not permanently located in the county, that jurisdictions other than Los Angeles County had subjected them to personal property taxation, and that none of plaintiff's aircraft had previously been taxed by the county at their full value. Plaintiff alleged, further, that the assessment and the equalization of the assessment were made arbitrarily and capriciously and without regard to the constitutional principle of apportionment; that the order denying the application for relief "was not an order made by the Board in pursuance of its fact finding duty to equalize said assessment but was made pursuant to representations of the County Counsel and County Assessor that the principle of apportionment applied only to aircraft operation in interstate commerce within the United States and scheduled by C. A. B. and did not apply where the aircraft were engaged in foreign commerce under contract with and scheduled by the Air Force and in which the Civil Aeronautics Board did not have jurisdiction." There followed an allegation that "said proceeding of the Board was a pretended and not an actual equalization and the Plaintiff's assessment has never been equalized in the manner provided by law * * *, and Plaintiff has been denied its right to such equalization and has no remedy or recourse except that which may be afforded by the Courts." The answer denied the invalidity of the assessment and denied any irregularity in the equalization proceedings.

The evidence at the trial consisted of a transcript of the proceedings before the board, a stipulation of the facts heretofore stated and the further fact that between November 1, 1952 and May 14, 1953, the planes were present in Los Angeles County only 36.37% of the time. The following facts were presented to the board by representatives of the airline. In previous years, all the planes owned and operated by the airline had been assessed on an apportioned basis in Los Angeles County. The airline maintained repair facilities in various airports "from Newark to Tokyo," but major overhauls on the DC–4s were performed at the Lockheed Air Terminal in Burbank. The planes were being taxed on an apportioned basis in the States of Nebraska and Wisconsin, as well as in San Mateo County, California. According to a statistical summary prepared by the airline the planes flew, in July 1952, 39.7% of their total mileage in the Pacific Airlift, 55.5% in other foreign commerce, and 4.8% in interstate commerce. During March 1953, the mileage percentages were as follows: 94.4% in the Pacific Airlift; 2.4% in other foreign commerce and 3.2% in interstate commerce.

The court found that the five planes were present in Los Angeles County only 36.37% of the time between November 1, 1952 and May 14, 1953; the board declined and refused to consider that fact; they were being taxed at a proportion of their value by other states; they could lawfully be assessed by Los Angeles County at only 36.37% of their value; it was beyond the county's jurisdiction to assess them at their full value; the facts justifying relief from the invalid portion of the

assessment were presented to the Board of Supervisors; the board denied relief in reliance upon the assessor's representations that the principle of tax apportionment did not apply to aircraft engaged in interstate and foreign commerce whose flights were not scheduled by the Civil Aeronautics Board; plaintiff was entitled to a refund representing the amount of the tax in excess of a tax on 36.37% of the value of its planes.

[1, 2] The first question to be considered is whether plaintiff obtained a fair hearing before the Board of Supervisors. This is the crucial question in the case, for the county board of equalization is the fact-finding body designated by law to remedy an excessive assessment and, as a general rule, its findings are final and conclusive upon the facts involved in a disputed assessment, and are not subject to review by the courts. Cal.Const. Art. XIII, § 9; Los Angeles Gas & Electric Co. v. County of L. A., 162 Cal. 164, 169–170, 121 P. 384, 9 A.L.R. 1277. However, the taxpayer must be accorded the substance as well as the form of a hearing. Where the procedure adopted by the board constitutes a denial of due process of law, the taxpayer is not limited to his administrative remedy; he may seek judicial relief. Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 360–362, 153 P.2d 746, and cases cited.

As we have said, the court found that the supervisors did not make a determination as to the facts in issue, but decided the matter upon the assessor's representations that the doctrine of tax apportionment is inapplicable to aircraft engaging in unscheduled flights in interstate and foreign commerce.

It appears from the transcript of the equalization proceedings that none of the facts adduced on behalf of the airline was controverted by the deputies of the County Counsel and those of the County Assessor who were present at the hearings. Deputy Assessor Watson stated the position of the taxing authorities as follows: "We have assessed this company for five airplanes which they own because there is no consistency to the pattern; they are not on a scheduled basis." Deputy Assessor West said: "We believe that our assessment, made in the manner in which we have made it, is legal, and that the valuation is equalized with the assessments that we have made to other owners and operators of planes being used on a contract for non-scheduled flight basis." Supervisor Jessup then asked: "I'd like to ask the County Counsel here, now, is this the legal point of the argument * * *." Mr. West answered: "The issue involved, as I understand, Mr. Jessup, is whether or not these five planes have the status for taxation in Los Angeles County. * * * They are a distinct and separate operation from that scheduled airlines part of the business." Supervisor Hahn asked: "There's no quarrel with the facts, but a legal question?" Mr. Anson, the deputy county counsel, replied: "Primarily a legal question * * *." Supervisor Ford asked: "Isn't it a matter that better go to the courts?" Anson replied: "While it may be a matter to go to the courts, unfortunately it is also a matter that this Board has to decide in the first instance. It is a very difficult question. It will be a difficult question for the courts to decide ultimately * * *." At the close of the second hearing, Supervisor Jessup asked: "Are you going to ask that he [the representative of the airline] be heard again?" County Assessor Quinn replied: "No, he's going to court from here."

[3, 4] The conclusion is inescapable that the board denied plaintiff a reduction of its assessment upon the ground that the only question involved in the proceedings was one of law, and that the law was as the taxing authorities had stated it to be. It is obvious that the supervisors disregarded the testimony of the airline's representatives and deemed it of no moment in view of the question they thought they had to decide. As we have said, a county board of equalization is a fact-finding body. Plaintiff was entitled to an adjudication of the merits of its case, which, manifestly,

it did not receive. We think the court was warranted in determining that the airline was deprived of a fair hearing by the board.

[5] However, the court erred in undertaking to equalize the disputed assessment. That, as we have stated, was the function of the board. Having found the supervisors' ruling to be a nullity, the court should have remanded the proceedings to the board for a determination upon the basis of evidence submitted to it. Bila v. Young, 20 Cal.2d 865, 869–870, 129 P.2d 364; Universal Consol. Oil Co. v. Byram, supra, 25 Cal.2d 353, 362–363, 153 P.2d 746; Steen v. County of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937. Accordingly, the judgment cannot be allowed to stand and the matter must be referred back to the board for further action in accordance with due process of law.

Upon the remand, the board will have to determine whether the full value of the planes is attributable to Los Angeles County or whether they may be assessed by the county at only a proportion of their value.

In this connection, the applicable principles of law are stated in four decisions of the United States Supreme Court. These are: Northwest Airlines v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283, decided in 1944; Ott v. Mississippi Barge Line Co., 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, decided in 1949; Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427, a 1952 case; and Braniff Airways, Inc., v. Nebraska State Board, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967, decided in 1954.

[6, 7] The law as applicable to our case is admirably stated in the county's brief as follows: "The state of the home port of roaming, migratory property and the state of the commercial domicile of the owner thereof has power to tax such property on the basis of its full value unless another jurisdiction or jurisdictions have acquired power to tax. When jurisdictions other than the home port and commercial domicile have acquired power to tax on an apportioned basis, the full power of the home base to tax is diminished to the extent, but only to the extent that such other jurisdictions have by regular, recurring physical contacts acquired the power to tax. For example, if a plane having its home port in Los Angeles County were continually to circle the globe and never to land anywhere but in Los Angeles County for cargo, fuel, repairs, overhauls, etc., beyond doubt such plane would be subject to *ad valorem* property tax by Los Angeles County as its full value. If the plane, instead of landing only in Los Angeles County, also made landings in New York State and in so doing spent 10% of the year there, New York would have the power to tax on 10% of its value, and Los Angeles County as the home port and commercial domicile, would have the power to tax on the basis of the remaining 90% of the value. This method of apportionment would not offend the Due Process or Commerce Clauses of the Constitution. Thereunder, roaming, migratory property such as these planes would never be taxed in excess of their value; nor, thereunder, on the other hand, would they escape taxation up to their full value."

[8] The factual question to be decided by the board was whether, in their interstate and foreign operations, the planes maintained sufficiently regular business contact with other states or foreign countries to subject them to an apportioned tax therein. See Braniff Airways, Inc., v. Nebraska State Board, supra, 347 U.S. 590, 600–601, 74 S.Ct. 757, 98 L.Ed. 967, 977.

If from the evidence before the board it is determined that the planes were subject to taxation in one or more other jurisdictions, the board should make its own determination with respect to the proper basis of apportionment of value as between Los Angeles County and such other jurisdiction or jurisdictions.

The judgment is reversed with directions to the trial court to remand the matter to

the Los Angeles County Board of Equalization for further consideration and action in accordance with due process of law and with the views herein expressed.

PARKER WOOD and VALLÉE, JJ., concur.



159 Cal.App.2d 429

PEOPLE of the State of California, Plaintiff and Respondent,

v.

WOO MEE FOO, Defendant and Appellant.

Cr. 3438.

District Court of Appeal, First District, Division 2, California.

April 17, 1958.

Rehearing Denied May 16, 1958.

Hearing Denied June 11, 1958.

Prosecution for illegal possession of heroin. From adverse judgment of the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., the defendant appealed. The District Court of Appeal, Dooling, J., held that where informer told police officers that defendant was selling narcotics in certain room of hotel and that defendant's procedure was to leave informer in room while he went out of room and returned later with narcotics, and officers sent informer into room with instructions to make purchase of narcotics while they hid in men's rest-room off hotel hallway, and after informer entered room defendant left room and reached up to molding over door of another room at which time he was arrested and two packets of heroin were found hidden in molding where defendant had been reaching, officers had reasonable cause for arrest and search of defendant and they did not violate any of defendant's rights in concealing themselves in rest-room off public hallway of hotel.

Judgment affirmed.

1. Arrest ⇐63(4), 71

Where informer told police officers that defendant was selling narcotics in certain room of hotel and that defendant's procedure was to leave informer in room while he went out of room and returned later with narcotics, and officers sent informer into room with instructions to make purchase of narcotics while they hid in men's rest-room off hotel hallway, and after informer entered room defendant left room and reached up to molding over door of another room at which time he was arrested and two packets of heroin were found hidden in molding where defendant had been reaching, officers had reasonable cause for arrest and search of defendant and they did not violate any of defendant's rights in concealing themselves in rest-room off public hallway of hotel.

2. Witnesses ⇐219(1)

In prosecution for illegal possession of heroin wherein at no time during course of proceedings was refusal by committing magistrate to allow disclosure of informer's name called to attention of trial judge, question of defendant's right to disclosure of informer's name was waived.

3. Criminal Law ⇐1028

Questions must be raised in trial court to be available on appeal.

Sol A. Abrams, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was tried before the court, a jury trial having been waived, and was found guilty of the illegal possession of heroin. The parties stipulated to submit the case on the transcript of the testimony given at the preliminary hearing and the further cross-examination before the superior court by appellant's counsel of Daniel Casey, the arresting officer.

The only error urged by appellant in his opening brief is that appellant's arrest without a warrant and the subsequent search which disclosed the narcotics were without reasonable cause and illegal. In his closing brief appellant raises the additional point that the refusal to disclose the name of the informer upon whose information the arrest and search were made was prejudicial error.

[1] Officer Casey testified at the preliminary hearing that he and fellow officers had received information from an informer whom they had found reliable that appellant was selling narcotics in Room 3 of a hotel in San Francisco. The informer stated that he had been purchasing narcotics from appellant for several weeks and appellant's procedure in every case was to leave the informer in Room 3 while he went out of the room and returned later with the narcotics. The officers sent the informer into Room 3 with instructions to seek to make a narcotics purchase while the officers hid in a men's rest-room off the hotel hallway. After the informer entered Room 3 the officers saw appellant leave Room 3, stand on the step of another room and reach up to a molding over the door. The officers immediately arrested appellant and found two packets of heroin hidden in the molding at the point where appellant had been reaching. Appellant at that time admitted that the heroin was his. The committing magistrate sustained an objection to appellant's question seeking the name of the informer.

There is no merit to appellant's argument that the officers did not have reasonable cause for the arrest and search. The actions of appellant in leaving Room 3 and reaching up over the molding fitted perfectly the pattern of conduct described by the informer and taken with the information given by him justified the officers in the belief, which proved to be true, that appellant had narcotics hidden there. Nor can we agree with appellant that the officers violated any of appellant's rights in concealing themselves in a rest-room off the public hallway of a hotel to observe his conduct. They were acting reasonably upon the information which they had received from the informer in doing so, and were committing no trespass upon a part of the hotel reserved for appellant's private use.

[2] Under the record made before the superior court appellant must be held to have waived the question of his right to the disclosure of the informer's name. His counsel cross-examined Officer Casey extensively before the superior court without asking the name of his informer and he argued before that court the claimed unreasonableness of the arrest and search without once adverting to the refusal of the committing magistrate to allow the disclosure of the informer's name. In agreeing to submit the case on the transcript of the preliminary hearing and further cross-examination of Casey appellant's counsel stated: "I dont want to be waiving anything here. I want the record to indicate that we're interposing an objection to the admission of any evidence in this case * * on the ground that the arrest of the defendant was illegal and the seizure of the narcotics found, was illegal, in violation of the constitutional rights of the defendant, made without a search warrant or warrant of arrest or without proper cause." We have read the entire transcript of the proceedings before the superior court and nowhere in those proceedings was the refusal of the committing magistrate to allow the disclosure of the informer's name called in any fashion to the attention of the trial judge.

[3] The record does show that a motion was made to dismiss the information but the record does not show the grounds of the motion nor that the refusal to disclose the name of the informer was made a ground of that motion. It is elementary that questions must be raised in the trial court to be available on appeal.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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50 Cal.2d 190

PEOPLE of the State of California, Plaintiff and Respondent,

v.

William G. BONELLI et al., Defendants, Nathan Harris Snyder, Defendant and Appellant.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Nathan Harris SNYDER, Defendant and Appellant.

Cr. 6173.

Supreme Court of California, In Bank.

April 10, 1958.

Prosecution for conspiring to receive money from liquor licensees for use in campaign of candidate for re-election to Board of Equalization and to give money for same purpose. From adverse judgment in the Superior Court, San Diego County, John A. Hewicker, J., the defendant appealed. The Supreme Court, McComb, J., held that statements made by defendant, who had been subpoenaed by state and called as a witness in trial of a coconspirator wherein defendant refused to testify on ground that his answers might tend to incriminate him, were inadmissible as admission made by party in response to accusatory statement and to show a consciousness of guilt.

Judgments reversed.

Opinion 315 P.2d 936, vacated.

1. Grand Jury ⇐29

Where superior court accepted final report of 1955 grand jury on February 6, 1956 but ordered grand jury to remain operative and 1956 grand jury was impaneled on February 6, 1956, but was not sworn in until after return of indictment against defendant on March 21, 1956, 1955 grand jury had not ceased to be an official body at time it returned indictment and it had authority to act as grand jury.

2. Criminal Law ⇐396(2)

In prosecution for perjury based upon giving of alleged false testimony before 1954 and 1955 grand juries, wherein prosecution introduced in evidence portions of defendant's testimony before grand juries to support charges, trial court erred in refusing to receive other portions of defendant's testimony before grand jury tending to prove that he did not make false statements claimed.

3. Witnesses ⇐271(3)

Where defendant is charged with perjury and a reporter reads in evidence portions of previous record necessary to support charge, accused cannot require state to introduce entire record on cross-examination, but is limited to introduction on cross-examination of record which is pertinent to portions which have been introduced on direct examination, but defendant may, as part of his case in chief, introduce all material and relevant portions of previous record.

4. Criminal Law ⇐407(1)

In prosecution for conspiring to receive money from liquor licensees for use in campaign of candidate for re-election to Board of Equalization and to give money for same purpose, statements made by defendant, who had been subpoenaed by state and

called as a witness in trial of a coconspirator wherein defendant refused to testify on ground that his answers might tend to incriminate him, were inadmissible as admission made by party in response to accusatory statement and to show consciousness of guilt. West's Ann.Elections Code, §§ 5002.5, 5002.6; West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 1323, 1324; West's Ann.Code Civ.Proc. § 2065.

5. Criminal Law ⇐787(2)

In prosecution for conspiring to receive money from liquor licensees for use in campaign of candidate for re-election to Board of Equalization and to give money for same purpose, instruction that defendant's refusal to testify in case against coconspirator on ground that his answers might tend to incriminate him could be considered in deciding guilt or innocence of defendant and that defendant's failure to testify on ground of self-incrimination could be considered in determining a showing of consciousness of guilt, was erroneous. West's Ann.Elections Code, §§ 5002.5, 5002.6; West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 1323, 1324; West's Ann.Code Civ.Proc. § 2065.

6. Criminal Law ⇐317

No implication of guilt can be drawn from a defendant's reliance on constitutional and statutory guarantees against self-incrimination. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 1323, 1324; West's Ann.Code Civ.Proc. § 2065.

7. Criminal Law ⇐393(1)

Use of evidence of assertion of privilege against self-incrimination as an indication of guilt and as support for a verdict is contrary to intent of constitutional guarantee against self-incrimination. West's Ann.Const. art. 1, § 13.

Joseph A. Ball, Long Beach, Walter Ely, Ward Sullivan, Abraham Gorenfeld and Marshall Ross, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., and Jack R. Levitt, Deputy Dist. Atty., San Diego, for respondent.

McCOMB, Justice.

Defendant appeals from judgments after trial before a jury finding him guilty of:

(a) Two counts of conspiracy,

(i) to receive money from liquor licensees for use in the campaign of William G. Bonelli for re-election to the Board of Equalization, in violation of section 5002.5 of the Elections Code, and

(ii) to give money for the same purpose, in violation of section 5002.6 of the Elections Code, and

(b) Two counts of perjury in having stated to the grand jury in 1954 and 1955 that he did not spend money on behalf of Bonelli.

The record discloses that defendant was secretary of the National Democratic Club of California; that the only records of the club were a bank book and deposit slips; that defendant was the only person authorized to withdraw funds from the club's bank account; and that funds collected from liquor licensees by others than defendant were received by him and were spent through the club for Bonelli's expenses in his 1946 and 1950 campaigns.

In 1954 defendant received checks collected by others from liquor licensees and spent them through the club for candidates other than Bonelli.

Because of the conclusions we have reached on other issues, it is unnecessary for us to determine whether on the evidence it can be inferred that defendant was a party to a conspiracy, within three years before the finding of the indictment, to spend funds for Bonelli's campaign in 1954.

[1] Defendant contends: *First: That the 1955 grand jury which returned the conspiracy indictment against him had no authority to act as a grand jury.*

This contention is devoid of merit. It is predicated upon the fact that when the 1956 grand jury was impaneled on February 6, 1956, the 1955 grand jury was no longer an official body.

The facts are that on February 6, 1956, the 1955 grand jury presented its final report. The superior court accepted the report but ordered the grand jury to remain operative until March 5, 1956. The 1956 grand jury was impaneled on February 6, 1956, but the court ordered that the oath should not be administered until the tenure of the 1955 grand jury ended. On March 21, 1956, the 1955 grand jury returned the conspiracy indictment here involved and was dismissed. Thereafter the 1956 grand jurors were administered the oath of office.

It is thus apparent that since the 1956 grand jury was not sworn in until after the return of the indictment herein, and the minutes of the superior court indicate that it was the intent of the court that the 1955 grand jury was to remain operative until the return of the indictment, the 1955 grand jury had not ceased to be an official body at the time it returned the indictment.

Halsey v. Superior Court, 152 Cal. 71, 74, 91 P. 987, 988, wherein it is said, "When, in obedience to this mandate [Code Civ. Proc. § 241: "In all counties there shall be at least one grand jury drawn and impaneled in each year."] a new grand jury is impaneled, the life of the former grand jury must necessarily end" had nothing to do with the problem here presented. In the cited case the essential holding is the rejection of the contention that the county clerk's depositing the names of prospective grand jurors in the grand jury box automatically discharged the existing grand jury.

[2] *Second: That the trial court erred in refusing to receive certain evidence which would have tended to prove that defendant had not made false statements to the 1954 and 1955 grand juries relative to the expenditure of money on behalf of Bonelli's election campaign by (a) the National Democratic Club and (b) defendant.*

This contention is correct. Defendant was charged with two counts of perjury. The first count charged that he had falsely stated before the 1954 San Diego Grand Jury that there were no expenditures by the National Democratic Club on behalf of Bonelli's election campaign. The second count charged that defendant had falsely stated before the 1955 grand jury that he had not spent money directly for Bonelli.

The evidence submitted to support the charge of the falsity of these statements was identical. The prosecution asserted that defendant stated before the San Diego Grand Juries he had never spent money on behalf of Bonelli's election campaigns, when in fact he had spent money for Bonelli in his election campaign in 1950. To support the charges against defendant, the prosecution introduced in evidence portions of his testimony before the grand juries.

Defendant contended that when he denied spending money for Bonelli, he was referring only to the 1954 election and not to the 1950 election. As evidence to prove this fact, he offered certain statements which had been made by him before the grand juries but were not included in the portions of his testimony introduced in evidence by the prosecution (including an admission that he had spent money on behalf of Bonelli in 1950), together with proof that all the checks referred to in such statements were drawn in 1954 and that the deputy district attorney of San Diego (Barton Sheela) who had questioned defendant before the 1954 grand jury held in his hands and showed defendant during the questioning the 1954 checks of the National Democratic Club.

Defendant sought by two methods to introduce such other portions of his testimony before the grand juries, but in each instance the trial court sustained objections to the introduction of the proffered evidence. First, defendant sought to cross-examine the official reporter of the proceedings before the 1954 and 1955 grand juries concerning such other portions of his testimony before the grand juries. Second, as part of defendant's affirmative defense he made a second offer to introduce the same testimony. In addition, he called Barton Sheela as a witness and sought to

show that Mr. Sheela was holding 1954 checks in his hands at the time he questioned defendant before the grand jury. In each instance the trial court sustained an objection of the prosecution and refused to permit the introduction of the testimony.[1]

It is apparent that the excluded evidence would have tended to explain defendant's testimony before the grand juries and to show that he had not testified falsely before them as charged.

[3] The correct rule is that where a defendant is charged with perjury and a reporter reads in evidence portions of a previous record necessary to support the charge, the accused cannot require the State to introduce the entire record on cross-examination, but is limited to the introduction on cross-examination of the record which is pertinent to the portions which have been introduced on direct examination. However, the defendant may, as part of his case in chief, introduce all material and relevant portions of the previous record. (State v. Archuleta [29 N.M. 25], 217 P. 619 [1]; cf. Powell v. Superior Court, 48 Cal.2d 704, 709, 312 P.2d 698; People v. Carter, 48 Cal.2d 737, 752 [14], 312 P.2d 665.)

Clearly, the failure to permit the introduction of the foregoing evidence was prejudicially erroneous.

[4] *Third: That the trial court committed prejudicial error in admitting, over*

1. The following testimony of defendant was received before the 1954 grand jury, the portions italicized having subsequently been offered by the People and received in evidence in the present case, and the nonitalicized portions having been offered by defendant but rejected by the trial court:

"Q. Did any money in the 1954 campaign go to any efforts to publicize Mr. Bonelli's campaign? A. To my knowledge, not.

"Q. No money was spent on behalf of Mr. Bonelli? A. To my knowledge not—not under this.

"Q. Who was the money spent for in 1954? A. Well, I have a list of these various checks here. If you would like to see them I think I have got them in order.

"Q. Is this Frank Bonelli, is that for Mr. Bonelli's son? A. No, no, Frank Bonelli is an Assemblyman representing the Huntington Park area. He succeeded Joe Holibaugh when Joe died.

"Q. I notice a check to Aldine Printing Company for $253.58, on May 27, 1954. Printing for Candidates—Did the Aldine Printing Company do the bulk of the printing—for the National Democratic Club? A. Yes, it did.

"Q. Did you ever instruct anyone to make their checks, the contributors to make their checks payable to the Aldine Printing Co? A. No, I never did such a thing.

"Q. Never instructed any of the people that were sending in any money? A. No. I never, I never saw anybody—I don't know who contributed except as it appears on what you show me.

"Q. I will ask you to examine a photostat of a check out of the Mexican Village, dated June 7, $25.00, signed by Nancy Forsyth, on the Bank of America, Coronado Branch, and asked if that is your endorsement on the back? A. Yes, that is my endorsement.

"Q. One from Jerry's 99, Coronado, California—endorsed by Bernarea Harris; asked you if that is your signature? A. Yes, it is.

"Q. Bocardo's 800 Club, in the amount of $100; drawn on the Bank of America —5 points Branch—dated June 5, I asked if that is your signature on the back? A. Yes, it is, sir.

"Q. One drawn on Albert Bram, personal check, Coronado Branch. A. Yes, that is my signature.

"Q. *Now none of the monies that were spent by the National Democratic Club paid for any advertising on behalf of William G. Bonelli. A. As far as I know, it was never done—I wrote no check for any such thing.*

"Q. Anyone else authorized to write checks? A. No one else—as far as I know.

"Q. *Any of the printing that was paid for—I notice printing and advertising firms in those checks that you showed me. Any of those paid for adtisements that mention the name William G. Bonelli as a candidate? A. To my knowledge not.*

"Q. *But there were no expenditures by the National Democratic Club, directly or indirectly, made on behalf of Mr. Bonelli's campaign? A. There were none.*"

objection, statements made by defendant in the trial of People v. Calhoun, Cal., 323 P.2d 427, wherein he refused to testify on the grounds set forth in article I, section 13, of the Constitution of the State of California,[2] *section 1323 of the Penal Code,*[3] *and section 2065 of the Code of Civil Procedure.*[4]

This contention is sound. By indictment, Bernard P. Calhoun and others, together with defendant, a named though unindicted coconspirator, were charged with conspiracy to violate section 5002.5 of the Elections Code and pervert and obstruct justice or the due administration of the laws. During the course of that trial, the district attorney subpoenaed defendant and called him as a witness for the prosecution, whereupon the following occurred:

"Q. Would you state your full name, sir? A. My name is Nathan Harris Snyder, sir.

"Q. * * * I refer you to a signature in the lower righthand corner thereof. It appears to be a signature of N. H. Snyder. Is that your signature, sir?

"Mr. Whelan [counsel for Snyder]: If the Court please, Mr. Snyder is under indictment in a case now pending in this court and I wish to advise him that he should refuse to answer that question on the statutory and Constitutional grounds.

"The Court: What are they?

"Mr. Whelan: Well, go ahead, Mr. Snyder.

"A. Well, upon the advice of my counsel I refuse to answer it upon the ground of Article I, Section 13 of the Constitution of California, Section 1323 of the Penal Code, Section 1324 of the Penal Code, and Section 2065 of the Code of Civil Procedure.

"The Court: I am not familiar with the sections you quoted. What do they provide?

"A. It is the immunity section. Any answer I give may tend to degrade or incriminate me."

Over objection by defendant, the trial court permitted the record from the Calhoun case quoted above to be read into the evidence before the jury in order to show consciousness of guilt. In this way evidence of defendant's refusal to answer a question asked him by the district attorney in People v. Calhoun, on the ground that the answer might tend to incriminate him, was put before the trial jury in the present case.

[5] Thereafter the trial court instructed the jury: "[T]hose accused of crime are competent as witnesses only at their own request and not otherwise. You are therefore not to draw an inference against the Defendant Nathan Harris Snyder because he refused to testify in the case of People versus Calhoun on this ground. However, you are further instructed that failure to testify on the ground that an answer might tend to incriminate may be considered by you in the light of all other proved facts in deciding the question of the defendant Nathan Harris Snyder's guilt or innocence. Whether or not his failure

2. Article I, section 13, of the California Constitution reads in part: "No person shall * * * be compelled, in any criminal case, to be a witness against himself."

3. Section 1323 of the Penal Code reads: "A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

4. Section 2065 of the Code of Civil Procedure reads in part: "A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony * * *."

to testify in the case of People versus Calhoun on the ground of self-incrimination shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination."

Defendant had appeared before the jury in People v. Calhoun in response to a subpoena. He was not there in the position of one who voluntarily appeared. The People contend that the testimony was admissible because (1) it was an admission made by a party in response to an accusatory statement, and (2) defendant's reaction thereto showed a consciousness of guilt.

[6] Neither of these grounds is tenable for the reason that no implication of guilt can be drawn from a defendant's relying on the constitutional guarantees of article I, section 13, of the Constitution of the State of California, section 1323 of the Penal Code, or section 2065 of the Code of Civil Procedure. (See People v. Calhoun, Cal., 323 P.2d 427. Any statements to the contrary in People v. Kynette, 15 Cal.2d 731, 749 [11], 104 P.2d 794, and People v. Wayne, 41 Cal.2d 814, 829 [19], 264 P.2d 547, are overruled. Any contrary statements in Keller v. Key System Transit Lines, 129 Cal.App.2d 593, 598, 277 P.2d 869, and People v. Graney, 48 Cal.App. 773, 192 P. 460, are disapproved.

[7] The trial court prejudicially erred in admitting the evidence of defendant's refusal to testify in People v. Calhoun. Likewise, the instruction quoted above which the trial judge read to the jury was prejudicially erroneous. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above.

The judgments are reversed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

159 Cal.App.2d 489

MATHEWS CONVEYER COMPANY WEST COAST, a California corporation, Plaintiff and Respondent,

v.

Eliza E. POWELL, etc., et al., Defendants, O. Frank Towse, Defendant and Appellant.

Civ. 17588.

District Court of Appeal, First District, Division 1, California.

April 18, 1958.

Proceeding on motion for change of venue. From an order of the Superior Court, San Mateo County, A. R. Cotton, J., denying the motion, the defendant appealed. The District Court of Appeal, Peters, P. J., held that where first count of complaint alleged an account stated in San Mateo county, second count alleged open book account for goods, wares and merchandise furnished to defendants in San Mateo county, and third count alleged a conditional sales contract for payment of money and that contract was to be performed in San Mateo county, motion for change of venue by one of defendants to Yolo county in which he resided was properly denied.

Order affirmed.

1. Venue ⇐7

Where first count of complaint alleged account stated in San Mateo county, second count alleged open book account for goods, wares and merchandise furnished to defendants in San Mateo county, and third count alleged conditional sales contract for payment of money and that contract was to be performed in San Mateo county, motion for change of venue by one of defendants to Yolo county wherein he resided was properly denied. West's Ann.Code Civ. Proc. § 395.

2. Venue 7

Subject to certain well defined statutory exceptions, a contract action, express or implied, is personal in nature, and there-

fore generally triable in county of defendant's residence. West's Ann.Code Civ. Proc. § 395.

3. Venue ⇐36

Where plaintiff joins two contract causes of action, on one of which defendant is entitled to change of venue and the other not, defendants are entitled to the change. West's Ann.Code Civ.Proc. § 395.

McGilvray, McGilvray & Cameron, Sacramento, for appellant.

Truce & Veal, Harlan K. Veal, San Carlos, for respondent.

PETERS, Presiding Justice.

The Mathews Conveyer Company West Coast filed a three count complaint in San Mateo County naming O. Frank Towse and several others as defendants. Towse moved for a change of venue to Yolo County, his residence. The motion was denied. Towse appeals.

[1] The first count of the complaint alleges an account stated in San Carlos, San Mateo County; the second alleges an open book account for goods, wares and merchandise furnished to defendants at San Carlos, San Mateo County; and the third simply alleges a written conditional sales contract for the payment of money. Plaintiff's affidavit in opposition to the motion for change of venue, which has attached as an exhibit the conditional sales contract, however, avers that the contract provided that all payments called for by the contract were to be made and were made at San Carlos, San Mateo County. It is further averred that pursuant to the provisions of the conditional sales contract involved, it was "to be performed in, and paid in the City of San Carlos, County of San Mateo." Defendant Towse challenged none of these allegations or averments. His notice of motion for change of venue and his affidavit in support of his motion allege only the fact that he is a resident of Yolo County.

[2] The motion for a change of place of trial was properly denied. While it is the general rule that a contract action, express or implied, is personal in nature, and therefore generally triable in the county of the defendant's residence, that general rule is subject to certain well-defined exceptions set forth in section 395 of the Code of Civil Procedure. That section, so far as pertinent here, now provides:

> "(1) In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *"

The instant case falls clearly within these exceptions. Ward Mfg. Co. v. Miley, 131 Cal.App.2d 603, 281 P.2d 343, is directly in point. There a two count complaint was filed in Los Angeles County. The first count averred an account stated in Los Angeles, and the second count set forth a common count for goods sold and delivered in Los Angeles. Defendant established that he was a resident of Fresno County, and contended that the obligation, if any, was incurred in that county. He moved for a change of venue to Fresno County. It was denied. The appellate court affirmed, pointing out that the complaint alleged that the account was stated

in Los Angeles and that the goods were sold and delivered in that county. These allegations were not denied. They established a prima facie case that Los Angeles County was a proper county for the trial of the action. The burden of overthrowing this prima facie case rested upon the moving defendant. His residence in Fresno County was not sufficient to overcome this prima facie case. His burden was also to show that the contract was not made or to be performed in Los Angeles County. Since the defendant failed to controvert plaintiff's allegations on these matters the motion was properly denied. That is precisely this case. See also Gilman v. Nordin, 112 Cal.App.2d 788, 247 P.2d 394.

[3] Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104, is not contrary to these cases. There a two count complaint was filed in Santa Clara County. The first count alleged a mutual open book account, and the second an account stated in Santa Clara County. The first count was not connected in any way in the complaint or in the affidavits with Santa Clara County. The defendants moved for a change of venue to the county of their residence, Los Angeles. The motion was denied and the appellate court properly reversed. The defendants were not entitled to a change of venue on the second count, but were on the first. The appellate court simply held that where a plaintiff joins two contract causes of action, on one of which the defendants are not entitled to a change of venue and the other they are, the defendants are entitled to the change. In such cases the exceptions in section 395 are not applicable. This rule is well settled. Ward Mfg. Co. v. Miley, 131 Cal.App.2d 603, 281 P.2d 343; Keithly v. Lacey, 77 Cal.App.2d 339, 175 P.2d 235. But that rule is not here applicable because in the instant case, as to all three causes of action, the plaintiff established a prima facie case that they were triable in San Mateo County. Defendant Towse did not refute this prima facie case. He in no way challenged the showing made by plaintiff that the account stated, the open book account and the written conditional sales contract were made and/or to be performed in San Mateo County. Under such circumstances he was not entitled to the change of venue.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



159 Cal.App.2d 340

Richard Bruce MARILL, a minor, by Arthur Q. Marill, his guardian ad litem, and Arthur Q. Marill, Plaintiffs and Respondents,

v.

John R. WEBER, Crescent Bay Council of the Boy Scouts of America, a corporation, the Boy Scouts of America, a corporation, State of California, Doe I to V inclusive, Doe Company, a co-partnership, Roe Corporation, a corporation, Defendants.

John R. Weber, Defendant and Appellant.

Civ. 22481.

District Court of Appeal, Second District, Division 3, California.

April 14, 1958.

An action for injuries sustained by boy scout in an automobile accident while being returned to his home from a scout camp in an automobile driven by scout supervisor after the boy scout became ill. Judgment for plaintiff in the Superior Court of Los Angeles County, Caryl M. Sheldon, J., and the individual defendant appealed. The District Court of Appeal, Patrosso, J. pro tem., held that a reversal was required where the defendant was seriously prejudiced by conflicting and erroneous instructions.

Judgment reversed.

1. Automobiles ⇐245(28)

In action for injuries sustained by boy scout in an automobile accident while being returned to his home from a scout camp in an automobile driven by scout supervisor after the boy scout became ill, evidence whether the supervisor was the agent of the local and national councils of boy scouts was properly submitted to the jury.

2. Automobiles ⇐246(1)

In action for injuries sustained by boy scout in an automobile accident while being returned to his home from a scout camp in an automobile driven by scout supervisor after the boy scout became ill, jury should have been told unequivocally that if they found that the supervisor was not the agent or employee of either or both the local and national councils, the scout's status as an occupant of the automobile was that of a guest and that they should return a verdict for the defendants.

3. Appeal and Error ⇐1064(1)

In action for injuries sustained by boy scout in an automobile accident while being returned to his home from a scout camp in an automobile driven by scout supervisor after the boy scout became ill, where instructions were sharply conflicting and removed from jury's consideration vital issue as to whether supervisor was acting as agent or employee of local and national councils or either of them and whether the scout's status was that of a guest or passenger, reversal was required.

4. Appeal and Error ⇐1064(1)

Instructions that are contradictory in essential elements may warrant reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury.

5. Automobiles ⇐246(54)

In action for injuries sustained by boy scout in an automobile accident while being returned to his home from a scout camp in an automobile driven by scout supervisor after the boy scout became ill, instruction whereby jury was told that one who volunteers to do an act or perform a service as an act of kindness and without expectation of compensation is under duty of exercising ordinary care, was erroneous under the evidence and as contrary to the statute where the only act which the supervisor volunteered to perform was to drive the scout home from the camp in his automobile. West's Ann.Vehicle Code, § 403.

6. Trial ⇐296(2)

An instruction which was incorrect as contrary to the Vehicle Code was not cured by the giving of an instruction in the terms of that section, since if the statement to the jury of an essential principle of law is materially incorrect, the error is not remedied by correct declaration of the same principle in another instruction. West's Ann.Vehicle Code, § 403.

Spray, Gould & Bowers, Los Angeles, for appellant.

Wyman & Finell and Frank Rothman, Beverly Hills, for respondents.

PATROSSO, Justice pro tem.

This is an action to recover damages for personal injuries sustained by the minor plaintiff Richard Marill and for consequential damages sustained by his father and co-plaintiff.

The case went to trial upon four counts of plaintiffs' complaint. In the first of these it is alleged that the defendant John R. Weber was the agent and employee of the defendants Crescent Bay Council of the Boy Scouts of America and of the Los Angeles Area Council of the Boy Scouts of America; that the minor plaintiff was a boy scout and a member of the Crescent Area Council and on July 30, 1953, he was in attendance at a boy scout camp known as Camp Wolverton which was organized, maintained and operated by Crescent Bay and Los Angeles Area Councils; that the minor plaintiff Richard paid $26 as a fee for attending the camp which included transportation to and from the camp; that defendant Weber was acting as a scoutmaster and supervisor of the activities of the boys in attendance at the camp with

the knowledge, consent and authority of both Crescent Bay and Los Angeles Area Councils; that defendant Weber acting in the course and scope of his employment as agent or employee of Crescent Bay Council, undertook to take Richard from the camp to his home in Los Angeles and that Richard was a passenger in Weber's automobile; that Weber operated the automobile in a negligent manner in consequence of which Richard sustained injuries. The second count incorporates substantially all of the allegations of the first, hereinbefore set forth, but in addition alleges that the defendants were "negligent in entrusting the care and custody of the minor plaintiff to a scoutmaster and supervisor who had gone for long periods of time without sleep and was under emotional stress and undertook to operate a vehicle on the highways at high speeds while in an exhausted condition." The other two counts are each substantially similar to those previously mentioned except that they seek to recover damages sustained by the plaintiff-father for medical expense incurred in the treatment and care of Richard. It will be noted that the complaint contained no allegations to the effect that defendant Weber was guilty of intoxication or wilful misconduct and no such claim was or is advanced by the plaintiffs.

The answer of defendant Weber admits that he was driving the automobile in which Richard was riding, and the occurrence of the accident but denies that in so doing he was acting as an agent or employee of either of his codefendants, Crescent Bay and Los Angeles Area Councils, and also denies that he was negligent. In addition the answer alleges that Richard was riding in the automobile driven by Weber at his (Richard's) request and the request of Richard's father and mother; that at the time in question Richard was sick and that at the express request of Richard's parents Weber "gratuitously and without compensation agreed to, and in fact did, endeavor to transport said Richard Bruce Marill from Sequoia National Park to the City of Los Angeles."

At the close of plaintiffs' case Weber made a motion for nonsuit upon the ground that there was no evidence of intoxication or wilful misconduct, and as under the evidence the status of Richard was that of a guest, plaintiffs had failed to establish a prima facie case. The motion was denied as was also a motion for directed verdict made upon the same ground. The jury returned a verdict in favor of plaintiffs and against all of the defendants but the defendant Weber alone appeals. No claim is made that the evidence is insufficient to support the implied finding that appellant was negligent, and the principal issues upon the trial, as here, were and are whether appellant was the agent or employee of his codefendants or either of them and whether the status of Richard was that of guest or a passenger.

Admittedly, if appellant in undertaking to transport Richard from the camp to his home, was not acting as an agent or employee of either of his codefendants, there being no claim that Richard gave any compensation to appellant for the ride, Richard was a guest, and absent evidence that appellant was intoxicated or guilty of wilful misconduct, a reversal is required.

There is no material dispute with respect to the facts. Respondent Richard was a boy scout and a member of Troop 170, which troop is a member of the Los Angeles Area Council. Appellant was a member of the Troop Committee which consisted of a group of adults. Richard's father was likewise a member of this Troop Committee. Members of the Troop Committee are not employed by the local area council. They are designated by the sponsoring organization which applies for the charter for the troop.

The Los Angeles Area Council provides camps and camping facilities and has paid employees who manage the camps. Crescent Bay Area Council conducts a "high adventure" type camp in Sequoia National Park, and the use of its camp facilities by troops of other councils is permitted. Crescent Bay Area Council opened its camping facilities to Richard's troop and others, and

in the case of Richard's troop the arrangements included chartered bus transportation from Los Angeles and return, as well as the use of the camp facilities and including food for one week. The total charge for each boy was $26 and Richard's parents paid this sum.

The camp personnel of Camp Wolverton were employees of the Crescent Bay Area Council. They briefed the scoutmasters and other adults who accompanied the troops to camp and furnished supplementary guidance on overnight backwoods trips, but what was done upon these trips was under the control of the adults accompanying each troop.

The boys of Troop 170, including Richard, were taken to the camp by chartered bus. The scoutmaster of the troop did not accompany them on the trip but at least one adult, a Mr. Piehl who was chairman of the Troop Committee, did. Later the appellant drove to the camp, his boy being a scout who was at the camp with the troop; appellant's purpose being to assist Mr. Piehl during a backwoods overnight hike.

The hike was made but during the course of it Richard, who was along, developed a sore throat and stomach upset. The hike, however, was completed and on returning to the camp Mr. Wells, the assistant manager of the camp and an employee of Crescent Bay Council, Mr. Piehl and a Mr. Gilbert (another member of the Troop Committee of Troop 170, and also a parent of one of the boys) decided to take Richard to the doctor at Lodge Pole, some distance from the place the boys were camped. He was taken to the doctor by Mr. Gilbert in his automobile. Upon arriving at Lodge Pole, Mr. Gilbert called Richard's father by telephone and the latter gave his permission for Richard to receive a penicillin injection and also gave his permission that appellant, who was leaving camp for Los Angeles on that day, bring Richard home. Appellant was not present at Lodge Pole but when Richard was returned to the camp and he was informed of the conversation between Mr. Gilbert and Richard's father, he consented to take Richard with him on his return to Los Angeles. It was during the course of the trip that the accident occurred and Richard was injured.

As grounds for reversal, appellant contends (1) that under the evidence which we have hereinabove epitomized, he was not an agent or employee of either of his codefendants and even assuming that either of his codefendants received some benefit from his undertaking to transport Richard to his home, absent any evidence or claim of intoxication or wilful misconduct, the court erred in denying his motions for a nonsuit and for a directed verdict, and (2) that if it were to be conceded that under the evidence appellant's agency and Richard's status as passenger or guest were issues of fact for the jury's determination, the court's instructions upon these issues were conflicting and erroneous.

[1, 2] We do not believe it may be said as a matter of law that the appellant was not the agent of either or both of his codefendants. Rather we are of the view, as respondents contend, that under the evidence this was an issue of fact for the jury. Cf. Brokaw v. Black-Foxe Military Institute, 1951, 37 Cal.2d 274, 277–278, 231 P.2d 816. As the jury's finding upon this issue was determinative of the duty which appellant owed to Richard, it was of the utmost importance that the jury be fully and clearly instructed with respect to the law applicable thereto. Particularly, the jury should have been told unequivocally that if they found from the evidence that appellant was not the agent or employee of either or both of his codefendants, Richard's status as an occupant of the automobile was that of a guest and that they must return a verdict for the appellant. We are in accord with appellant's second contention that this was not done and that the trial court gave erroneous and contradictory instructions upon this subject, as a result of which it cannot be determined whether the jury based its verdict upon a finding that Richard was a guest or a passenger.

The court gave instructions dealing with the doctrine of agency and defined an agent; the jury were told that if they found that appellant was the agent of either of his codefendants, and that a benefit was conferred upon either or both of said codefendants by appellant's transportation of Richard, he owed Richard the duty of exercising ordinary care in the operation of the automobile and that failure to do so constituted negligence. They were further instructed as to the distinction between a guest and a passenger and the duty which the operator of an automobile owed to each, followed by the statement "that wilful misconduct and intoxication of John R. Weber are not issues in this trial." Then at the request of plaintiffs the court gave the following instruction:

"A person may undertake, voluntarily and beyond any legal duty, to do an act or to perform a service which involves a risk to the safety or interests of another. He may venture such service purely as a gift, as an act of kindness, or with or without expectation of compensation or reward.

"If an ordinarily prudent individual in the same circumstances and the same undertaking would realize the risk involved, then the person so acting assumes a duty of exercising ordinary care toward anyone whose health, safety or property is hazarded. A breach of that duty is negligence."

Immediately following this instruction the court at the request of the plaintiffs, gave an instruction upon the doctrine of *res ipa loquitur* reading as follows:

"From the happening of the accident involved in this case as established by the evidence, an inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. That inference itself is a form of evidence, and if none other exists tending to overthrow it, or if the inference, either alone or with any other evidence,[1] it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference by showing that ~~(he)~~ ~~(it)~~ *they* did, in fact, exercise ordinary ~~(the utmost)~~ care and diligence or that the accident occurred without being proximately caused by any failure of duty on ~~(his)~~ ~~(its)~~ *their* part."

Still later, at the request of plaintiffs, the jury was instructed as follows:

"The issues to be determined by you in this case are these:

"First: Was the defendants negligent?

"If you answer that question in the negative, you will return a verdict for the defendants. If you answer it in the affirmative, you have a second issue to determine, namely:

"Was that negligence the proximate cause of any injury to the plaintiffs?

"If you answer that question in the negative, plaintiffs are not entitled to recover, but if you answer it in the affirmative, you then will find what damage plaintiff thus has been caused to suffer, and you will return a verdict in their favor for the amount thereof.

"As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damage, if any, found to have been suffered."

[3] The conflict between these various instructions is at once apparent. The jury were told in one breath that if appellant "voluntarily and beyond any legal duty" undertook "as an act of kindness, or with

1. While this instruction is otherwise a copy of BAJI 206B as it appears in the Fourth Edition, there is omitted therefrom at this point the words therein which immediately follow, namely: "supporting it preponderates over contrary evidence."

or without expectation of compensation or reward" to drive Richard home, he was under the duty of exercising ordinary care in the operation of his automobile. In the next they were told that under identical circumstances appellant was only under the duty of refraining from intoxication and wilful misconduct. They were then instructed that from the happening of the accident "as established by the evidence" an inference arose that the proximate cause of the accident was some negligent conduct upon the part of the appellant, which inference, if not overcome by other evidence, warranted a verdict for the plaintiffs. When added to this the jury were instructed that the issues to be determined by them were (1) negligence and (2) proximate cause, this operated to effectively remove from the jury's consideration the vital issue as to whether appellant was acting as an agent or employee of his codefendants or either of them and as a necessary corollary, whether Richard's status was that of a guest or passenger. Indeed the instruction upon the doctrine of *res ipsa loquitur* and that defining the issues which the jury were called upon to determine necessarily assume that Richard's status was that of a passenger. In the light of the evidence these instructions were clearly erroneous. These instructions were not only erroneous but they effectively nullified the previous instruction wherein the jury were told that if Richard's status was that of a guest appellant was liable only if he was guilty of intoxication or wilful misconduct. The jury should have been unequivocally told that under the evidence a verdict for the plaintiffs could be returned only in the event that they found (1) that at the time of the accident appellant was acting as the agent or employee of one or both of his codefendants, (2) that some benefit was conferred upon either or both of said codefendants by reason of appellant's transportation of Richard, and (3) that the accident and consequent injury to Richard were proximately caused by the failure of appellant to exercise ordinary care.

It is manifestly impossible to determine which of the conflicting statements of law embodied in the instructions, the jury followed in reaching its verdict. They may well have believed (and this is not at all unlikely in view of the evidence) that in undertaking to drive Richard from the camp to his home, appellant was a mere volunteer and did so "as an act of kindness" and without "expectation of compensation or reward" but that under the court's instructions hereinbefore quoted, they were nonetheless required to return a verdict in favor of plaintiffs if they found that he failed to exercise ordinary care even though they further found that appellant was not acting as the agent or employee of either of his codefendants. If they reached the verdict upon this hypothesis, it was clearly erroneous.

As stated in Sebrell v. Los Angeles Ry. Corp., 1948, 31 Cal.2d 813, 817, 192 P.2d 898, 900:

> [4] "Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury. Chidester v. Consolidated People's Ditch Co., 53 Cal. 56, 58; Starr v. Los Angeles Railway Corp., 187 Cal. 270, 280, 201 P. 599; Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675. In determining whether there is such a conflict the decisive question is whether the instructions read as a whole and in the light of the circumstances of the case in which they were given, are apt to confuse a person of ordinary intelligence."

[5, 6] The instructions when read in their entirety are not only contradictory but the instruction previously quoted whereby the jury was told that one who volunteers to do an act or perform a service "as an act of kindness" and "without expectation of compensation or reward" is under the duty of exercising ordinary care, is under the evidence clearly erroneous as contrary to

Vehicle Code, section 403, for here the only act or service which appellant volunteered to perform was to drive Richard home from the camp in his automobile. Nor may it be said that this error was cured by the giving of an instruction in the terms of that section, for if the statement to the jury of an essential principle of law is materially incorrect, the error is not remedied by a correct declaration of the same principle in another instruction. Wells v. Lloyd, 1942, 21 Cal.2d 452, 458, 132 P.2d 471.

That appellant was seriously prejudiced by the conflicting and erroneous instructions in question may not be doubted.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



159 Cal.App.2d 326

Audrey J. BROWNING et al., Plaintiffs and Appellants,

v.

Joseph F. KING, Defendant and Respondent.

Civ. 22583.

District Court of Appeal, Second District, Division 1, California.

April 10, 1958.

Action for personal injuries sustained as a result of a rear-end automobile collision. The Superior Court of Los Angeles County, V. P. Lucas, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evidence that plaintiff had been involved in other accidents and that plaintiff had struck a deputy sheriff several times and engaged in several fights was prejudicial for reason that prejudicial suggestions had been placed before jury that plaintiff was accident-prone, claims conscious, and a brawling and unrespectable citizen.

Judgment reversed and cause remanded for new trial.

Appeal and Error ⇐1050(1)

In action for personal injuries sustained as the result of a rear-end automobile collision, evidence that plaintiff had been involved in other accidents and evidence that plaintiff had struck a deputy sheriff several times and had engaged in several fights was prejudicial for reason that prejudicial suggestions had been placed before jury that plaintiff was accident-prone, claims conscious, and a brawling and unrespectable citizen.

Wolford, Johnson & Pike, George E. Pike, El Monte, for appellants.

Spray, Gould & Bowers, Los Angeles, Robert M. Maslow, Beverly Hills, for respondent.

DRAPEAU, Justice pro tem.

Plaintiffs herein allege injuries sustained as a result of a rear-end automobile collision proximately caused by the defendant's negligence. The accident occurred about 5:30 p. m. on November 13, 1954, a dark but clear Sunday afternoon. The automobiles involved were a part of a long line of southbound traffic which had stopped at the time of the collision. There is evidence that the Buick driven by defendant collided with the rear of plaintiffs' Cadillac, and skidded some 36 feet before coming to rest. Plaintiffs' car, standing still at the moment, was caused to collide with an Oldsmobile stopped just ahead of plaintiffs' car, which latter car travelled about 10–12 feet after the impact. The Oldsmobile travelled about 15 feet.

Plaintiffs' Cadillac was registered in the name of Audrey J. Browning, but had been paid for with community funds. At the time of the accident it was being driven by one George Fiske, a friend who had accompanied Mr. and Mrs. Browning and three

children on a trip to Palmdale. The two Brownings occupied the front seat with Fiske and the children were in the back seat. Severe injuries were alleged by both Mr. and Mrs. Browning, including a fresh fracture of Mr. Browning's right forearm through an old fracture site, with permanent injury of the ulna nerve.

It is appellants' contention that, "With the evidence on liability preponderantly in favor of both plaintiffs, with the evidence of injuries and damages to Audrey unimpeached and herself unimpeached as a witness, but with John's credibility as a witness somewhat impeached as to a 12-year-old injury, the jury nevertheless found against both plaintiffs. Such result was manifestly the result of prejudice of the jury against the plaintiffs because of the prejudiced suggestions through such examination and proof that John was an accident prone, claims conscious, brawling and unrespectable citizen not deserving any consideration from the jury of relief against the nice old defendant and his wife."

In particular, this point is concerned with the testimony of a deputy sheriff to the effect that on October 30, 1954, fifteen days before the accident in question, John Browning struck the deputy three times in the ribs with his right hand, and, with both hands handcuffed together, struck a fellow officer. The trial court overruled appellants' objection "in anticipation that he (defendant's counsel) will get down to the right hand. That is right. It is the right hand we are talking about." The purpose of this testimony, according to respondent's attorney, "is to show injury to the right arm".

Following this inquiry, John Browning was asked about an automobile accident in June, 1956, which occurred after the accident here in question and after John had had a bone graft, although there had been no new arm injury. There were also inquiries whether John had been involved in a rear-end collision in 1948, where he broke his ribs, although no rib injury was claimed in the present case; and, finally, whether John had had any "Accidents or fights where you were injured yourself". John recounted "a slight accident in the machine shop where I dropped a drill press on my left wrist right here."

In this connection appellants also point out that John Browning was interrogated as to whether "at the time of this accident, insofar as your driver's license was concerned, the Department of Motor Vehicles had put you on probation", to which objection was sustained. The record discloses other references to various accidents in which appellant had been involved, and as to certain alleged fist fights which John had had. John admitted "that I have had a few fights. Who hasn't?". Mr. Browning denied having had an accident in 1945 in which he had injured his right ulna, and was thereafter impeached by the introduction of an Industrial Accident Commission file showing such a claim and the payment of $800 therefor.

As stated in Re Estate of Harvey, 143 Cal.App.2d 368, 370, 299 P.2d 712, 713: "The appellate courts are required to reiterate from day to day, and with unremitting monotony * * * That the appellate court cannot weigh the evidence to determine where the preponderance lies; that its duty begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding of fact; and that when two or more inferences reasonably can be deduced from the evidence the reviewing court cannot substitute its own inferences for those of the trial court". In the present case, therefore, it is not proper to attempt a retrial or revaluation of the evidence. The record discloses abundant conflict, but it also reveals substantial evidence in support of the verdict.

Appellants' contention that by permitting detailed evidence of other accidents in which John Browning had been involved; that Mr. Browning had struck a deputy sheriff several times, and had engaged in several fights, etc., prejudicial suggestions had been placed before the jury "that John was an accident-prone, claims conscious,

brawling and unrespectable citizen not deserving any consideration", appears to possess merit.

Had the present case been tried without a jury, it may be that such a contention could be resolved by considering that the legally trained trial judge could and would overlook any incidental and irrelevant references to the plaintiff's character. But such is not the case. Here, a jury, empaneled to try issues of alleged negligence on the part of the defendant, was permitted to listen to a long series of evidential items calculated, intentionally or unintentionally, to provide a somewhat unsavory character picture of the plaintiff John Browning. It is impossible to view this situation in the light of harmless error, and its impact on the members of the jury panel cannot have been negligible.

It is conceded by the appellants that evidence of other injuries sustained by a plaintiff may in a proper case be admissible in respect to the matter of damages. But the present record, viewed in its entirety, goes very much further than this, and provides not one, but many instances interspersed throughout the trial, which might lead the jury to believe that plaintiff's "accident-prone, claim conscious, brawling" character was a decisive factor in the case, or at least create a strong prejudice against him. Such a situation is one in which an appellate court should give relief.

The present case is not unlike Lowenthal v. Mortimer, 125 Cal.App.2d 636, 638, 270 P.2d 942, 946, where plaintiff was cross-examined about some 15 other lawsuits and accidents. Although an objection was sustained and the jury instructed to disregard the matter, the reviewing court said: "Nevertheless the jury heard the foregoing, and it undoubtedly added cumulatively to the hostility ordinarily felt against one who constantly requires services of a court of law for the adjustment of life's problems. The cross-examiner must not inject insinuations into the case for the purpose of appealing to prejudices, or go outside of the issues of the case".

Plaintiffs are clearly entitled to a trial free from such dangerous implications. Respondent's assertions that any objection to the introduction of such evidence had been waived, is untenable. In view of the foregoing determination that appellants are entitled to a new trial, it becomes unnecessary to discuss the further points raised in appellants' briefs.

The judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and FOURT, J., concur.



159 Cal.App.2d 519

Milton D. WHITNEY, Plaintiff and Appellant,

v.

Joseph J. LEIPZIGER et al., Defendants and Respondents.

Civ. 22675.

District Court of Appeal, Second District, Division 1, California.

April 18, 1958.

Action to recover for wrongful termination of plaintiff's employment. The Superior Court of Los Angeles County, A. A. Scott, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Drapeau J. pro tem., held that it had not been error to render judgment against plaintiff, notwithstanding answer wherein it was alleged that after plaintiff's employment had been terminated, for failure to properly perform services, it had been agreed that plaintiff might return to work for a limited period to assist defendant in completing certain houses, as to which defendants agreed to pay him share of net profits as incentive bonus, but that, at commencement of action, not all

of houses had been sold and it was thus not possible to ascertain net profits realized.

Affirmed.

1. Judgment ⇐193

In action to recover for wrongful termination of plaintiff's employment, it was not error to render judgment against plaintiff, notwithstanding answer wherein it was alleged that after plaintiff's employment had been terminated, for failure to properly perform services, it had been agreed that plaintiff might return to work for a limited period to assist defendant in completing certain houses, as to which defendants agreed to pay him share of net profits as incentive bonus, but that, at commencement of action, not all of houses had been sold and it was thus not possible to ascertain net profits realized.

2. Declaratory Judgment ⇐389

A court may as well deny declaratory as any other kind of relief; and notwithstanding fact that plaintiff asked, in three counts of complaint, for an accounting, for declaratory relief, and for damages for wrongful termination of employment contract, it was not error for trial court, giving judgment against plaintiff and in favor of defendants, to fail to make explicit declaration as to respective rights of parties.

N. E. Youngblood, Beverly Hills, for appellant.

Horowitz & Howard, Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Appellant Whitney, a general contractor, entered into a written agreement with respondent Leipziger under which Whitney was to act as the "managing supervisor and responsible managing officer * * * in connection with the subdivision and development of the hereinafter described tracts and the construction of houses thereon, and that plaintiff would be employed upon a monthly salary in the sum of $866.66 per month, plus a certain incentive bonus on each tract, to be computed on the basis of the net profits derived from the sale of said houses." Appellant alleged and testified that he left an advantageous position to accept such employment.

It is alleged that, from September 11, 1954 to January 6, 1956, plaintiff performed his duties pursuant to this agreement, at which time defendants wrongfully terminated plaintiff's appointment; that it would have taken approximately two years to complete the contemplated work; that the defendants "informed plaintiff that they would pay no bonus whatsoever." Whitney claimed damages by way of loss of wages in the sum of $20,800, and loss of bonuses on the amount of $75,568. In other counts plaintiff asked for an accounting, and for declaratory relief.

The defendants deny that "plaintiff is entitled to redress * * * for any matter or thing alleged in said second amended complaint;" admit executing the contract of employment, plaintiff's previous employment, and his performance of certain duties during the period in question. It is alleged that on January 6, 1956, "defendant Foremost notified plaintiff that his services would be no longer required by reason of plaintiff's failure to properly perform his services; that plaintiff thereupon requested that he be permitted to remain in the employ of said defendants for a period of two weeks longer, to assist said defendants in completing those of the 120 houses on said Tract 20732," to which continuation defendants agreed, but that, nevertheless, "on January 9, 1956, plaintiff did not return to work, but accepted a position with another company."

The answer also states that, "defendant Foremost advised plaintiff on January 6, 1956, that notwithstanding his failure to properly perform his services for it, said company nevertheless would pay him an incentive bonus of 3½% on the net profit of the 120 houses, * * * as soon as said houses were completed and sold and the certified public accountant * * * had completed his audit thereof," but that at the commencement of this action, not all of the

houses had been sold and the accountant was not able to ascertain the net profits realized. In a later paragraph, defendants again "allege that defendant Foremost agreed to pay a bonus of 3½% on net profits," but that such profits had not yet been ascertained.

After a trial without a jury, lasting ten days, the trial court gave judgment against the plaintiff and in favor of all defendants. It is from this judgment that plaintiff appeals. Appellant's contention is that "Plaintiff is entitled to his bonus on Tract 20732 as a matter of law, and the judgment in favor of all defendants is therefore erroneous." This argument is predicated upon the statements in the answer, hereinbefore mentioned, to the effect that defendants "agreed to pay a bonus of 3½% on the net profits;" and that since "defendants conceded and admitted their obligation to plaintiff, * * * it was error for the Court to hold to the contrary."

[1] Appellant's contention is specious in nature, and cannot be sustained. As pointed out in respondents' brief, the argument is based upon only a partial survey of the allegations contained in the answer, and a partisan view of certain evidence which is in conflict with other evidence supporting the judgment. In respect to the answer, Paragraph X thereof, specifically alleges that notwithstanding the agreement that plaintiff was to continue work for another two weeks in order to assist in completing certain houses, "on January 9, 1956, plaintiff did not return to work, but accepted a position with another company." As respondents state, "a large portion of the ten-day trial was devoted to this phase of the case."

That this was a vital issue in the case, can hardly be denied, and the record indicates that the trial was conducted on this theory. This matter is particularly important inasmuch as the agreement between the parties specifies that "Should you voluntarily leave the employ of the company, or should you be discharged for just cause, prior to completion and sale of all of the houses in a tract, then you shall not be entitled to any bonus regardless of the number of houses completed and sold at the termination of your employment." The circumstances surrounding plaintiff's dismissal and his alleged voluntary abandonment of work after agreeing to stay on for two weeks, were matters of considerable moment in reference to defendants' liability.

The record certainly discloses substantial evidence in support of the trial court's decision to the effect that plaintiff was entitled to receive nothing from the defendants. This state of the record brings into play the long established principle that an appellate tribunal will not then attempt a reappraisal of the evidence but will accept the conclusions of the trial court.

[2] Nor can it be said that the trial court was in error for failing "to declare the respective rights of the parties in connection with the profits." As a matter of fact, that is exactly what the court did do, by declaring that plaintiff was entitled to receive nothing. No other or further declaration was required. And, of course, a court may as well deny declaratory relief as well as any other kind of relief.

The decision was not, as appellant claims, one which controverts an admission by the defendants and which should have been decided in plaintiff's favor as a matter of law. It was rather, a decision based upon substantial evidence, as hereinbefore indicated. Both sides were given ample opportunity to present their respective theories, and the record reveals no reversible error.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

159 Cal.App.2d 307

Theodore RUPLEY and William A. Rupley, doing business under the firm name and style of Rupley Bros. Logging Co., Plaintiffs and Appellants,

v.

Leonard HUNTSMAN and Donald Huntsman, doing business under the firm name and style of Huntsman Bros., and California Compensation & Fire Company, formerly California Compensation Insurance Company, a corporation, Defendants and Respondents.

Civ. 9390.

District Court of Appeal, Third District, California.

April 10, 1958.

Action by owners of tractor against an insured and insurer for damages to tractor allegedly caused by negligence of insured when tree fell on tractor. The Superior Court, El Dorado County, Robert E. Roberts, J., sustained demurrer to second amended complaint and denied order declaring insured and insurer in default and guilty of laches. Tractor owners appealed from judgment dismissing complaint. The District Court of Appeal, Schottky, J., held that complaint sufficiently alleged facts, to the effect that tractor owners had been induced to forbear to sue, for application of doctrine of estoppel and question whether insurer was estopped to assert bar of limitations was for trier of facts.

Judgment of dismissal reversed with directions.

1. Appeal and Error ⇐854(3)

Where a trial court sustains a demurrer which is made on several grounds and trial court does not specify its reason, ruling of trial court will be sustained if demurrer was well taken on any of the several grounds.

2. Insurance ⇐591½, 612(1)

In order for a third party to have a direct cause of action against an insurer, an intent to make an obligation inure to benefit of third party must clearly appear and if there is any doubt, policy should be construed against such intent; and in absence of a provision in policy or ordinance pursuant to which policy was issued, making policy inure to benefit of third party, it is a condition precedent to any action against insurer that a final judgment be obtained against insured.

3. Insurance ⇐642

Complaint for damages which occurred when insured, while felling a tree, caused a tree to fall on owners' tractor, based on theory that policy inured to benefit of public, including tractor owners, stated a cause of action as against a general demurrer.

4. Pleading ⇐208

It is error to sustain a special demurrer unless it spells out where the objection exists.

5. Pleading ⇐208

Where ground of special demurrer to effect that several causes of action were not separately stated, did not specify wherein alleged error existed, trial court should not have sustained special demurrer.

6. Limitation of Actions ⇐13

One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause adversary to subject his claim to bar of statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought. West's Ann.Code Civ.Proc. § 338.

7. Limitation of Actions ⇐179(1), 199(1)

Complaint against an insurer for damages to tractor on theory that insureds, while felling a tree caused tree to fall on tractor sufficiently alleged facts, to effect that insurer had induced tractor owners to forbear to sue, for application of doctrine of estoppel and question whether insurer was estopped by its conduct to assert bar of limitations was for trier of facts. West's Ann.Code Civ.Proc. § 338.

8. Judgment ⇐210

Where defendants did not seek a judgment promptly after plaintiffs chose to stand on their second amended complaint,

plaintiff was not entitled to order declaring defendants guilty of laches.

9. Pleading ⇐225(3)

After a demurrer is sustained with leave to amend and plaintiff fails to amend within specified time, no formal motion to dismiss the action is necessary; the entry of a judgment follows as a matter of course.

10. Judgment ⇐276

Where demurrer to plaintiffs' second amended complaint was sustained with leave to amend and plaintiffs failed to amend and elected to stand on complaint, judgment of dismissal was properly made notwithstanding only eight days' notice of motion for entry of judgment had been made.

11. Appeal and Error ⇐85, 102

Orders sustaining a demurrer to a second amended complaint and denying plaintiffs' motion to declare defendants in default for laches in not seeking entry of a judgment promptly were not appealable.

H. D. Jerrett, Sacramento, for appellants.

Keith, Creede & Sedgwick, San Francisco, for respondents.

SCHOTTKY, Justice.

Plaintiffs above named have appealed from a judgment entered in favor of defendants after defendants' demurrer to plaintiffs' second amended complaint was sustained with leave to amend and plaintiffs had elected to stand on their complaint. Plaintiffs also appeal from a ruling of the trial court denying their motion for an order declaring defendants in default and guilty of laches, from the order of the court sustaining the demurrer to the second amended complaint, and from an order of the court denying plaintiffs' motion to set aside and vacate the judgment.

The second amended complaint alleged in substance that defendants Leonard and Donald Huntsman were engaged in the business of tree felling, and that on August 8, 1952, a tractor belonging to plaintiffs was damaged when a tree fell on it, said damage being caused by the negligence of defendants Huntsman; that said defendants were fully covered by liability insurance with defendant California Compensation & Fire Company "and that said policy inured to the benefit of the public including the plaintiff herein"; that plaintiffs made repeated demand on said defendants, and each of them, for payment of said damage, the first demand being made within 20 days after the damage occurred. Said complaint alleged further:

That Anderson & Mayer, agent of defendant insurance company, wrote plaintiffs' attorney, on August 19, 1953, a letter in which it was stated that they could not discuss plaintiffs' claim further until the personal injury features of the case had been disposed of, the letter concluding as follows: "It is impossible for us to advise you at present just when we could entertain disposition of your claim and can only state that at the time that the claim of Mr. Green is disposed of we will then be glad to consider Rupley Brothers claim." That on November 27, 1953, the said agent of defendant insurance company again wrote plaintiffs' attorney that the personal injury action was at issue but that no settlement had been reached, the letter concluding as follows: "Because of these circumstances our principal will not be able to accommodate you with respect to your property damage claims and have requested that we do advise you." That on June 8, 1955, plaintiffs' attorney wrote to defendant insurance company, stating that he had been informed that the personal injury action had been settled out of court and that plaintiffs were preparing to immediately file suit on their claim, the letter concluding as follows: "I understand your attention has heretofore been called to this claim, and demand made by Anderson & Mayer, General Insurance Adjusters, Sacramento, California, and others, and therefore, I feel it only proper to again bring to your attention the matter of the claim of the Rupley Bros., etc. against the insured, before filing the action mentioned above." That on June 29, 1955, the

insurer's agent requested appellants' attorney to communicate with him. That the matter was discussed with the agent who told the attorney that the insurer was ready to take up the claim but it was necessary to have the invoices for the work done on the tractor in order to make a settlement. That the invoices were delivered to the agent on August 9, 1955, at which time the agent stated "that he would forward them on to the said Insurance Company * * * and it was possible he would have a reply when he returned from his vacation, and that by said declarations of assurance so made by said agent * * * and as understood by plaintiff, and intended by said agent to be understood, the plaintiff was thereby induced to forbear to sue, upon said claim until the happening of said event, * * *" That on August 22, 1955, plaintiffs' attorney called the agent of defendant insurance company and was informed by said agent "that said defendant Insurance Company had refused to consider said claims on the ground that said claim was barred by the statute of limitations; and that while he, said agent, considered it a rotten deal and there was nothing he could do about it."

All of the defendants joined in a demurrer to the second amended complaint, the grounds stated being:

"I. The complaint does not state facts sufficient to constitute a cause of action against California Compensation & Fire Company, a corporation.

"II. The complaint contains several causes of action not separately stated.

"III. The complaint does not state facts sufficient to constitute a cause of action against Leonard Huntsman and Donald Huntsman, individually and doing business as Huntsman Brothers, and California Compensation & Fire Company, a corporation, in this, that it affirmatively appears therefrom that said causes of action are barred by the provisions of Section 338 of the Code of Civil Procedure."

The chief question to be determined upon this appeal is the propriety of the ruling of the trial court in sustaining the demurrer.

[1] The trial court did not indicate its reason for sustaining the demurrer, and the rule that where a trial court sustains a demurrer which is made on several grounds and the trial court does not specify its reason the ruling of the trial court will be sustained if the demurrer was well taken on any grounds, is applicable. Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416, 424, 282 P.2d 890; Moxley v. Title Ins. & Trust Company, 27 Cal.2d 457, 462, 165 P.2d 15, 163 A.L.R. 838.

[2, 3] The first ground of the demurrer was that the complaint did not contain sufficient facts to constitute a cause of action against the defendant insurance company. The complaint alleged that the insurer had issued its insurance policy insuring the respondents Huntsman for damage to property and "that said policy of insurance inured to the benefit of the public including the plaintiff herein." The exact terms of the policy are not shown by the complaint. The California rule is that in order for one to have a direct cause of action against an insurer an intent to make an obligation inure to the benefit of a third party must clearly appear, and if there is any doubt it should be construed against such intent. Chamberlin v. City of Los Angeles, 92 Cal.App.2d 330, 206 P.2d 661; Van Der-Hoof v. Chambon, 121 Cal.App. 118, 131, 8 P.2d 925. In the absence of such provision in the policy or an ordinance pursuant to which the policy is issued making the policy inure to the benefit of a third party it is a condition precedent to any action against the insurance company that a final judgment be obtained against the assured. (See cases cited above.) However, the specific ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action against defendant insurance company. As stated in 39 Cal.Jur.2d, page 198:

"A general demurrer does not lie therefore, when the necessary facts are

shown to exist, although they may be stated imperfectly, inaccurately, or ambiguously, or may appear by necessary implication only. Similarly, a complaint is not insufficient as against a general demurrer because essential facts appear only inferentially, as conclusions of law, by way of recital, or as informal and argumentative allegations."

The complaint here involved did allege that the policy of insurance "inured to the benefit of the public including plaintiff herein." While a special demurrer on the ground that this allegation was uncertain in that it did not appear how or in what manner the policy inured to the benefit of plaintiff would have been a good ground of demurrer, we do not believe that the general demurrer of the defendant insurance company was good.

[4, 5] The second ground of the demurrer was that several causes of action were not separately stated. It does not specify wherein the alleged error exists. It is error to sustain a special demurrer unless it spells out where the objection exists. Miller v. Dyer, 20 Cal.2d 526, 531, 127 P.2d 901, 141 A.L.R. 1428; Coons v. Thompson, 75 Cal.App.2d 687, 171 P.2d 443. As stated in Coons v. Thompson, supra, 75 Cal.App.2d at page 689, 171 P.2d at page 444:

"A special demurrer to a pleading upon the ground that several counterclaims have been improperly joined and not separately stated is insufficient unless the demurrer specifies wherein the alleged misjoinder exists. (See Miller v. Dyer, 20 Cal.2d 526, 531, 127 P.2d 901, 141 A.L.R. 1428; Healy v. Visalia & Tulare R. R. Co., 101 Cal. 585, 593, 36 P. 125.)"

[6] The third ground of demurrer was that the complaint affirmatively shows on its face that the cause of action is barred by the statute of limitations. Code Civ. Proc. sec. 338. This ground is good unless the complaint alleges sufficient facts to constitute an estoppel. The principle of estoppel is: "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." Carruth v. Fritch, 36 Cal.2d 426, 224 P.2d 702, 706, 24 A.L.R. 2d 1413, 1420 et seq. See also Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323.

"It is well settled that where delay in commencing an action is induced by the conduct of the defendant, he cannot avail himself of the defense of the statute [of limitations]." Gaglione v. Coolidge, 134 Cal.App.2d 518, 286 P.2d 568, 574. And as stated in Industrial Indemnity Co. v. Industrial Accident Commission, 115 Cal. App.2d 684, at page 689, 252 P.2d 649, at page 652:

"The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. [Citations.] A person by his conduct may be estopped to rely on the statute. Where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. [Citations.] When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise. [Citations.] One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought. Carruth v. Fritch, 36 Cal.2d 426, 433, 224 P.2d 702, 24 A.L.R.2d 1413."

Estoppel is a question of fact and the question that we must determine is whether or not plaintiffs have alleged facts which

would be sufficient to support a finding of estoppel by a trier of facts.

We have hereinbefore stated the substance of the allegations of the second amended complaint. These allegations show that following damage to plaintiffs' tractor, plaintiffs made demand upon each of the defendants for payment of the damages to the tractor; that thereafter, on August 19, 1953, the agent of defendant insurance company informed plaintiffs that as soon as the personal injury feature of the case had been disposed of they would be glad to consider plaintiffs' claim; that on November 27, 1953, the agent of defendant insurance company wrote plaintiffs' attorney that the personal injury action had not yet been disposed of and that "Because of these circumstances our principal will not be able to accommodate you with respect to your property damage claims and have requested that we advise you;" that on June 8, 1955, plaintiffs' attorney wrote defendant insurance company stating that he had been informed that the personal injury action had been settled, and that plaintiffs were preparing to immediately file suit; that on June 29, 1955, the insurer's agent requested appellants' attorney to communicate with him; that the matter was discussed with the agent who told the attorney that the insurer was ready to take up the claim but it was necessary to have the invoices for the work done on the tractor in order to make a settlement; that the invoices were delivered to the agent on August 9, 1955, at which time the agent stated "that he would forward them on to the said Insurance Company, * * * and it was possible he would have a reply when he returned from his vacation, and that by said declarations of assurance so made by said agent * * * and as understood by plaintiff, and intended by said agent to be understood, the plaintiff was thereby induced to forbear to sue upon said claim until the happening of said event * * *"; that on August 22, 1955, plaintiffs' attorney called the agent of defendant insurance company and was informed by said agent "that said defendant Insurance Company had refused to consider said claims on the ground that said claim was barred by the statute of limitations; and that while he, said agent, considered it a rotten deal and there was nothing he could do about it."

[7] We think that the complaint, as against a general demurrer, does allege facts sufficient to make the question of estoppel an issue of fact to be decided by the trier of facts. It is a reasonable inference from the facts alleged that the agent of defendant insurance company was also acting as the agent for defendants Huntsman. Demand was made by plaintiff upon defendants Huntsman and thereafter the agent of that insurance carrier, defendant insurance company, began negotiating with plaintiffs' attorney as hereinbefore set forth. From these letters and statements, together with the allegation that "by said declarations of assurance so made by said agent * * * and understood by plaintiff, and intended by said agent to be understood, plaintiff was induced to forbear to sue upon said claim" until the three year period expired, we believe that the complaint did allege sufficient facts for the application of the doctrine of estoppel. We therefore conclude that the court erred in sustaining the demurrer to the second amended complaint.

[8] Appellants also contend that the trial court erred in denying their motion for an order declaring respondents guilty of laches. This motion was based on the fact that respondents did not seek a judgment promptly after appellants chose to stand on their second amended complaint. There is no merit in this contention.

[9, 10] Likewise, there is no merit in plaintiffs' contention that the court erred in entering the judgment of dismissal because only 8 days' notice of the motion for entry of judgment was made. After a demurrer is sustained with leave to amend, and the plaintiff fails to amend within the specified time, no formal motion to dismiss the action is necessary. The entry of

a judgment follows as a matter of course. Michaels v. Mulholland, 115 Cal.App.2d 563, 565, 252 P.2d 757.

No other points raised require discussion.

[11] The appeal of plaintiffs from the order sustaining the demurrer to the second amended complaint and from the order denying plaintiffs' motion to declare defendants in default for laches in not seeking entry of judgment promptly is dismissed, said orders being non-appealable.

The judgment of dismissal is reversed with directions to the trial court to overrule the demurrer to the second amended complaint.

VAN DYKE, P. J., and PEEK, J., concur.



159 Cal.App.2d 413

Jim ANDERSON, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, Russell S. Munro, Director, A. S. Madden, District Liquor Control Administrator, L. W. Hubbard, Supervising Agent, et al., Defendants and Respondents.

Civ. 5636.

District Court of Appeal, Fourth District, California.

April 16, 1958.

Petition for writ of mandate to review revocation of liquor license. The Superior Court of Kern County, Norman F. Main, J., denied the petition and petitioner appealed. The District Court of Appeal, Griffin, J., held that where certificate of revocation of on-sale beer and wine license was mailed to licensee December 20, 1956, and received December 24, 1956. and notice of appeal was mailed January 30, 1957, but not received until February 4, Alcoholic Beverage Control Board lacked jurisdiction to consider appeal under statute requiring appeal within 40-day period, which begins to run from time decision is delivered or mailed to licensee.

Affirmed.

1. Administrative Law and Procedure ⇐229

Exhaustion of all available administrative remedies is a jurisdictional prerequisite to right of judicial review of an administrative board, and cannot be excused on ground that it would cause unreasonable delay or hardship. West's Ann. Gov.Code, § 11523; West's Ann.Const. art. 20, § 22.

2. Intoxicating Liquors ⇐108(10)

Where certificate of revocation of on-sale beer and wine license was mailed to licensee December 20, 1956, and received December 24, 1956, and notice of appeal was mailed January 30, 1957, but not received until February 4, Alcoholic Beverage Control Board lacked jurisdiction to consider appeal under statute requiring appeal within 40-day period, which begins to run from time decision is delivered or mailed to licensee. West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 23081.

3. Intoxicating Liquors ⇐108(10)
Mandamus ⇐13

Fact that licensee petitioned for reconsideration of revocation of liquor license, which was denied, did not extend time for appeal nor constitute a timely exhaustion of all remedies before seeking writ of mandate. West's Ann.Bus. & Prof. Code, § 23081; West's Ann.Gov.Code, § 11523.

4. Administrative Law and Procedure ⇐229
Licenses ⇐38

A licensee need not petition for reconsideration under Administrative Procedure Act in order to exhaust administrative remedies. West's Ann.Gov.Code, § 11523; West's Ann.Const. art. 20, § 22.

5. Statutes ⇐219

Interpretation placed upon administrative procedure act by Alcoholic Beverage Control Board is entitled to consideration. West's Ann.Gov.Code, § 11523; West's Ann.Const. art. 20, § 22.

6. Intoxicating Liquors ⇐108(10)

The mailing of notice of appeal from revocation of liquor license is not the equivalent of constructive filing.

Morris B. Chain, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., and William T. Chidlaw, Deputy Atty. Gen., for respondents.

GRIFFIN, Justice.

The principal question here involved is whether petitioner, under the provisions of the Alcoholic Beverage Control Act (Business and Professions Code, Sec. 23081) filed his notice of appeal from an order of the respondent, Department of Alcoholic Beverage Control, revoking plaintiff's on-sale beer and wine license, within the required 40 days after "service or mailing" of such decision by said board. On December 20, 1956, the license was revoked and on the same date a certificate of such revocation was mailed by it to petitioner. It was received by him on December 24, 1956. On January 30, 1957, petitioner mailed his notice of appeal to the Alcoholic Beverage Control Board. It was not received by it until February 4, 1957. February 2nd and 3rd fell on Saturday and Sunday respectively. On March 4, 1957, the Board, on motion, dismissed the appeal because it was not filed within the period above described. It subsequently denied a motion to reconsider said decision. Petitioner, by way of mandate in the Superior Court, sought to require the Board to hear and determine the appeal and to cancel and annul its decision on the ground that petitioner was not afforded a proper hearing in the first instance. Judgment went for respondents on the ground that petitioner had not exhausted his administrative remedies in that he had failed to perfect his appeal within the statutory time. Petitioner now claims, on this appeal, that an appeal to the Alcoholic Beverage Control Board was not a condition precedent to the right of judicial review by writ of mandate, citing section 11523 of the Government Code, and that since he subsequently petitioned for a reconsideration of the decision he had exhausted his remedy before said Board and a writ of mandate was authorized.

[1] It has been uniformly held in this state, as to the right of judicial review of an administrative board, that all available administrative remedies must be first exhausted; that it is jurisdictional and cannot be excused by the court on the ground that it would cause unreasonable delay or hardship. 2 Cal.Jur.2d p. 304, sec. 184; Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433; United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26; City and County of San Francisco v. County of San Mateo, 36 Cal.2d 196, 222 P.2d 860; Molina v. Munro, 145 Cal.App.2d 601, 302 P.2d 818; Art. XX, sec. 22, California Constitution.

[2–6] It seems clear from the act under consideration that the 40 days within which petitioner could appeal begins to run from the time a decision is "delivered or mailed" to the licensee. The decision revoking petitioner's license was rendered and mailed to him on December 20, 1956. The notice of appeal was not received by the Board until February 4, 1957, more than 40 days thereafter. The Board lacked jurisdiction to consider the appeal. The fact that petitioner subsequently petitioned for reconsideration of that decision, which was denied, did not extend the time for appeal nor did it constitute a timely exhaustion of all remedies before seeking a petition for a writ of mandate. Under Section 23081 of the Business and Professions Code the only decision from which plaintiff could

appeal was the decision revoking his license. A timely appeal to the appeals board is necessary to exhaust the administrative remedies. A licensee need not petition for reconsideration under the administrative procedure act in order to exhaust his administrative remedies. Sec. 11523 Government Code. See also Hollywood Circle, Inc., v. Department of Alcoholic Beverage Control, 153 Cal.App.2d 523, 314 P.2d 1007, writ of certiorari denied by U. S. Supreme Court 3/10/58, 78 S.Ct. 562, 2 L.Ed.2d 580. This has been the construction and interpretation placed upon that act by the Alcoholic Beverage Control Board. This interpretation is entitled to consideration. Nelson v. Dean, 27 Cal.2d 873, 168 P.2d 16, 168 A.L.R. 467. It adopted as part of its Administrative Code, Rule 180, Title 4, Chapter 1.1 of the California Administrative Code, which provides: "*Time of Appeal.* The appeal to the board shall be deemed filed on the date it is received in the principal office of the board." This rule follows the established general rule for appellate bodies, as set forth in 3 Cal.Jur.2d p. 653, sec. 168. See also La Rue v. Board of Trustees, 40 Cal.App.2d 287, 104 P.2d 689. The mailing of a notice of appeal is not the equivalent of constructive filing. Van De Veer v. Department of Alcoholic Beverage Control, 155 Cal.App.2d 817, 318 P.2d 686, and the late case of Pesce v. Depart- of Alcoholic Beverage Control, Cal.App., 322 P.2d 995, fortify this conclusion. See also In re Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250; and 3 Cal.Jur.2d p. 653, sec. 168.

The refusal of the board to hear the appeal because the notice of appeal was filed too late and the trial court's conclusion that petitioner had not exhausted his remedies within the required time and in a proper way, was justified.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

159 Cal.App.2d 534

Minnie CROSBY and Bertha Moulton, Plaintiffs and Appellants,

v.

Jose Guadalupe MARTINEZ et al., Defendants,

Jose Guadalupe Martinez, Mary B. Romo, now known as Mrs. Jose Guadalupe Martinez, Respondents.

Civ. 22718.

District Court of Appeal, Second District, Division 2, California.

April 18, 1958.

Rehearing Denied May 13, 1958.

Hearing Denied June 17, 1958.

Action for personal injuries sustained as result of intersectional automobile collision. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that testimony by police officer as to what defendant told officer with respect to what witness at scene of accident had told defendant was inadmissible, notwithstanding on cross-examination, plaintiff's counsel had asked officer whether witness' name appeared on police report.

Judgment reversed.

1. Evidence ⇐317(1)

In intersectional automobile collision case, testimony by police officer as to what defendant told officer with respect to what witness at scene of accident had told defendant was inadmissible as hearsay, notwithstanding plaintiff's counsel had asked officer whether witness' name appeared on police report. West's Ann.Code Civ.Proc. § 1854.

2. Evidence ⇐155(10)

Statute providing that when part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, does not authorize reception of other portions of conversation which are not explanatory of that which the opponent has brought out and which are intrinsically

inadmissible. West's Ann.Code Civ.Proc. § 1854.

3. Appeal and Error ⇐1043(7)
Continuance ⇐31

Where trial court had permitted police officer to testify as to what defendant told officer with respect to what witness at scene of accident had told defendant, plaintiffs were entitled to a short continuance in order to produce the witness at scene of accident and plaintiffs' case was prejudiced by denial of request for short continuance. West's Ann.Code Civ.Proc. § 1854.

4. Continuance ⇐6

Fact that a court may be under pressure to attend to other matters cannot justify refusal of a short continuance to which a party is entitled.

5. Automobiles ⇐145

Absence of a driver's license is not evidence of negligence. West's Ann.Code Civ.Proc. §§ 53, 2055.

6. Automobiles ⇐243(1)

In intersectional automobile collision case, it was error to overrule objection to testimony relating to possession or lack of possession of a driver's license on part of one of plaintiffs and to overrule motion to strike all testimony relating to subject. West's Ann.Code Civ.Proc. §§ 53, 2055.

Vaughn, Brandlin & Baggot, Los Angeles, for appellants.

Dryden, Harrington, Horgan & Swartz, by Vernon G. Foster, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiffs in this personal injury action appeal from an adverse judgment which was entered pursuant to a jury's verdict. They rely upon errors of law which are claimed to have been highly prejudicial.

Plaintiffs, two Negro women, were injured in a collision of automobiles which occurred within the intersection of San Pedro Street and Vernon Avenue, in the city of Los Angeles. Plaintiffs were traveling east on Vernon and defendants south on San Pedro; this was shortly before noon on May 25, 1955. Defendants' automobile ran head-on into the left rear fender of plaintiffs' car, a 1951 Mercury, and the point of impact was within the southwest quarter of the intersection. The crucial issue was who ran the red light.

Plaintiffs testified that they approached and entered the intersection at a moderate speed of 20 to 25 miles an hour, that the green signal light was with them when they entered. Neither one of them saw defendants' car until just before they were struck. Plaintiffs' witness Robert Lee Hall, who was sitting on the fire plug at the northwest corner of the intersection, testified that he saw defendants go south through a red light at a speed of 45 to 50 miles an hour and strike plaintiffs' vehicle at the left rear fender; that plaintiffs had entered on the green light. Albert K. Houston testified that his car was standing southbound at the northwest corner and he was waiting for the light to change to green so he could turn to the west; that defendants passed him while the red light was on and at a speed of about 45 miles per hour. Tommy Harper said he was standing on the southwest corner of the intersection intending to cross the street to the north; that he had stopped for the red light and was waiting for the green; he saw defendants Martinez enter the intersection against the red light, traveling abour 35 to 40 miles an hour; the light changed to green for north and south traffic after defendants had run into plaintiffs' car; plaintiffs did not enter against the red light.

Defendant Jose Martinez and his present wife were riding together and he was driving. Both testified that they were traveling only 20 to 25 miles an hour, saw the red light when a block away, and that it changed to green when they were half a block north of it; that they continued into the intersection at the same speed and with the green light still in their favor. Also, that there was an eastbound vehicle on the streetcar track on Vernon whose driver was waiting for the signal to turn

in his favor; that while it was standing there plaintiffs' car passed it on the right and came in front of defendant just like a flash when itwas too late for him to avoid a collision.

No one but the defendants Martinez saw any eastbound car which was stopped or which was passed by plaintiffs. All of plaintiffs' witnesses who mentioned the subject swore that plaintiff Crosby was driving the eastbound car, but the defendants Martinez had plaintiff Moulton doing the driving while wearing a red coat. Defendant Jose Martinez at the scene of the accident accused Mrs. Moulton of running the red light. There were circumstances which impaired somewhat the credibility of each of the parties plaintiff and defendant; also plaintiffs' witness Harper. But no one other than the two defendants undertook to say that plaintiffs did not enter the intersection with the green light.

In this setting certain hearsay evidence was received tending to corroborate defendants in this respect. Police Officer William E. Meyer, called as defendants' last witness, was asked on cross-examination if he had the name of Irving Harris as a witness and replied in the affirmative. Nothing more was asked about the subject on cross-examination. Upon redirect the officer was asked by defense counsel to give his conversation with defendant Jose Martinez at the scene of the accident. He related defendant's version of the collision and added: "He also stated that a witness—". Plaintiffs' attorney objected upon the ground of hearsay and was overruled. The officer then said that Martinez "stated that a witness, Mr. Harris, gave him his name, and he also stated that Mr. Harris had told him that he, Mr. Harris, had been stopped on Vernon, heading east, for the red light, and that the driver driving the 1951 Mercury had passed him while he was stopped for the red light and ran the red signal, and was hit by southbound traffic." This is the only corroboration the defendants have with respect to the claim that it was plaintiffs who ran the red light. The officer also said he later tried to contact Harris by telephone but did not succeed. Plaintiffs' counsel started to examine him on recross about the same matter and the following occurred:

"Q. Now, with reference to this follow-up of Mr. Irving Harris, you say that you were unable to contact him later? A. He had left the scene, and I always make a telephone call.

"Q. Did you make the telephone interview? A. I did not make the telephone interview.

"Mr. Foxx: I object as assuming a fact not in evidence, and is hearsay.

"The Court: Sustained. * * *

"Mr. Brandlin: The plaintiff offers to prove that the police report shows that a telephone interview took place shortly after the accident with Mr. Harris, and Mr. Harris stated that he was headed in a northerly direction on San Pedro when the light was red for the San Pedro traffic, at which time the accident took place. * * *

"The Court: What do you have to say to that?

"Mr. Foxx: In the first place, this is a completely hearsay document. The officer testified he did not at any time talk with Mr. Harris. It is made by a third party.

"The Court: Definitely, unless it was made by him, he cannot relate to them—

"Mr. Foxx: The only reason I went into the officer's conversation with Mr. Martinez was after counsel—

"The Court: He opened it up.

"Mr Foxx: I thought the entire conversation was hearsay.

"The Court: This man knows of his own knowlege whether he had a conversation by telephone with Mr. Harris. It is proper. But what someone else did, what is in that report, that is improper." Plaintiffs' counsel then sought to examine about the contents of the police report and was blocked by a hearsay objection. He then inquired if Officer V. W. Vogel was the follow-up man and the witness said he did not know. Defendants then rested their case.

Immediately following that statement the transcript seems to start in medias res as follows:

"The Court: You know what my instructions were last night. You were going to have him here.

"Mr. Brandlin: I was under the impression last night—there was the possibility that Irving Harris would be called.

"The Court: You were told distinctly he would not be here.

"Mr. Foxx: In any event, I would object to any testimony by Officer Vogel, to any conversation he had with Mr. Harris or anyone else outside the presence of the parties, on the ground that it is pure, unadulterated hearsay.

"The Court: It would be. If you make an objection, I will sustain it.

"Mr. Foxx: I will so object now, to expedite this, if we can. * * *

"Mr. Brandlin: Of course, when the question was asked originally by Mr. Foxx, what was said by Mr. Harris and Mr. Martinez, I then said that it was hearsay, and I objected to it on that ground.

"The Court: You opened this up as far as Martinez was concerned.

"Mr. Brandlin: I asked him what Mr. Martinez said, of his own knowledge, not what somebody else told him.

"The Court: You never mentioned anything about his own knowledge.

"Mr. Brandlin: The minute the officer got into what Martinez told Harris, I objected on the ground that it was hearsay.

"The Court: It is part of the conversation.

"Mr. Brandlin: It is not an admission.

"The Court: We may as well get this thing straightened out. If you want to make your offer as to what Vogel is going to testify to, I can rule on that, and save him coming over here."

That offer was made and objection thereto sustained. After further discussion the following colloquy took place:

Mr. Brandlin: If it please the Court, I should like to make one observation, and that is this: True, normally when you open a conversation, all the conversation is admissible, if it is admissible on all other grounds. This wasn't admissible because it was hearsay.

"The Court: Where did you get that rule of law?

"Mr. Brandlin: I think that is a basic rule.

"The Court: I am sorry, I can't agree with you.

"Mr. Brandlin: May I have time to bring in Mr. Harris? I will have him here this afternoon.

"The Court: I am going to finish this case. I told you fellows in chambers last night—you asked Mr. Foxx the direct question if he was going to have him here, and he said no.

"Mr. Brandlin: That is correct; but I had no suspicion that the statement of Mr. Harris made to Martinez would be admitted in evidence and presented to the jury.

"The Court: If your request is in the nature of a motion for continuance, it will be denied, in the state of the record now.

"Mr. Brandlin: We would request the continuance until 1:45.

"The Court: It is denied."

[1, 2] Plaintiffs' objection to Meyer's testimony as to what defendant said that Harris had told him should have been sustained; it was unadulterated hearsay (see, Buchanan v. Nye, 128 Cal.App.2d 582, 584–585, 275 P.2d 767), and was not admissible under § 1854, Code of Civil Procedure, as is now claimed. That section says: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary

to make it understood, may also be given in evidence." It has never been construed to authorize the reception of other portions of a conversation which are not explanatory of that which the opponent has brought out and which are intrinsically inadmissible. 18 Cal.Jur.2d § 128, p. 572: "When a detached act, declaration, conversation, or writing is given in evidence, evidence which is necessary to make it understood may be introduced. This rule contemplates a declaration of such a nature that it cannot be understood without the introduction of the entire statement. * * *" Section 129, p. 574: "Moreover, the rule of the statute is subject to the limitation or qualification that the supplementing or explanatory testimony be confined to the same subject as the one it supplements or explains, and that the portion of the evidence not relevant to the matter in question may be excluded. So also, where the inadmissible matter in a document is inseparably interwoven with the admissible parts, the entire document may be excluded.

"The court may properly exclude portions of a conversation that are not relevant to the part introduced, and portions of a document not relevant to any issue in the case may also be rejected. Such supplementing or explanatory evidence must likewise be excluded where its connection to the other evidence is doubtful and its admission would be prejudicial. A court should be reluctant to admit evidence which in itself is incompetent merely because of a more or less remote or inferential connection with evidence that is properly admitted." The decided cases support the text just quoted. See, Loftus v. Fischer, 113 Cal. 286, 288, 45 P. 328; People v. McCoy, 25 Cal.2d 177, 187, 153 P.2d 315; Zibbell v. Southern Pacific Co., 160 Cal. 237, 250, 116 P. 513; Bacon v. Grosse, 165 Cal. 481, 490, 132 P. 1027; John Breuner Co. v. King, 9 Cal.App. 271, 274, 98 P. 1077; People v. Williams, 123 Cal.App.2d 226, 231, 266 P.2d 599; In re Estate of Nunes, 140 Cal.App. 2d 744, 747, 296 P.2d 29.

"In passing upon the admissibility of such evidence, where the connection is doubtful, it is a safe rule to exclude evidence otherwise incompetent, where its admission would be prejudicial if erroneous. A court should be reluctant to admit evidence which in itself is incompetent, because of a more or less remote or inferential connection with evidence that is properly admitted. The purpose of a trial is to do justice between the parties, and even though such evidence, by reason of some slender thread of connection, is technically admissible under the above rule, it is not prejudicial error to reject it, unless its rejection results in a 'miscarriage of justice.' Const., art. 6, § 4½. Where a party seeks to introduce incompetent evidence, relevant, if at all, only because connected with other evidence already in the case, and admissible solely because of such connection, and where, if erroneously admitted, it would be prejudicial to one of the parties, and would have little, if any, proper weight with the jury, the trial court, if in doubt as to the sufficiency of the connection shown, should resolve the doubt in favor of the exclusion of the evidence, for the error in its exclusion, if any, would not be prejudicial to either party, while the error in its reception, if any, would be prejudicial to the party against whom it is offered." Avery v. Wiltsee, 177 Cal. 484, 486, 171 P. 95, 96.

The matter to which plaintiffs' attorney objected was not related to the testimony which he had brought out on cross-examination; it was objectionable hearsay and the ruling admitting it in evidence was patently erroneous. Coming from the mouth of this officer of the law the alleged statement of Harris took on a verisimilitude which it might not otherwise carry. It was obviously introduced for the purpose of corroborating defendants' own testimony and is the only evidence in the record which actually or apparently has that quality.

The subsequent efforts of plaintiffs' counsel to offset it by showing what the police report said or what officer Vogel would say were properly frustrated by objections sustained. "The so-called 'open the gates' argument is a popular fallacy." Laursen v. Tidewater Associated Oil Co., 123 Cal.App.2d 813, 816, 268 P.2d 104, 106.

[3, 4] But his proposal to produce Harris as a witness bears a different complexion. This occurred upon the last morning of a trial which appears to have proceeded with reasonable expedition. Plaintiffs' counsel, as he pointed out, had no reason to anticipate and prepare to counteract egregious error in the court's rulings. Apparently he had no reason to foresee that he would need the presence of Harris. He well may have considered that a clear preponderance of the evidence was with him and that he would not need Harris as a witness. He was doubtless surprised at the admission of this hearsay statement attributed to Harris, and for the first time cognizant of the necessity of producing him. In the circumstances plaintiffs were entitled to the short continuance that their counsel requested. The fact that the court may have been under pressure to attend to other matters could not justify a refusal of a short continuance to which plaintiffs were entitled. "A litigant is entitled to a fair share of the court's time, and may not be deprived of an opportunity to present his case fully and fairly because someone else is being inconvenienced by having to wait his turn. No lawyer can foresee or predict all the vicissitudes that will occur in the course of a contested trial, which often consist of unpredictable rulings of the court. * * * The court stated no sound reason for denying the continuance and we can discover none. Had we been in the position of the trial judge we would have considered denial of the requested continuance to be an abuse of discretion. As a reviewing court, our views are not different, and we cannot put them aside merely because the trial judge believed it would be an abuse of his discretion to grant the continuance. We must be guided by the dictates of our own judgment and experience, and we hold that plaintiff's case was prejudiced for no good reason by denial of her request of a short continuance." Hays v. Viscome, 122 Cal.App.2d 135, 140, 141, 264 P.2d 173, 177, 39 A.L.R.2d 1435.

We deem it reasonably probable that a result more favorable to appellants would have been reached in the absence of the errors just discussed; this means a miscarriage of justice (People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243) and a reversal.

[5] Because of the necessity of a new trial, another alleged error must be considered (Code Civ.Proc. § 53). Over objection plaintiff Crosby was cross-examined with respect to her failure to possess a driver's license. First she was asked if she had ever taken the necessary tests in California. Having answered in the affirmative she was then required to disclose the fact that she never obtained a California license. Next it was developed that she had secured a Michigan license under a fictitious name. Near the close of the case plaintiff was recalled under § 2055, Code of Civil Procedure, and again interrogated on the subject with the obvious purpose of prejudicing her before the jury upon an extraneous pseudo issue; in immediate conjunction with this it was shown that she had been convicted of a felony, the nature of which is not disclosed by the record. An attempt was made to show that the conviction was under a fictitious name, another matter that was foreign to this case. There was no issue raised by the pleadings which would make the absence of a driver's license material or competent evidence. Absence of one is not evidence of negligence. If plaintiff was negligent, that had no proximate relationship to her possession or nonpossession of a license. If she was not negligent in fact, her failure to obtain a driver's license would not convert careful conduct into tortious absence of care. The applicable rule is succinctly stated in Strandt v. Cannon, 29 Cal.App.2d 509, 518, 85 P.2d 160, 164: "The weight of authority, as we see it, is that the operator's negligence is to be determined by the facts existing at the time of the accident, and whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one." This language was quoted

with apparent approval in Armenta v. Churchill, 42 Cal.2d 448, 458, 267 P.2d 303. To the same effect are, Page v. Mayors, 191 Cal. 263, 264, 216 P. 31; Wysock v. Borchers Bros., 104 Cal.App.2d 571, 582–586, 232 P.2d 531, 29 A.L.R.2d 948; Corsetto v. Pacific Electric Ry., 136 Cal.App.2d 631, 635, 289 P.2d 116; People By and Through Department of Public Works v. J. P. Loubet Co., 147 Cal.App.2d 566, 570, 305 P.2d 651; 7 Cal.Jur.2d § 393, p. 305.

[6] Objection was made to the initial inquiry concerning this subject and was overruled. Later a motion was made to strike all evidence relating to possession or the lack of a driver's license, with the request that the jury be instructed that that evidence was immaterial. The Wysock case, supra, was cited to the court but the motion was denied. Both rulings were erroneous.

The judgment is reversed.

FOX, P. J., and HERNDON, J., concur.



159 Cal.App.2d 463

In the Matter of Mary Patricia WALKER, Ward of the Juvenile Court.

Hersch E. Bayes, Petitioner and Respondent, Howard Walker, Respondent and Appellant.

Civ. 9300.

District Court of Appeal, Third District, California.

April 17, 1958.

Proceeding to have child declared a ward of juvenile court, and for commitment and custody of child. The Superior Court of Solano County, Raymond J. Sherwin, J., entered an order decreeing child to be a ward of juvenile court, committing her to a convent, and ordering father to reimburse county, and the father appealed. The District Court of Appeal, Peek, J., held that evidence supported the determination.

Affirmed.

1. Infants ⇐16.10

In proceeding to have a minor declared to be ward of court, finding that all allegations in petition were true was sufficient without further findings of fact. West's Ann.Welfare & Inst.Code, § 735.

2. Infants ⇐16.14

In proceeding to have minor declared to be a ward of court, record on appeal did not support contention that juvenile court had considered matters outside of record. West's Ann.Welfare & Inst. Code, § 735.

3. Infants ⇐16.8

Evidence supported decree declaring child to be ward of juvenile court, committing her to a convent, and ordering father to reimburse county for her care and maintenance. West's Ann.Welfare & Inst. Code, §§ 551, 552, 700(i), 735.

4. Infants ⇐16.14

In proceeding to declare a minor to be ward of court, record did not support contention that probation officer had private interview with child's school teacher and made secret report to court. West's Ann.Welfare & Inst.Code, § 735.

5. Infants ⇐16.11

The statutory provisions for giving preference to family or institution of same religious belief as child's parents or family, in placing child, are not mandatory but child's welfare is paramount. West's Ann. Welfare & Inst.Code, §§ 551, 552.

6. Infants ⇐16.11

Record did not show abuse of discretion in committing child to Catholic institution which would be more convenient for visitation by father than Protestant institution. West's Ann.Welfare & Inst.Code, §§ 551, 552.

William H. McPherson, Fairfield, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen.; P. B. Lynch, Solano County District Atty., Fairfield, for respondent.

PEEK, Justice.

This is an appeal by the father of Mary Patricia Walker, a minor child from an order decreeing her to be a ward of the juvenile court, committing her to a convent, and ordering the father to reimburse the county for her care and maintenance.

The record which comes to us on a settled statement shows that the probation officer of Solano County filed a verified petition alleging the minor to be a person within the provisions of section 700, subdivision (i), of the Welfare and Institutions Code in that she was beyond the control of her parents and seeking to have her declared to be a ward of the court. A citation was issued and served upon the father and the minor's stepmother. On the date set for the hearing the parents, who appeared without an attorney, were both sworn but only the father testified. Additionally there was testimony by the deputy probation officer and the child. The officer's report was considered by the court as well as a written statement by the minor which was included therein.

The settled statement shows that the minor confirmed the truthfulness of her statement set forth in the probation officer's report concerning her conduct which gave rise to the proceeding; that she did not like the conditions at her home; that she felt her parents would be happier if she were not there; that she did not care if she were there at all as long as she might see her father and stepmother occasionally; and that if she were to remain at home she would probably continue her then course of conduct. In this regard the officer also reported that the minor had stated she felt she would like to be in a boarding school and that she would enjoy the company of girls of her own age group.

The father did not deny any of the statements contained in the report which it is now contended were erroneous. Neither did he deny that he had previously sought the advice of the probation officer concerning the best means of handling problems arising from his daughter's conduct, nor of his fear concerning her actions, nor that he had asked the officers to have her committed to the Convent of the Good Shepherd in San Francisco and had changed his mind only when he learned he would be compelled to pay for her maintenance and support at that institution. His only contention at the time of the hearing was that he felt the best place for his daughter was in his home and that the disciplinary problems which had developed had only arisen since she had been involved in an accident.

The probation officer testified that the doctor who examined the child had filed a report and would appear before the court if desired. However this witness also stated that since the process of commitment took some time, and since the child was receiving no benefit from her then confinement in the juvenile hall, it would appear that a commitment order should be made forthwith, that if thereafter a further hearing was indicated, such commitment order could be set aside and a different disposition made if it appeared to be in the best interests of the minor. At the conclusion of the hearing the court made an order committing the minor to the custody of the juvenile court, placing her in the Convent of the Good Shepherd at county expense, and ordering that the county be reimbursed by payments from the father to the probation officer. The court further stated that because the question of the ability of the parents to bear the expense of such commitment had not been determined, the case would be continued for one week at which time the doctor would have an opportunity to appear and testify.

The record shows that on the same date, August 17, 1956, an order of commitment was signed by the court wherein it was

found that all of the statements of fact "* * * contained in said petition and herein set forth are true." It was ordered that said minor be committed to the Convent of the Good Shepherd and that the father reimburse the county of Solano for such costs. Said order was filed on the 23rd of that month. At the continued hearing which was on the following day, the 24th, there were present the probation officer, the parents, their attorney and the doctor. Attorney McPherson stated, in response to a question from the court, that he was not appearing in regard to the amount to be paid by the parents; that he was there because of the question of the custody of the child, and that he desired to bring certain matters to the attention of the court before the child was taken from the parents' custody, to which the court replied, "Well, we will see."

The doctor testified as indicated in the probation officer's report that while he was not an expert in the particular field, he believed there was no connection between the accident and the child's behavior. He further testified that he had talked with Dr. LaTourelle of the staff of the Napa State Hospital but that no conclusion had been reached concerning her condition. Upon ascertaining that Dr. LaTourelle had suffered a heart attack, Mr. McPherson did not press his request to examine him. However he did reiterate his statement that he desired to introduce evidence attacking the probation officer's report and said that he had witnesses in court who would so testify. He was informed by the court that it appeared that the parents had not disclosed all of the facts to counsel, the court further stating, "We have letters, reports and conversations in the file which I do not think you are aware of and of which your client has not told you." Mr. McPherson then requested that he be allowed to inspect the file and the matters referred to by the court. In reply to his request the court stated that his request was too late and the same was denied. Following further examination of the father concerning his financial situation, the court issued what is entitled a modified order requiring him to pay to the probation officer of Solano County the sum of $25 per month toward the care and maintenance of his daughter at the convent.

Appellant contends (1) that the court failed to make findings of fact; (2) that the proceedings in the juvenile court were irregular in that [a] counsel for appellant was refused the opportunity to produce witnesses, [b] secret reports were made to the court without affording appellant an opportunity for the witnesses to testify, and [c] certain documents, letters and evidence in the file were presented to the court without the presence of the child or her parents, and without allowing counsel the right to inspect the same; (3) that the placement of the child was in violation of sections 551 and 552 of the Welfare and Institutions Code; and (4) that the trial court abused its discretion in depriving the parents of the child's custody.

[1] We find no merit in appellant's first contention. It is sufficient compliance with the provisions of section 735, Welfare and Institutions Code, where as in the present case the court finds that all of the allegations contained in the petition are true. In re Corrigan, 134 Cal.App.2d 751, 286 P.2d 32.

[2, 3] Appellant's second contention is likewise without merit. Neither the settled statement which is before the court, nor the record in the trial court which was requested on appeal disclose that any matters outside of the record were considered by the court or in any way affected its determination of the case. Certainly there would be no need for citation of authority to conclude that had such been the case a reversal would be warranted. In view of the sufficiency of the evidence to support the conclusion of the court, it cannot be said that the court abused its discretion in ordering a commitment of the child.

It would further appear that even if we were to conclude that the order of August

17 was not final, in that the court had reopened the case for further evidence on the 24th, nevertheless the evidence which counsel offered related to matters not sufficiently pertinent to the basic issue before the court, the welfare of the child, to justify a conclusion by this court that a different determination probably would have been made had such evidence been before the court. See In re Dargo, 81 Cal.App. 2d 205, 183 P.2d 282.

[4] Appellant's next contention regarding an alleged private interview by the probation officer with one of the minor's school teachers, and a secret report to the court, assumes facts not supported by the agreed statement and hence is without merit. In fact the record is to the contrary. It shows that the judge was informed in open court that the manner of grading children in the Vallejo school system was too indefinite to form any basis for a determination of the child's scholastic attainments, and hence no testimony thereon was taken since under the circumstances it would have been meaningless.

[5, 6] At the hearing on the 24th the appellant was given the opportunity of choosing between a Protestant school in southern California and the Convent of the Good Shepherd in San Francisco, a Catholic school. He did not deny he had originally suggested the San Francisco school to the probation officer. The other alternative was the southern California school, obviously so far removed from the appellant's home that any visitation by him with his daughter could only be accomplished at considerable expense. The provisions of sections 551 and 552 of the Welfare and Institutions Code are not mandatory. It is the welfare of the child which is of paramount consideration. Hence we cannot say that under the circumstances the order of the court was not for the best interests of the child.

What has heretofore been said is also determinative of appellant's final contention, that the court abused its discretion in making the order now attacked, and hence warrants no further discussion.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



159 Cal.App.2d 500

Jacob (Jay) PALEY, Plaintiff and Respondent,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association, Defendant and Appellant.

Civ. 22563.

District Court of Appeal, Second District Division 1, California.

April 18, 1958.

As Modified on Denial of Rehearing May 6, 1958.

Hearing Denied June 17, 1958.

Declaratory judgment action. The Superior Court of Los Angeles County, Philip H. Richards, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Lillie, J., held that statute, providing that upon death of either spouse one-half of all personal property acquired after marriage by either or both while domiciled elsewhere should belong to surviving spouse if it would not have been separate property of either if acquired while domiciled in state and providing that other one-half should be subject to testamentary disposition of decedent, was insofar as it purported to give one spouse power either to take property of other or to curtail or diminish his right in it during his lifetime, arbitrary and unconstitutional, as violative of due process clause and as an abridgement of privileges and immunities of citizen.

Affirmed.

1. Husband and Wife ⇐246

Where all of property acquired while living in common-law states was, under law of those states, husband's separate property, its character did not change when it was brought to California, even though it would, if acquired by husband while domiciled in California, have been community property. West's Ann.Prob.Code, § 201.5.

2. Descent and Distribution ⇐52(1)
Husband and Wife ⇐247

Statute providing that upon death of either spouse one-half of all personal property acquired, after marriage, by either or both while domiciled elsewhere should belong to surviving spouse if it would not have been separate property of either if acquired while domiciled in state, and providing that other one-half should be subject to testamentary disposition of decedent, was intended to be a statute of succession, dealing only with property of deceased spouse and not with sole and separate property of surviving one, and such statute was not intended to operate in such a way as to dispose of property of living person and, in effect, rearrange property rights of spouses during their lifetimes. West's Ann.Prob.Code, § 201.5.

3. Constitutional Law ⇐48

Presumption of constitutionality may be overcome by showing that statute in question operates to deprive one of property without due process of law or that any of the guarantees of Constitution have been violated. U.S.C.A.Const. Amend. 14, § 1.

4. Constitutional Law ⇐206(1)

All citizens of the United States have right to travel freely between states and to become residents of any one of them; and state cannot constitutionally exact, as price of residence, giving up of vested rights in property acquired by citizen outside of state. U.S.C.A.Const. Amend. 14, § 1.

5. Constitutional Law ⇐206(1), 278(1)
Descent and Distribution ⇐53

Statute providing that upon death of either spouse one-half of all personal property acquired, after marriage, by either or both while domiciled elsewhere should belong to surviving spouse if it would not have been separate property of either if acquired while domiciled in state and providing that other one-half should be subject to testamentary disposition of decedent was, in so far as it purported to give one spouse power either to take property of other or to curtail or diminish his right in it during his lifetime, arbitrary and unconstitutional, as violative of due process clause and as an abridgement of privileges and immunities of citizen. West's Ann.Prob. Code, § 201.5; U.S.C.A.Const. Amend. 14, § 1.

6. Constitutional Law ⇐38

A statute may be invalid as applied to one set of facts but valid as applied to another.

7. Statutes ⇐64(1)

When a statute is unconstitutional in part, and invalid part cannot be severed, entire statute is void.

8. Statutes ⇐64(1)

Remaining part of statute may be preserved if it can be separated from unconstitutional part without destroying statutory scheme or purpose.

9. Statutes ⇐64(2)

Statute providing that upon death of either spouse one-half of all personal property acquired, after marriage, by either or both while domiciled elsewhere should belong to surviving spouse if it would not have been separate property of either if acquired while domiciled in state and providing that other one-half should be subject to testamentary disposition of decedent was severable; and therefore that portion providing rule of succession designed to operate on property of deceased spouse could be upheld notwithstanding invalidity of that portion purporting to give one spouse power either to take property of other or to curtail or diminish his right in it during his lifetime. West's Ann. Prob.Code, § 201.5.

10. Constitutional Law ⇐81

Even the police power is subject to constitutional limitations, and it may not

be exerted arbitrarily or unreasonably. U. S.C.A.Const. Amend. 14, § 1.

Fox, Goldman & Kagon, Stanley E. Fox, Beverly Hills, Brady, Nossaman & Walker, Walter L. Nossaman, Joseph L. Wyatt, Jr., and Paul Thomas Guinn, Los Angeles, for appellant.

Wright, Wright, Green & Wright, Loeb & Loeb, Herman F. Selvin, Los Angeles, for respondent.

LILLIE, Justice.

This is an appeal on the judgment roll in an action for declaratory relief brought by Jacob (Jay) Paley against the Bank of America National Trust and Savings Association, executor of the will of his wife, Lillian, who died in Los Angeles on January 2, 1954. The action was brought to determine rights to her estate.

[1] Plaintiff and Lillian were married in Illinois in 1906. They lived there until 1920 at which time they moved to Pennsylvania. Plaintiff became an American citizen in 1925. On January 1, 1936, the Paleys came to California where they took up residence in Los Angeles and remained until her death. While living in the common-law states of Illinois and Pennsylvania, plaintiff acquired substantial personal property. We are of the view that all of that property, under the law of the states of his then domicile, was his separate property and that Lillian had neither a present nor expectant interest therein. When the Paleys moved to California in 1936, plaintiff brought the property with him. Had that property been acquired by Paley while he was domiciled in California, it would have been community property, but having been his separate property in the state in which it was acquired, its character did not change when it was brought to California. It was plaintiff's separate property where it was acquired and it retained its separate character in this state.

Lillian died testate on January 2, 1954, survived by the plaintiff. On her death she owned real and personal property valued in excess of $1,750,000. At the time of Lillian's death, plaintiff was the owner of property having a value of about $8,000,000, none of which was community property, all having been acquired as aforesaid, as his sole and separate property. At the trial, defendant contended that under section 201.5 of the Probate Code, Lillian had a right to and did, by will, devise and bequeath to her beneficiaries (who did not include plaintiff) not only her own property but one-half of plaintiff's sole and separate property.

In rendering judgment for plaintiff, the trial court concluded (1) that section 201.5 of the Probate Code does not apply to, or affect the disposition of, or plaintiff's right, title and interest in any of his property; and (2) that if section 201.5 is applicable to the property of the surviving spouse (plaintiff) under the circumstances here involved, the section is unconstitutional.

Appellant seeks reversal of the judgment on the ground that factually the case falls within the provisions of Probate Code, Section 201.5 and that this section as applied to respondent herein is a valid enactment and should control. Its contention raises two main points:

(1) Does section 201.5 of the Probate Code give a predeceased spouse testamentary power over the separate and sole property of the surviving spouse?

(2) If it does, as applied to respondent, is the statute constitutional?

Section 201.5 of the Probate Code reads as follows:

"Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired

while domiciled in this state, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this code."

We are satisfied that section 201.5, as applied to the facts in the instant case, will operate to take from a living person his sole and separately owned property, by the testamentary action of the predeceased spouse having no interest of any kind therein.

Respondent urges that such a purported testamentary disposition could not be a reasonable interpretation of the statute; first, because such an effect was not intended by our Legislature and second, because it would be unconstitutional in its operation.

The legislative history of section 201.5 and the obvious purpose for which it was enacted favor the interpretation placed on it by the trial court in its application to the facts in the instant case. Prior to the Supreme Court's decision in Re Estate of Thornton, 1934, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343, our Legislature made several unsuccessful attempts to change the interests of the spouses in property acquired during marriage outside of the State of California. The Thornton case arose out of the 1917 and 1923 amendments to sections 164 of the Civil Code. The husband died in 1929. Had the amendments been operative as against him, they would have had the effect of passing one-half of his property, separate when acquired in Montana, to his surviving spouse who under Montana law had no interest in it other than dower. The Supreme Court held that, as applied, they were unconstitutional for the reason that the limitation of the vested rights of one spouse in his separate property, found in the 1917 and 1923 amendments, was a denial of due process and an abridgement of the privileges and immunities of a citizen. Mr. Justice Langdon in his dissenting opinion agreed with the proposition that "absolutely owned personal property brought into this state by the husband cannot be taken from him, nor can his ownership or control over it be diminished or impaired by our statute," (1 Cal.2d 5–6, 33 P.2d 3), but in discussing the problem of succession to the property of a *deceased* spouse, he expressed the view that upon the death of a decedent, certain property owned by him and brought into this state may be subject to the same rules of testamentary disposition and succession as community property acquired here. It is clear that he had in mind a statute which would operate only to control the succession to the property of a decedent—a statute of succession. It is obvious that he had no thought of a statute which would permit a decedent to dispose of the other spouse's separate property.

In 1935 after the decision in the Thornton case and intending to follow the suggestion of Mr. Justice Langdon our Legislature enacted Probate Code, section 201.5. That it was intended to be strictly a statute of succession as suggested by the dissenting opinion and did not purport to rearrange property rights as between living spouses is borne out in a number of cases. In Re Miller, 31 Cal.2d 191, at page 196, 187 P.2d 722, at page 725, the Supreme Court said:

"Unlike the earlier legislation which had been declared unconstitutional, this statute (section 201.5) does not purport to rearrange property rights between living husbands and wives in marital property brought into this state upon their change of domicile to California. On the contrary, it is a succession statute apparently enacted in pursuance of the theory of the dissenting opinion in the Thornton case * * *"

Other courts have expressed a similar view that the section did not attempt to reclassify in the lifetime of the spouses any property coming within its terms (Paley v. Superior Court, 137 Cal.App.2d 450, 290 P.2d 617; In re Estate of Schnell, 67 Cal.App.2d 268, 154 P.2d 437).

[2] From the authorities cited it is clear that from the beginning section 201.5 of the Probate Code was interpreted by our courts strictly as a succession statute governing the devolution, on death, of the property of a decedent and that it was not intended to operate in such a way as to dispose of the property of a living person which, in effect, would rearrange the property rights of the spouses during their lifetimes.

A fair reading of the statute itself bears this out. An analysis of its language makes it obvious that instead of applying to all property of both spouses, as contended by appellant, it applies to each spouse and to the property of that spouse upon his or her death. To shorten its wording, the Legislature used the disjunctive forms in referring first to the death of either husband or wife, and second, to property acquired after marriage by either husband or wife. This to show that the statute was to apply in exactly the same way; to each spouse and to the property of that spouse on his or her death. The first words, "Upon the death," qualify the entire section. Furthermore, the title of the Act plainly designates it as a statute of "Succession (Descent of Property)". Additional corroboration is supplied by the use of the word "goes" in specifying what occurs in the event decedent does not exercise the testamentary power provided for. In that event the property "goes" to the surviving spouse. As appellant seeks to apply this to a failure of a decedent to dispose of the property of the surviving spouse, there is nothing to "go" to the latter because the property is already and always has been vested in him as his sole and separate property. This is another indication of the legislative intent to deal only with the property of the deceased spouse and not with the sole and separate property of the surviving one.

We conclude from its history, its language and from prior judicial interpretation, that section 201.5 of the Probate Code is strictly a statute of succession which does not extend, nor purport to give, to one spouse the testamentary power to dispose of the surviving spouse's separate property, in which she has no interest, during the latter's lifetime. Otherwise construed and applied to the facts in the instant case, its operation would be unconstitutional.

A review of the authorities cited by both parties discloses no case in which the question of the constitutionality of section 201.5 of the Probate Code, as the statute is sought to be applied to the property of the surviving spouse, has been raised, decided or even discussed. The question is an open one.

[3] Appellant's argument that the presumption of legislative validity operates in favor of section 201.5 is of little help when a direct challenge to its constitutionality is made, and it is overcome. The presumption of constitutionality may be overcome by a showing that the statute in question operates to deprive one of property without due process of law or that any of the guarantees of our constitution have been violated. This same point was argued without success in Re Estate of Thornton, supra. It is not the presumption that determines the constitutionality or unconstitutionality of a statute but the fact of its operation and effect in a given case.

When plaintiff came to California, he was already the sole and absolute owner of the property in question. His wife had no interest in it whatever, expectant or otherwise. The character of this property did not change when he brought it to this state. If section 201.5 is to be applied in the instant case, then it gave plaintiff's wife as soon as she became a California resident the right to dispose of her husband's separate property by will, thereby stripping him, while he is still living, of one-half of his sole and separate property. Can this application of section 201.5 constitutionally give to the wife such a power? We think not. If the statute has that effect, it clearly takes

plaintiff's property without due process of law.

Leading among California cases which have interpreted statutes with a close identity of language and similar method of operation with that of section 201.5 is In re Estate of Thornton, supra. The Supreme Court therein after discussing at length vested property rights, the language of the 1917 and 1923 amendments to section 194 of the Civil Code and the constitutional provisions involved, held that the amendments sought to limit the vested rights of the one spouse in his separate property and, as applied, were unconstitutional as a denial of due process. The court said, 1 Cal.2d at page 5, 33 P.2d at page 3:

"So long as we are bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the Fourteenth amendment to the Constitution of the United States. If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence."

The Thornton case involved the husband's separate property on his death. In the instant case we have an attempt to take the husband's separate property away from him during his lifetime. It is also important to note that the language of the statute in the Thornton case was almost identical with that found in section 201.5. In the absence of direct authority, the Thornton case it most persuasive here. However, analogous situations have arisen in other cases in which the courts have held against constitutionality. McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; In re Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534; Melvin v. Carl, 118 Cal.App. 249, 4 P.2d 954; In re Estate of Drishaus, 199 Cal. 369, 249 P. 515; Scott v. Remley, 119 Cal.App. 384, 6 P.2d 536. In the case of Boyd v. Oser, 23 Cal.2d 613, at page 622, 145 P.2d 312, at page 317, the Supreme Court used this language: "* * * to hold that the income of property vested in the husband, whether separate or community in tenure, can be taken from him by the Legislature and given to the wife or her testamentary beneficiaries, would be destructive of the principle which it is necessary to maintain if either husband or wife is to be protected in the fruits of his or her separate property. To attempt a distinction on the ground that the property in this case is community property while in the cited case it was separate property, would be doing homage to names at the sacrifice of the principle. By whatever name the tenancy be called, the fact remains that the property of the Waterlands was vested in the husband. He could not be divested of his rights therein without due process of law."

This same thinking is reflected in various law review articles discussing section 201.5. The writers are unanimous in their view that when applied to give the wife the power of testamentary disposition of her surviving husband's sole and separate property, section 201.5 is unconstitutional. Abel, Estate Planning, 41 Cal.L.Rev. 230, 234–235; Comment, 19 So.Cal.L.Rev. 39, 43–44; Thurman, Estate Tax, 9 Stan.L.Rev. 239, 249. Suggestive also is the California Law Revision Commission's recommendation submitted to the Legislature in 1957, which resulted in a revision of section 201.5. The commission reported: "Section 201.5 should be revised to eliminate the provi-

sion which purports to give the non-acquiring spouse testamentary power over the acquiring spouse's property during the latter's lifetime. As is pointed out in the research consultant's report, the courts of this state have repeatedly held similar legislation to be an unconstitutional infringement of vested property rights, in violation of the due process clauses of the Federal and State Constitutions."

[4] The due process clause, however, is not the only constitutional provision involved here. If applied in the manner urged by appellant, section 201.5 conditions the right to enter and settle in California upon the giving up of one's right to his own sole and separate property, which abridges the privileges and immunities of a citizen of the United States. Under Amendment XIV, section 1, United States Constitution, and a variety of Supreme court decisions, Mr. Paley had the right, accorded to all citizens of this country, to travel freely between the states and to become a resident of any one of them. If section 201.5 is applied in the manner urged by appellant, immediately upon his becoming a resident of California, plaintiff's separate property in which she has no interest whatever is subjected to the testamentary disposition of his wife. In other words in order to exercise his right guaranteed under the Constitution he must give up a substantial part of the incidents of the ownership of his property. This problem, too, was discussed by the Supreme Court in Re Estate of Thornton, 1 Cal. 2d at page 5, 33 P.2d at page 3. Therein the court said: "* * * If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. * * *" It seems plain from this language our Legislature cannot constitutionally exact as the price of residence here that plaintiff give up vested rights in property which he acquired and which he owned before he came here.

[5] We conclude that section 201.5 of the Probate Code, as it purports to give one person the power either to take the property of another or to curtail or diminish the owner's right in it during his lifetime, is arbitrary and unconstitutional as violative of the due process clause and that it abridges the privileges and immunities of a citizen. Appellant cites various California cases in support of its contention that the constitutionality of section 201.5 has already been upheld by the courts of this state. They neither raised the question of its constitutionality, nor was the section sought to be applied to take away the property of the surviving spouse. In re Miller, 31 Cal.2d 191, 187 P.2d 722, arose out of the Inheritance Tax Act of 1935. This and section 201.5 were passed at the same time and contained similar language. On a question of interpretation of the tax statute, section 201.5 was discussed but it was not directly before the court nor was the question of its constitutionality raised. In re Estate of Ball, 92 Cal.App.2d 93, 206 P.2d 1111, involved sections 228 and 229 of the Probate Code and it arose with respect to the succession to the separate property of the *acquiring predeceased* spouse, not the living one. Athough section 201.5 was discussed, no challenge to its constitutionality was made. The court as in the Miller case viewed section 201.5 strictly as a statute of succession.

In other cases cited by appellant (In re Estate of Schnell, supra; In re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231; Logan v. Forster, 114 Cal.App.2d 587, 250 P.2d 730) no question of the constitutionality of section 201.5 was raised, considered or decided. Nor were any concerned with the right of the predeceased spouse to dispose by will of the sole and separate property of the surviving spouse. They all deal with the question of succession to the property of the deceased spouse; the reclassification of property after death

(which of course the Legislature has a right to regulate since the right of inheritance is not an inherent or natural one) and not with reclassification of property in the lifetime of the spouses.

[6, 7] Although section 201.5 may be properly applicable to the property of the deceased spouse, it is quite a different matter when applied to a situation in which the separate property of a living person is subject to disposition by the will of a spouse having no interest in it. If the first application be constitutional there is nothing in the law to require a similar holding when the statute is applied to a materially different set of facts in which it may work an impairment of some right secured by the Constitution. The rule that a statute may be invalid as applied to one set of facts, yet valid as applied to another, is too well-known to require citation of authority. In this case, however, we have more of a question of the operation and effect of a statute and of how it affects the rights and interests of the various parties to whom it is sought to be applied rather than a question of severability. But its constitutionality in the first situation cannot prevent a contrary determination in the other if justified under the law. In other words, if section 201.5 is constitutional as applied to the property of an acquiring decedent, such a holding does not necessarily render it constitutional as applied to the property of the acquiring surviving spouse. Generally, when a statute is unconstitutional in part and the invalid part cannot be severed the entire statute is void. Therefore, if appellant is correct in its contention that section 201.5 is not severable the statute is not saved merely because it may, in part, be constitutional.

[8, 9] Nevertheless, section 201.5 appears to be severable. The purpose of the legislative enactment was to provide a rule of succession and it was designed to operate on the property of the decedent. If it be limited to this, as a succession statute, then it would be complete in itself and capable of being executed in accord with the legislative intent and the dominant purpose of the legislature. That being so, the constitutional part is clearly severable from the unconstitutional. The fact that a statute is unconstitutional in part does not necessarily invalidate it in its entirety. The remaining part of the statute may be preserved if it can be separated from the unconstitutional part without destroying the statutory scheme or purpose. People v. McCaughan, 49 Cal.2d 409, 317 P.2d 974; People v. Lewis, 13 Cal.2d 280, 89 P.2d 388; In re Bell, 19 Cal.2d 488, 122 P.2d 22; Hale v. McGettigan, 114 Cal. 112, 45 P. 1049.

[10] Appellant's principal argument that section 201.5 is not a deprivation of property without due process of law centers around the proposition that it is a reasonable exercise of the police power of the state. This same argument advanced in Re Estate of Thornton, supra, was not successful. Appellant cites considerable authority to the effect that a modification or even abolition of marital property rights comes within the regulatory power of the state and that the police power can destroy vested rights. There are as many cases in which the court recognizes the principle that, however exercised, even the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949; McKay Jewelers v. Bowron, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188; Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169. Statutes which operate in a manner to give one person power over the property of another have been declared clearly arbitrary and a denial of due process, the police power notwithstanding (Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160; State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 438, 254 P.2d 29; State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210; Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156). These cases involved various statutes which delegated

the power to curtail or limit rights of ownership in property held by another. In the instant case section 201.5, if applied in the manner sought by appellant, delegates the power to take another's property away completely.

Appellant relies heavily on Warburton v. White, 176 U.S. 484, 20 S.Ct. 404, 44 L.Ed. 555 and Arnett v. Reade, 220 U.S. 311, 31 S.Ct. 425, 55 L.Ed. 477. These cases are clearly distinguishable from the one at bar. They do not deal with the right of the Legislature to give to one spouse (wife) an interest in property in which, when it was acquired by the husband, the wife got no vested interest. Even in respect to community property they do not deal with the enlargement of the wife's interest in the property at the expense of an equivalent diminution of the husband's rights. In Warburton v. White, 176 U.S. 484, 20 S.Ct. 404, 44 L.Ed. 555, at the time the property was acquired by husband and wife, under the law of Washington the wife got a present vested proprietary interest in it. The Supreme Court held that a subsequent change in the law of inheritance with respect to that interest would be constitutional since the succession to that interest was subject to regulation and change by the Legislature at any time before the wife died. This case dealt only with the power of the Legislature to change the law of succession with respect to one's own property or property interest. The only issue involved centered around the succession to the wife's interest, which she got at the moment the property was acquired. In Arnett v. Reade, supra, under the law of New Mexico the wife got a present vested ownership interest in community property when it was acquired. The Supreme Court held that a 1901 statute requiring the wife's concurrence to a conveyance of the community property by the husband before it could be valid against her was constitutional; that it further protected her against alienation by the husband in fraud of her interest in the property and it did not take away any of the husband's vested interest in the property. The court, however, made it clear that since her interest was a vested one the law could not constitutionally take it away without compensation.

Prior to 1927, when the wife's interest in community property was a mere expectancy and not a present vested ownership right as it was in the jurisdiction in which the Warburton and Arnett cases arose, the holding in these cases was not persuasive upon our courts in California.

Wissner v. Wissner, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, argued at length by appellant, throws little light upon our constitutional problem. The question there was whether Congress, in providing for life insurance for military personnel, intended to give the insured the right to select a beneficiary in whom the policy proceeds could be vested regardless of the property law of the various states. The Supreme Court held it did and that the insured's wife, who was not named as his beneficiary in the policy, could not claim a community interest in the proceeds. The statute which created the property could attach to it whatever incidents of ownership it saw fit; the property laws of the various states notwithstanding. Congress took away no vested right because no property right ever vested in the one (widow) claiming it.

In the instant case, the entire rights to the property in question were fully vested in respondent alone, solely and exclusively, at the time he acquired the property and still were vested in him alone when section 201.5 was enacted and when he came to California. Lillian at no time ever had any kind of an interest in his property. The authorities cited by appellant seem to have little to do with our question—whether the wife who got no interest in the property when it was acquired can thereafter be given the right to dispose of it.

We hold that section 201.5, as applied to plaintiff, has the effect of taking his property without due process of law and abridging his privileges and immunities as a citizen of the United States. It is unconstitutional and void as applied to him. Section

201.5 of the Probate Code did not grant Mrs. Paley the testamentary power claimed for her.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



William V. SMITH, Plaintiff and Appellant,

v.

GENERAL PETROLEUM COMPANY et al., Defendants,

Kern County Land Company, Defendant and Appellant.*

Civ. 5637.

District Court of Appeal, Fourth District, California.

April 14, 1958.

Hearing Granted June 11, 1958.

Employee of county brought action against owner of realty for injuries sustained by employee in explosion, which occurred when steel blade of heavy equipment struck underground pipeline on owner's realty while county was removing tree roots along highway with permission of owner. The Superior Court, Kern County, Norman F. Main, J., entered judgment of dismissal, and the employee appealed. The District Court of Appeal, Barnard, P. J., held that complaint alleging that owner knew that it would be necessary for county and its employees to use heavy steel equipment in doing the work, but that owner negligently failed to advise county and its employees of fact that pipeline, which carried dangerous combustible gases and fluid, was buried underneath and near surface of realty in area where it was necessary for county to do the work, sufficiently alleged a cause of action.

Judgment reversed.

* Opinion vacated 331 P.2d 645.

1. Pleading ⇐34(1)

In passing on sufficiency of complaint, its allegations must be liberally construed with view to substantial justice between parties, and it must be reasonably interpreted and read as a whole, and any defects which do not affect substantial rights of parties should be disregarded.

2. Negligence ⇐32(1), 52

Generally, owner of realty must use reasonable care to keep his premises in a reasonably safe condition and give warning to invitee of any latent or concealed perils.

3. Negligence ⇐32(1)

Rule that owner of realty owes no duty to a licensee, except for wanton or willful injury, is applicable where injury is caused by a mere defect in premises, but in cases where injury results from some conduct of owner, as distinguished from condition of premises, owner may be liable for failure to exercise ordinary care toward licensee, whose presence on realty is known to owner.

4. Negligence ⇐32(1)

Owner, which gave county permission to enter on owner's realty, which adjoined public highway, to remove trees and roots, had duty to exercise ordinary care to avoid injuring county's employee as result of coming into contact with underground pipeline, which owner had permitted oil company to install, whether county's employee was an invitee or a licensee.

5. Gas ⇐20(1)

In action by employee of county against owner of realty for injuries sustained by employee in explosion, which occurred when steel blade of heavy equipment struck underground pipeline on owner's realty while county was removing tree roots along highway with permission of owner, complaint alleging that when owner granted permission to county to do the work owner knew that heavy equipment would be used, but that owner negligently failed to advise county and its employees that pipeline, which carried dangerous combustible gases and fluid, was buried underneath area

where county would be working, sufficiently alleged a cause of action.

6. Pleading ⇐192(2)

In action by employee of county against owner of realty for injuries sustained by employee in explosion, which occurred when steel blade of heavy equipment struck underground pipeline on owner's realty while county was removing tree roots along highway with permission of owner, complaint was not subject to demurrer on grounds of uncertainty, ambiguity, and unintelligibility.

Oscar F. Catalano, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment of dismissal in an action for damages for personal injuries. The defendant's demurrer to the first amended complaint had been sustained, with leave to amend, but the plaintiff elected not to amend.

The defendant owned land adjoining a public highway, and the roots of some large trees on this right of way extended into the ground underneath the defendant's property. The defendant had given the county permission to enter upon its land for the purpose of removing these trees and roots. Long prior thereto the defendant had permitted an oil company to install an underground pipeline near this right of way. While the plaintiff, an employee of the county, was using heavy equipment in removing these roots from the defendant's land the steel blade of the equipment came into contact with this steel pipeline, through which highly combustible gases and fluids were flowing, causing an explosion which injured the plaintiff.

In addition to these general facts the amended complaint alleged that the defendant and Kern County desired and wished to have these trees and roots removed and excavated from said right of way and from defendant's land; that at the time of granting permission to do this work the defendant knew that it would be necessary for the county and its employees to use heavy steel equipment in doing this work, and negligently failed to advise the county and its employees, including the plaintiff, of the fact that this pipeline which carried dangerous combustible gases and fluids was buried underneath and near the surface of the defendant's land without being so marked, and near or at the place where it was necessary for the county's employees and the plaintiff to use heavy equipment in order to remove said trees and roots; that the defendant negligently failed to place markers at sufficient intervals to advise the plaintiff of the existence of this pipeline containing dangerous gases and fluids, and negligently failed to advise the plaintiff that these buried steel pipes carried highly dangerous and combustible gases and fluids; and that, as a direct and proximate result of the negligence of the defendant, the plaintiff suffered certain permanent injuries.

[1] The question presented is as to whether the amended complaint sufficiently stated a cause of action. In passing upon the sufficiency of such a complaint its allegations must be liberally construed with a view to substantial justice between the parties, the pleading must be reasonably interpreted and read as a whole, and any defects in the pleading which do not affect the substantial rights of the parties should be disregarded. Schaefer v. Berinstein, 140 Cal.App.2d 278, 295 P.2d 113.

The appellant contends that it appears from this complaint that he, as an employee of Kern County and with the knowledge and consent of the defendant, went upon the defendant's property for the purpose of doing work which was of common interest and mutual benefit to both the county and the defendant; that an underground and concealed pipeline containing

dangerous gases and fluids was maintained on the premises with the knowledge and consent of the defendant; that the defendant negligently failed to give the plaintiff notice or warning of the underground pipeline and its contents; and that while plaintiff was doing the work with the necessary equipment the steel blade thereof came in contact with the concealed pipeline, causing an explosion resulting in his injuries. It is argued that it sufficiently appears from the complaint that the appellant was an invitee on these premises, for the purpose of doing work which was of benefit to both the county and the respondent, and that the respondent owed him the duty of exercising reasonable care to keep its premises in a reasonably safe condition, and to give warning of latent or concealed perils. It is further argued that even if it be assumed that appellant's status at the time was that of a licensee, the concealed pipeline containing highly combustible and dangerous gases and fluids amounted to a trap to one who was thus working on respondent's land with such equipment; that the court therefore erred in sustaining the general demurrer to the amended complaint; and that the complaint was also sufficient as against the special demurrer which was filed.

The respondent contends that the appellant was on these premises at this time as a mere licensee; that the allegation that the respondent desired and wished that this work be done is a mere conclusion; that it appears from the complaint that the appellant was on this land by permission only, and there is nothing to show that he was there in any capacity except that of a licensee, citing Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 267 P.2d 841; and that being a licensee the respondent owed him no duty other than to refrain from inflicting injury upon him by wanton or willful misconduct, citing Knight v. Kaiser Co., 48 Cal.2d 778, 312 P.2d 1089. It is further argued that there is nothing in the complaint to indicate that this buried pipeline was a trap; that since it was buried the pipeline itself could do no harm; that no injuries would have been incurred had it not been for the affirmative conduct of the appellant in digging beneath the ground with his blade; and that it follows that no duty devolved upon the respondent to inform the appellant concerning the existence or location of the pipeline.

[2, 3] In Pauly v. King, 44 Cal.2d 649, 284 P.2d 487, the general rule with respect to the duty owed by the property owner to an invitee is stated to be that the owner must use reasonable care to keep his premises in a reasonably safe condition and give warning of any latent or concealed perils. As pointed out in Knight v. Kaiser Co., the rule that an owner owes no duty to a licensee, except for wanton or willful injury, is applicable where the injury is caused by a mere defect in the premises. It is well recognized, however, that in cases where injury results from some conduct of the owner as distinguished from the condition of the premises, the landowner may be liable for failure to exercise ordinary care toward a licensee whose presence on the land is known to him. Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 21, 156 A.L.R. 1221. In that case, the court said: "The courts have frequently made general statements to the effect that the only duty to a licensee is to abstain from willful or wanton injury. * * * On their facts, however, all of these cases involved injuries resulting from a defective condition of the premises, as distinguished from active conduct of the possessor or his employees. * * * In the present case it is apparent that plaintiff's presence on the premises was known to defendant at the time of the accident and that the accident did not result from a defective condition of the premises. Accordingly, even if plaintiff were a licensee rather than a business visitor, it is clear that defendant had a duty to exercise ordinary care to avoid injuring her, * * *".

[4, 5] In the instant case, the presence of the appellant was known to the respondent and the accident did not occur merely

as the result of a defective condition of the premises. Even if the appellant was a licensee, and even though a different standard of care might be applicable, the respondent had a duty to exercise ordinary care to avoid injuring him. The premises were not defective in any ordinary sense, and the conduct of the respondent is the important thing in determining what caused the accident and whether or not ordinary care was used. The buried pipeline, carrying dangerous gases and fluids, would naturally constitute something in the nature of a trap to one who did not know of its presence. Its existence and location was known to the respondent and whether, in the exercise of ordinary care, it should have warned the appellant presented a factual question in any event. While the allegation that both the county and the respondent desired and wished this work done is more or less a conclusion, a benefit to the respondent is strongly indicated. Ordinarily, the presence of large trees with far-reaching roots is detrimental to land and interferes with crops by withdrawing water and giving unwanted shade. Under the circumstances, it cannot be held as a matter of law that no mutual benefit was expected from this operation, and the complaint was sufficient to raise the factual question as to whether or not this employee of the county, in doing this work, was an invitee rather that a mere licensee. Whether he was an invitee or a mere licensee the complaint was sufficient to raise questions of fact as to whether the respondent, in the exercise of reasonable care, should have warned the appellant of this hidden danger, and whether this duty was sufficiently performed. In our opinion, the complaint sufficiently alleged a cause of action.

[6] The respondent contends that its special demurrer was properly sustained on the grounds of uncertainty, ambiguity and unintelligibility. It is argued that the complaint is clearly uncertain and ambiguous since it failed to allege how or in what manner the appellant entered upon the respondent's premises other than as a licensee. The special demurrer was based on the grounds that it did not appear from said complaint how the plaintiff entered the said premises other than as a licensee, and that it did not appear how or in what manner it was alleged that the respondent was negligent or how or in what manner such negligence, if any, had caused any injury to the appellant. The complaint sufficiently alleged how or in what manner the appellant entered these premises, how or in what manner the respondent was negligent, and how and in what manner such negligence caused the injuries complained of. Nothing appears in connection with the special demurrer which requires an affirmance of the judgment.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing granted; TRAYNOR, J., not participating.



159 Cal.App.2d 384

A. C. HARRIS, Plaintiff, Cross-Defendant, Respondent and Appellant,

v.

Glenn M. WHISLER and Elsie Whisler, Defendants, Cross-Complainants, Respondents and Appellants.

Civ. 5634.

District Court of Appeal, Fourth District, California.

April 15, 1958.

Action for rescission, conversion and accounting, involving uncompleted agreement of sale of automobile sales agency by defendants to plaintiff, who gave chattel mortgages and who was to secure a dealer's franchise, upon which event the agreement

was to be effective. The defendants filed a cross-complaint. The Superior Court of Kern County, W. L. Bradshaw, J., rendered judgment, and both parties appealed. The District Court of Appeal, Griffin, J., held that where it was difficult to determine from the findings, conclusions of law and judgment the basis upon which the court actually entered judgment and whether judgment included damages for conversion and whether cancellation of the instruments was ordered and whether a sale should be had under the terms of the mortgage or whether the judgment entered was based solely on the cause of action for accounting, the entire judgment would be reversed so that a proper disposition could be made of the issues presented and the facts found.

Reversed.

1. Appeal and Error ⇐1177(8)

In action for rescission, conversion and accounting, involving uncompleted agreement of sale of automobile sales agency by defendants to plaintiff who gave chattel mortgages and who was to secure a dealer's franchise, upon which event the agreement was to be effective, where it was difficult to determine from the findings and conclusions of law and the judgment for plaintiff, whether damages for conversion were allowed and whether cancellation of instruments was ordered and whether sale should be had under terms of mortgage or whether judgment was based solely on cause of action for accounting, the entire judgment would be reversed so that proper disposition could be made of the issues presented and the facts found.

2. Judgment ⇐256(1)

A judgment must conform to the findings.

Siemon & Siemon, Bakersfield, for plaintiff and appellant.

S. B. Gill, Bakersfield, for defendants and appellants.

GRIFFIN, Justice.

Plaintiff, cross-defendant, respondent and appellant A. C. Harris (hereinafter referred to as plaintiff) brought this action against Glenn M. Whisler and wife, defendants, cross-complainants, respondents and appellants (hereinafter referred to as defendants) for rescission, conversion and accounting, involving an uncompleted agreement of sale of the Bakersfield Kaiser-Fraser Motor Company agency by defendants to plaintiff dated December 27, 1951. By it defendants agreed to sell the Kaiser-Fraser Motor Sales Corporation agency owned by them for $6,000 plus inventory of parts and accessories determined to be of the value of $3,069.02. Plaintiff delivered to defendants his note for $9,069.02 and a chattel mortgage on plaintiff's fixtures, parts and accessories in a like business conducted by him in Delano. (Apparently there was a previous mortgage of $5,000 given by plaintiff on this property to one Logrecco.) An itemized bill of sale of defendants' property was delivered to plaintiff and a chattel mortgage covered these items as well as certain other property consisting of parts, tires, etc., owned by plaintiff which had an estimated value of $10,000. Plaintiff also took with him to Bakersfield certain used cars valued at $7,400. They were not subject to the chattel mortgage.

The agreement provides, as a condition precedent that the sale should not be effective unless the Kaiser-Fraser Sales Corporation granted plaintiff a franchise. Plaintiff immediately went into possession of the Bakersfield business, moved his stock of used cars, parts, accessories, office and shop equipment, etc., there and immediately applied for a franchise. It was denied by the Kaiser-Fraser Sales Corporation on March 14, 1952. On March 17th defendants ousted plaintiff from the premises, took over and retained possession of all of the assets, including the used cars and equipment brought from Delano. Defendants claim a right to this property under some form of written agreement alleged in

their answer dated March 17, 1952, whereby plaintiff transferred to defendants and Logrecco title to and possession of all assets located in Bakersfield at the prescribed address of the defendants. It is plaintiff's claim that his signature to this instrument was obtained from him without consideration and by means of threats and coercion, by threatening plaintiff that if he did not sign it they would have to send him to prison for theft, i. e., executing a mortgage on property already subject to a prior mortgage. The court so found. On April 9, 1952, plaintiff gave written notice of rescission of this so-called written agreement and demanded return of all of his property.

This complaint for conversion alleged generally in the first cause of action the facts above related and then recited that on March 17, 1952, plaintiff was the owner of certain property used in the operation of the agency, including property purchased from defendants in the sum of $6,000, plus used cars, parts, tires and batteries, oil and grease, and electrical fixtures, all of the value of approximately $17,991.23, being the difference between the total value of the property and the amount due ($8,816.86) on the chattel mortgage given by plaintiff to defendants. The second cause of action realleges paragraphs 1, 2, 3 and 4 of the first cause of action and that plaintiff, on April 9, 1952, demanded a cancellation and return of the purchase agreement, the promissory note and chattel mortgage for $9,069.02, and offered to return all things of value; that on March 17, 1952, plaintiff was the owner of the property described in the first cause of action; that defendants took it and refused to return it upon demand and refused to cancel or deliver up said agreement, note and mortgage. The third cause of action alleged certain transactions in respect to flooring of cars during the period plaintiff was in possession, and claimed defendants refused to account to plaintiff for money due plaintiff. The prayer of the complaint is: first, that the agreement be cancelled and that plaintiff have judgment for damages against defendants in the sum of $17,991.23; or, in his second cause of action, the note and mortgage be cancelled and defendants return all things of value received by them under the agreement or that plaintiff have judgment for their value in the sum of $17,569.82; and in the third cause of action that defendants account for all money paid and received under the purchase agreement and plaintiff have judgment against defendants for said amount found due.

Defendants answered and denied generally the allegations of the complaint and alleged the previous execution of an unrecorded mortgage to Logrecco in the sum of $5,000 on the property mortgaged to them; that Logrecco, previous to the recording of the instant mortgage, recorded his mortgage and subsequently filed an action to foreclose it; and that since plaintiff was guilty of such fraud he could not invoke the process of an equity court. By cross-complaint defendants alleged that between December 27, 1951, and March 17, 1952, they advanced plaintiff in excess of $20,000; that plaintiff agreed that he was unable to meet his obligations on the note and to meet other bills accumulated and voluntarily turned over said property to defendants to liquidate; that they did liquidate said assets after paying Logrecco and applied the balance of the proceeds to the credit of plaintiff; that after the application of such credit plaintiff still owed defendants $10,743.08. Judgment for this amount was sought.

Plaintiff, in answer to defendants' cross-complaint, denied generally these allegations and alleged that said mortgage given to defendants had never been foreclosed and no proper sale was held under its terms.

[1] By minute order the trial court ordered that plaintiff have judgment against defendants for $2,860.75, and findings in favor of plaintiff were ordered. Plaintiff's counsel was to prepare the findings. The findings, as thus prepared and signed by the court, in effect find that the allegations of the second and third causes of ac-

tion were true; that the allegations of defendants' cross-complaint were untrue except as otherwise indicated. It then specifically found that the note and chattel mortgage given to defendants by plaintiff were "secured"; that no action had been filed to foreclose them and no proper sale of the securities had been effected under its terms. It then concluded, from the facts found, that defendants were indebted to plaintiff in the sum of $2,860.75. The judgment, as entered, was that plaintiff recover said sum. No mention is made therein as to the validity of the sale of the mortgaged property. In effect, the court found there was a conversion, particularly as to the used cars, and that the note and mortgage given under the agreement were to be ineffective if a franchise was not obtained by plaintiff.

The finding that the property was still subject to sale under the provisions of said mortgage cannot be supported by the evidence. The agreement specifically provided that the purchase agreement was to be effective only if defendant did secure the franchise. The liability under the note and mortgage was equally conditional and formed an integral part of that agreement. Sec. 1434, Civ.Code; Schwab v. Bridge, 27 Cal.App. 204, 149 P. 603; 33 Cal.Jur.2d p. 554, sec. 159. The prayer of the complaint is that the note and chattel mortgage be cancelled and delivered up to plaintiff. No mention is made of this in the judgment. On the face of the pleadings it would appear that the judgment entered only had reference to the third cause of action in respect to an accounting.

Plaintiff appealed on the judgment roll alone, from that portion of the judgment denying him full relief as demanded. Defendants appealed from the judgment as entered. It is difficult to determine from the findings, conclusions of law and judgment the basis upon which the court actually entered the judgment, i. e., whether it included damages for conversion, whether cancellation of the instruments was ordered, whether a sale should be had under the terms of the mortgage, or whether the judgment entered was based solely on the third cause of action for an accounting.

[2] It is fundamental that a judgment must conform to the findings. Cappelmann v. Young, 73 Cal.App.2d 49, 165 P.2d 950; Harlow v. Motor Coach Co., 128 Cal.App. 487, 17 P.2d 748; Spindler v. Wittemann Co., 54 Cal.App. 207, 201 P. 604; San Francisco Credit Clearing House v. MacGowan, 77 Cal.App. 308, 246 P. 347.

Accordingly the entire judgment should be reversed and a proper disposition made of the issues presented and facts found.

Judgment reversed. Each party shall bear own costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

159 Cal.App.2d 432

Emma CAMPBELL, Plaintiff and Appellant,

v.

Ethel M. CLARK, Maurice Wilson, Harry A. Wardenburg, Warren Hook, Willis Clark, Ernest W. Tiegs, and California Test Bureau, a corporation, Defendants and Respondents.

Civ. 22624.

District Court of Appeal, Second District, Division 2, California.

April 17, 1958.

Action by a corporate shareholder on her own behalf for alleged wrongful appropriation of corporate assets by officers and directors. From a judgment of the Superior Court, Los Angeles County, Mildred L. Lillie, J., in favor of the defendants, the plaintiff appealed. The District Court of Appeal, Herndon, J., held that the plaintiff's action was derivative in nature and could not be maintained other than in a representative capacity for and on behalf of the corporation, that it could not be maintained without complying with provision of Corporations Code requiring allegation of attempt to obtain action desired from board of directors, and that statute relating to liability of directors for unlawful purchase of shares, declaration of dividends, or distribution of assets did not authorize shareholder to maintain such an action on her own behalf.

Judgment affirmed.

1. Pleading ⇐428(4)

An objection to introduction of any evidence on ground that complaint fails to state a cause of action is in nature of a general demurrer to complaint or a motion for judgment on the pleadings.

2. Pleading ⇐428(6)

On objection to introduction of any evidence on ground that complaint fails to state a cause of action, allegations of complaint must be accepted as true for purposes of the objection.

3. Pleading ⇐428(6)

If objection to introduction of any evidence on ground that complaint fails to state a cause of action is sustained, leave to amend must be granted unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted.

4. Corporations ⇐320(4)

Action by stockholder against corporation and officers and directors thereof charging misappropriation of earnings and profits was derivative in nature and could not be maintained by stockholder in any capacity other than a representative capacity for and on behalf of corporation.

5. Corporations ⇐320(8)

Derivative action by stockholder against directors could not be maintained without fulfilling requirements of Corporations Code requiring allegation of endeavor to secure from board of directors the action desired. West's Ann.Corp.Code, § 834(a).

6. Corporations ⇐320(4)

The statute relating to liability of directors for unlawful purchase of shares, declaration of dividends, or distribution of assets contemplates an action derivative in character and did not authorize shareholder to sue in her own behalf for wrongful appropriation of corporate assets by officers and directors. West's Ann.Corp.Code, §§ 824, 825.

Marvin Gross, Beverly Hills, for appellant.

Waters, Arditto & Waters, Los Angeles, for respondents.

HERNDON, Justice.

Plaintiff appeals from a judgment rendered against her after defendants' objection to the introduction of any evidence had been sustained and after plaintiff's motion for leave to amend her complaint had been denied. The stated ground of the objection and the basis for the ruling was that the complaint failed to state a cause of action. Similar rulings were made in another action which was consolidated with the instant action for purposes of trial. The

appeal from the ensuing judgment in the companion case is the subject of our opinion this day filed in Campbell v. Clark, Cal. App., 324 P.2d 55.

[1–3] It is well settled, of course, that an objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is in the nature of a general demurrer to the complaint or a motion for judgment on the pleadings. Upon such an objection the allegations of the complaint must be accepted as true for the purposes of the objection. Miller v. McLaglen, 82 Cal.App.2d 219, 223, 186 P.2d 48; Bice v. Stevens, 136 Cal.App.2d 368, 373, 289 P.2d 95; Domino v. Mobley, 144 Cal. App.2d 24, 26, 300 P.2d 324; Byson v. City of Los Angeles, 149 Cal.App.2d 469, 472, 308 P.2d 765. It is also a well established rule that after such an objection is sustained, leave to amend must be granted "unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted." Miller v. McLaglen, supra, 82 Cal.App.2d at page 228, 186 P.2d at page 53, and Bice v. Stevens, supra, 136 Cal.App.2d at page 379, 289 P.2d at page 102.

We must accordingly examine and test plaintiff's complaint in the light of these applicable rules of law.

The complaint, which is most inartificial and which her present counsel concedes to be "deficient in several respects," was filed on July 13, 1955. It is most deceptively and inaccurately entitled "Complaint For Damages; Refusal to Transfer Stock on Books of Corporation." It names as defendants California Test Bureau, a corporation, and a number of individuals alleged to be then present or former officers and directors of said corporate defendant.

After various allegations with respect to the official capacities of the individual defendants, plaintiff alleges in paragraph VII that on November 27, 1940, the corporate defendant's predecessor issued its stock certificates for ten shares of its capital stock to one Emery W. Harvey and that by virtue of his ownership of said certificate Harvey became the owner and entitled to receive ten shares of the capital stock of the defendant corporation.

In paragraph VIII it is alleged that between May 7, 1931, and April 10, 1951, the corporate defendant issued a total of twenty shares of its capital stock to one Hazel W. Whedon. In paragraph IX it is alleged that on June 22, 1953, plaintiff purchased Harvey's ten shares and took an assignment thereof. In paragraph X it is alleged that on June 19, 1953, plaintiff purchased Whedon's twenty shares and that both Harvey and Whedon by separate instruments assigned their respective interests in said shares to plaintiff. Paragraph XIII alleges that by the assignments "plaintiff acquired all of the right, title and interest held by her assignors in and to said shares of stock." The gist of plaintiff's first purported cause of action is set forth in paragraphs XIV, XV, and XVI as follows:

"XIV

"That since the date of acquisition of the shares of this plaintiff's assignors, as aforesaid, defendant California Test Bureau at all times during which said assignor's held stock in said corporation, did operate at a profit and has made financial gains and profits of a substantial nature which said profits and gains have been unlawfully concealed and withheld from this plaintiff who has a legal right thereto by virtue of the assignment of said stock, with the rights pertinent thereto, and said sums have been wrongfully paid to the officers and directors of said corporation as aforesaid; that the exact amount of said sums thus wrongfully withheld and illegally paid to the aforenamed officers and directors of this corporation is unknown to this plaintiff, but this plaintiff is informed and believes and upon such information and belief alleges that such sums are in excess of $750,000 of which her rightful share is in excess of $60,000 and interest thereon.

"XV

"That this plaintiff, for the first time, discovered the false and fraudulent representations of these defendants relative to the

gains, profits and wrongful withholdings of moneys of said corporate defendant by these named defendants in a hearing before the office of the Corporations Commissioner of this state during the period of June through December 1953 and again in January, 1954 through May, 1954.

"XVI

"That the statements of the defendants, and each of them, with regard to the extent of profits and liabilities of the corporate defendant and their untrue representations of the same during the period as aforesaid, were untrue and were made to plaintiff's assignors with the intent to deceive, mislead, intimidate and induce plaintiff's assignors to accept dividends and profits less than those actually earned by the corporation; that as the proximate result of the acts and representations of the defendants, as aforesaid, plaintiff herein as assignee of the rights of the assignors, as aforesaid, has been deprived of her present, past and future rightful share in the profits and earnings of defendant corporation in a sum in excess of $60,000 plus interest thereon."

The second cause of action repleads the first and alleges that the officers and directors conspired together to wrong plaintiff's assignors; that they voted themselves excessive salaries, bonuses, royalties, dividends and commissions and (on information and belief) that defendants have used large amounts of funds of the corporation for their own benefit and use and have collected commissions for goods and services which they did not sell.

In the third cause of action plaintiff repleads the allegations of the first two causes of action and alleges that all of the alleged wrongful acts of the defendants were done maliciously and with the intention to "injure plaintiff in and to her name, reputation and property rights, * * * and by reason thereof demanded exemplary and punitive damages."

In the prayer to her complaint plaintiff requests relief "as assignee of the rights of Hazel Whedon and Emery W. Harvey" praying: "(1) That all sums, profits and earnings belonging to said corporation and the stockholders thereof which have wrongfully been appropriated or concealed by these defendants be returned to said corporation; (2) That defendant officers and directors be restrained by injunction from paying excessive sums as salaries, bonuses, royalties and commissions to themselves; (3) That an account be taken of the acts of defendant officers and directors and that they be charged with all moneys they have wrongfully appropriated; (4) That plaintiff be awarded the sum of $60,000 as her pro rata share of moneys wrongfully withheld from her as a shareholder in said corporation and interest thereon; (5) Punitive damages, $25,000; (6) Costs of suit; (7) Such other and further relief as to the court seems just and proper."

[4] It is manifest from the foregoing analysis of the complaint that the gravamen thereof is the charge that the defendant officers and directors wrongfully appropriated and paid to themselves the earnings and profits of the corporation. The alleged misrepresentations and concealments related solely to the extent of such earnings and profits. Their alleged purpose was to hide wrongs being done to the corporation and its shareholders. Whatever wrongs were done necessarily affected all shareholders.

Thus the causes of action which plaintiff has attempted to plead are derivative in nature in that the gravamen of the complaint is injury to the corporation and to the whole body of its stockholders. Gagnon Co., Inc. v. Nevada Desert Inn, Inc., 45 Cal.2d 448, 453, 289 P.2d 466; Sutter v. General Petroleum Corp., 28 Cal.2d 525, 530, 170 P.2d 898, 167 A.L.R. 271; Shenberg v. DeGarmo, 61 Cal.App.2d 326, 330, 143 P.2d 74; 12 Cal.Jur.2d 768, § 213.

[5] The action being derivative in nature, plaintiff could not maintain it in any capacity other than in a *representative* capacity for and on behalf of the corporation. Melancon v. Superior Court, 42 Cal.2d 698, 708, 268 P.2d 1050; Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 20, 265 P.2d 1. For the

same reason, plaintiff could not maintain the action without fulfilling the requirements of subdivision (a) of section 834 of the Corporations Code.[1] Hogan v. Ingold, 38 Cal.2d 802, 809, 243 P.2d 1, 32 A.L.R.2d 834; Difani v. Riverside County Oil Co., 201 Cal. 210, 215, 256 P. 210.

[6] Here plaintiff neither claims nor seeks to represent the corporation. Indeed she expressly disavows any intent, purpose or desire to act in a representative capacity and makes no contention that she could amend her complaint to allege compliance with section 834. According to her opening brief "the sole and single issue involved herein is whether this action is derivative in nature, or whether appellant as a shareholder is authorized to sue *on her own behalf* for wrongful appropriations of corporate assets by the corporate officers and directors. Plaintiff submits that the amendment to Corporations Code section 825 allows an independent action by the shareholder in the instant case." (Emphasis added.) Plaintiff's position is wholly untenable. Her argument betrays a complete misconception of the meaning and effect of section 825, which must be read with section 824. These sections read as follows:

"§ 824. *Unlawful purchase of shares, declaration or payment of dividends, or withdrawal or distribution of assets.* Except as provided in this division, the directors of a corporation shall not authorize or ratify the purchase by it of its shares, or declare or pay dividends, or authorize or ratify the withdrawal or distribution of any part of its assets among its shareholders."

"§ 825. *Same: Liability of Directors.* In case of any wilful or negligent violation of section 824, the directors in office at the time of the violation, except those who have caused their dissent from the unlawful action to be entered on the minutes of the meeting at which the action was authorized, and those who were not present at the time the board acted, are jointly and severally liable to the corporation or to its receiver, liquidator, or trustee in bankruptcy, for the benefit of the creditors of the corporation or any of them and of the shareholders and owners of shares at the time of the violation, for its debts and liabilities existing at the time of the violation and for the full amount of any loss sustained by such holders and owners of shares, other than shares upon which any such payment or distribution was made, to the amount of the unlawful dividends, purchase price, withdrawal, or other distribution."

It seems obvious that any action brought by a stockholder to enforce a liability under these statutory provisions would have to be brought and maintained in a representative capacity. Such a cause of action is purely derivative in character. It was so held in Anderson v. Derrick, 220 Cal. 770, 32 P.2d 1078, construing section 309 of the Civil Code, the statutory antecedent of sections 824 and 825 of the Corporations Code. It follows that if plaintiff could possibly have stated any cause of action under these

1. "(a) No action may be instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation unless both of the following conditions exist:

"(1) The plaintiff alleges in the complaint that he was a registered shareholder or the holder of voting trust certificates at the time of the transaction or any part thereof of which he complains or that his shares or voting trust certificates thereafter devolved upon him by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of.

"(2) The plaintiff alleges in the complaint with particularity his efforts to secure from the board of directors such action as he desires and alleges further that he has either informed the corporation or such board of directors in writing of the ultimate facts of each cause of action against each defendant director or delivered to the corporation or such board of directors a true copy of the complaint which he proposes to file, and the reasons for his failure to obtain such action or the reasons for not making such effort."

sections, it would have been *derivative* and no less subject to the provisions of section 834 than any other action instituted "in the right of a corporation." (See Reed v. Norman, 41 Cal.2d 17, and decisions cited at page 22, 256 P.2d 930.)

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.



159 Cal.App.2d 439

Emma CAMPBELL, Plaintiff and Appellant,

v.

Ethel M. CLARK, Maurice Wilson, Harry A. Wardenburg, Warren Hook, Willis Clark, Ernest W. Tiegs, and California Test Bureau, a corporation, Defendants and Respondents.

Civ. 22625.

District Court of Appeal, Second District, Division 2, California.

April 17, 1958.

Action against corporation and officers and directors thereof charging defendants with having fraudulently induced plaintiff to surrender her stock to the corporation. From a judgment of Superior Court, Los Angeles County, Mildred L. Lillie, J., in favor of the defendants, the plaintiff appealed. The District Court of Appeal, Herndon, J., held that objection to introduction of any evidence was properly sustained because of generality of allegations of the complaint, but that trial court erroneously denied the plaintiff's request for leave to amend, that the cause of action alleged was individual in nature and not representative and that the cause of action was not barred by limitations.

Judgment reversed with directions.

1. Pleading ⇐8(15)

In action by former shareholder against corporation, officers and directors for fraudulently inducing the plaintiff to surrender her stock to corporation, complaint which alleged threats, intimidation and fraud in general terms without indicating the nature thereof was insufficient and objection to introduction of evidence was properly sustained.

2. Fraud ⇐41

Fraud must be pleaded in specific language descriptive of acts which are relied upon to constitute fraud, and it is insufficient to allege it in general terms or terms amounting to mere conclusions.

3. Pleading ⇐428(6)

Request for leave to amend complaint to which objection to introduction of evidence was sustained because of generality of allegations was improperly denied.

4. Pleading ⇐243

Request for leave to amend must be granted unless record demonstrates to a reasonable certainty that no cause of action can be stated.

5. Corporations ⇐320(8)

Complaint by former shareholder against corporation and officers and directors thereof charging that defendants fraudulently induced the plaintiff to surrender her stock to corporation set forth an individual cause of action and was not subject to objection that it was derivative in nature.

6. Limitation of Actions ⇐34(5)

Limitations provision relating to actions against directors or stockholders to recover a penalty or forfeiture or to enforce a liability created by law, was inapplicable to action by former shareholder charging that she had been fraudulently induced to surrender her stock to corporation. West's Ann.Code Civ.Proc. § 359.

7. Limitation of Actions ⇐99(2)

Action by former shareholder against corporation and officers and directors thereof charging that defendants had fraudulently induced plaintiff to surrender her stock to corporation was not barred by three year statute of limitations governing actions for fraud and mistake where the ac-

tion was commenced within two years after alleged date of transfer. West's Ann.Code Civ.Proc. § 338, subd. 4.

Marvin Gross, Beverly Hills, for appellant.

Waters, Arditto & Waters, Los Angeles, for respondents.

HERNDON, Justice.

This appeal is companion to Campbell v. Clark, Cal.App., 324 P.2d 51. The judgment here under review likewise followed rulings which sustained defendants' objection to the introduction of any evidence and denied plaintiff's request for leave to amend her complaint. The record discloses that defendants filed a general demurrer to the complaint, but it was stricken by the judge presiding in the Law and Motion Department on the ground that its filing was "not timely."

It is unnecessary to repeat here the general rules of law governing our review of this judgment and the rulings upon which it is based. Those rules and the supporting authorities are adequately set forth in our opinion in Campbell v. Clark, 324 P.2d 51. Suffice it to say that defendants' objection to the introduction of any evidence was designed to subject plaintiff's complaint to the same test that the judge presiding in the Law and Motion Department would have been called upon to apply had he ruled upon the merits of defendants' general demurrer instead of striking it from the record.

[1] Our decision can be meaningful only in the light of a thorough and detailed analysis of the complaint. It is denominated "Complaint for Damages (Fraud and Extortion in Transfer of Corporate Stock)." It joins as parties defendant the corporation and the several individuals alleged to have been its officers and directors during the times herein mentioned. It alleges that on various dates between August 23, 1933, and October 11, 1946, plaintiff acquired shares of stock until on the latter date she owned eighty shares. In paragraph VII, it is alleged that from October 11, 1946, until June 17, 1953, plaintiff owned the eighty shares; that during this period the corporate defendant was operating at a profit; that at various times during this period defendants importuned her to sell; that defendants, and each of them, did, on at least three occasions threaten plaintiff "that they, the defendants, and each of them, would dissolve defendant corporation, pay off the corporate creditors and have nothing left with which to pay off the shareholders, of which this plaintiff was one, and would thereafter re-open said business and operate the same under a partnership form." Paragraphs VIII to XI read as follows:

"VIII

"That defendants, and each of them, on or about the 17th day of June, 1953, falsely and maliciously caused and procured the said plaintiff to endorse over to the defendant corporation her aforesaid stock certificates representing her ownership in 80 shares of said corporation; that said plaintiff was induced, intimidated and threatened, then and there, and against her will and protesting that she did not desire to surrender her stock in said corporation, was nevertheless forced and compelled by these defendants to surrender said shares of stock to the corporate defendant or one that it would designate, as aforesaid; that at said time and place defendants, and each of them, did misrepresent to this plaintiff the extent of the corporate assets and liabilities so as to give an untrue picture of the same to this plaintiff.

"IX

"Since the time of this plaintiff's original ownership of shares of stock in defendant corporation this corporate defendant has made substantial financial gains and profits which said gains and profits have been concealed and withheld from this plaintiff and have wrongfully been paid to the officers and directors thereof; that the exact amount of said sums thus wrongfully withheld and

illegally paid to officers and directors of said corporation is unknown to this plaintiff, but this plaintiff is informed and believes, and therefore alleges, that such sums are in excess of $750,000 of which her rightful share is in excess of $60,000.

"X

"That plaintiff, for the first time, discovered the false and fraudulent representations of these defendants relative to the gains, profits and wrongful withholdings of moneys of said corporate defendant by these named defendants in a hearing before the office of the Corporation Commissioner of this state during the period of June through December 1953 and again in January, 1954.

"XI

"That the statements of the defendants, and each of them, as aforesaid, with regard to the dissolution of the defendant corporation and the extent of profits and liabilities of the corporate defendant were untrue and known by defendants, and each of them, to be untrue and were made to plaintiff with the intent to deceive, mislead, intimidate and induce plaintiff to transfer her aforesaid shares of stock and that this plaintiff was thereby defrauded, induced and coerced into transferring her shares as aforesaid; that as a result of said transfer, as aforsaid, this plaintiff has been deprived of her present, past, and future rightful share in the profits and earnings of defendant corporation; that plaintiff would not have transferred her shares, as aforesaid, but for the fraud, force and intimidation of defendants, and each of them, exercised upon this plaintiff; that as a proximate result of defendant's conduct this plaintiff has been, and is, greatly injured and put to large expense and trouble and has suffered loss in a sum in excess of $60,000 plus interest."

The second cause of action alleges a conspiracy among the defendant officers and directors to appropriate the funds of the corporation and to deprive plaintiff of her rights and alleges, generally, that in various ways the individual defendants wrongfully diverted the funds of the corporation by taking excessive salaries, bonuses, dividends and other unearned compensation. The third cause of action repleads the second and seeks exemplary damages.

Citing Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, and Taylor v. Wright, 69 Cal.App.2d 371, 159 P.2d 980, standing for the so-called "special facts doctrine," plaintiff urges that the complaint states a cause of action against the defendant officers and directors for fraud and coercion by which she was induced to sell her stock. Recognizing that this theory of the complaint is somewhat inconsistent with the nature of the relief sought in the prayer, plaintiff argues that "regardless of mistaken theory or imperfections of form" the complaint states a cause of action and that it was error to sustain the objection to the introduction of evidence and to deny the motion for leave to amend.

[2] It is our holding that the trial court did not err in sustaining the objection, which served the purpose of the general demurrer. The allegations relating to coercion were all in terms which amounted to nothing more than conclusions of the pleader. We agree also with respondents' contention that the essential elements of actionable fraud were not adequately set forth. As stated in Hannon v. Madden, 214 Cal. 251, 267–268, 5 P.2d 4, 11: "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions." (See, also, Fallbrook Public Utility Dist. v. Martin, 151 Cal.App.2d 84, 94, 311 P.2d 151.)

[3, 4] We hold, however, that the denial of plaintiff's request for leave to amend was an erroneous ruling. Such leave must be granted unless the record demonstrates to a reasonable certainty that no cause of action can be stated. Miller v. McLaglen, 82 Cal.App.2d 219, 228, 186 P. 2d 48; Bice v. Stevens, 136 Cal.App.2d 368,

379, 289 P.2d 95; Reed v. Norman, 152 Cal.App.2d 892, 900, 314 P.2d 204.

The evident imperfections in plaintiff's complaint do not afford any sufficient justification for an adjudication "that no basic right of action can possibly exist." Bice v. Stevens, supra, 136 Cal.App.2d at page 379, 289 P.2d at page 102. One of the most common varieties of amendments is that which is allowed after the sustaining of a general demurrer. Thomas v. Bruza, 151 Cal.App.2d 150, 155–156, 311 P.2d 128.

[5] Respondents advance two further contentions in support of the judgment, both of which we find to be untenable. The contention that the gravamen of plaintiff's complaint is derivative in nature is refuted by our detailed analysis as set forth above. While there are some aspects of the complaint which are suggestive of a derivative cause of action, the central and dominant theme of the pleading is an alleged fraud which induced plaintiff to sell her eighty shares of stock, to her damage in the sum of $60,000. Such a cause of action obviously is individual, and not representative, in character.

[6, 7] Respondents' plea of the statute of limitations, (Sec. 338, subd. 4 and Sec. 359 of the Code of Civil Procedure), is not sustainable. Sec. 359, relating to actions against directors or stockholders of a corporation to recover a penalty or forfeiture or to enforce a liability created by law, is wholly inapplicable. Sec. 338, subd. 4, of course, applicable, but it does not operate to bar any cause of action which plaintiff may have against defendants for fraud inducing the sale of her stock, if we assume the truth of her allegation that the sale was effected on June 17, 1953. This action was commenced on June 2, 1955, less than two years after the sale, which would mark the accrual of any cause of action for fraud therein.

The judgment is reversed with directions to allow plaintiff to file an amended complaint, if she be so advised.

FOX, P. J., and ASHBURN, J., concur.

The PEOPLE of the State of California, Plaintiff,

v.

Harry OKEN et al., Defendants.

Tony ALARCON, Defendant, Cross-Complainant and Appellant,

v.

EL MONTE SCHOOL DISTRICT et al., Cross-Defendants and Respondents.

No. 22496.

District Court of Appeal, Second District, Division 3, California.

April 17, 1958.

Rehearing Denied May 7, 1958.

Hearing Denied June 11, 1958.

Action by state to abate a public nuisance. One of the defendants filed his third-amended cross-complaint against school district and county for declaratory judgment that certain lands should be acquired for the construction of a school building. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., entered order striking third amended cross-complaint, and the cross-complainant appealed. The District Court of Appeal, Patrosso, J. pro tem., held that a private citizen could not seek to acquire property for the purpose of constructing and operating a public school.

Affirmed.

1. Appeal and Error ⇐103

While order striking pleading is not ordinarily appealable, the rule is otherwise where the cross-complaint is directed against cross-defendants not otherwise parties to the action.

2. Pleading ⇐254

Where demurrers interposed to second amended complaints were sustained without leave to amend as to the first, second and fourth causes of action thereof, the attempted incorporation of such counts in third amended cross-complaint without leave of court was ineffective and they would not be treated as a part of the pleading in the case.

3. Pleading ⇐225(1)

The trial court properly sustained demurrers without leave to amend where each of the three causes of action seemingly undertook to state a cause of action for monetary and injunctive relief against the cross-defendants upon some undiscernible theory of damages which the cross-complainants and others similarly situated allegedly would sustain if the plaintiff should prevail in its action to abate the nuisances alleged to exist upon the properties owned by the cross-complainant and others similarly situated.

4. Declaratory Judgment ⇐292

Private citizens could not maintain action against school district and county for judgment declaring that public interest and necessity required construction of school building and acquisition and appropriation of a site upon which the building was to be erected within described tract of land.

5. Schools and School Districts ⇐71

Where, when or how, if at all, a school district shall construct school buildings is a matter within sole competency of its governing board to determine.

6. Eminent Domain ⇐168(1)

A private citizen cannot sue to acquire property for purpose of constructing and operating a public school. West's Ann. Civ.Code, § 1001; West's Ann.Code Civ. Proc. § 1238, subd. 21.

7. Eminent Domain ⇐191(2, 3)

Under statute authorizing any person, as an agent of the state or as a person in charge of such use to acquire private property under the power of eminent domain for any of the public uses provided in a section of the Code of Civil Procedure, a private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of such public uses but it must likewise be made to appear that he is authorized to devote the property to the public use in question. West's Ann.Civ.Code, § 1001; West's Ann.Code Civ.Proc. § 1238, subd. 21.

8. Evidence ⇐5(2)

The District Court of Appeal judicially knows that a private citizen is not a person competent and qualified to acquire described realty as agent of the state or as a person in charge of a public use within statute permitting such person to acquire private property under the power of eminent domain. West's Ann.Civ.Code, § 1001.

9. Pleading ⇐358

Where third amended cross-complaint wholly failed to state a cause of action and was patently frivolous and sham, such cross-complaint was properly stricken by the trial court.

Alexander Ruiz and Manuel Ruiz, Jr., Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Edwin P. Martin, Deputy County Counsel, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

[1] This is an appeal by cross-complainant Tony Alarcon from an order striking his third amended cross-complaint as against the cross-defendants El Monte School District and County of Los Angeles. While an order striking a pleading is not ordinarily appealable, the rule is otherwise where, as here, the cross-complaint is directed against cross-defendants not otherwise parties to the action. Trask v. Moore, 1944, 24 Cal.2d 365, 373, 149 P.2d 854.

The action in which the cross-complaint was filed is one instituted on behalf of the People of the State of California by the district attorney of Los Angeles County against numerous defendants, including cross-defendant, alleged to be the owners or occupants of properties within an area comprising some 24 acres located in the county of Los Angeles and commonly known as "Hick's Camp," to abate a public nuisance alleged to exist upon the properties located therein by reason of the maintenance thereon of dilapidated buildings and unsanitary conditions therein more particularly described.

A demurrer having been sustained with leave to amend to the original cross-complaint, appellant filed a second amended cross-complaint containing four separate causes of action. Demurrers interposed by the respondents to the latter complaint were sustained without leave to amend as to the first, second and fourth cause of action thereof. Thereafter appellant filed a third amended cross-complaint which was stricken upon motion of the respondents as hereinbefore stated.

The third amended cross-complaint, as is likewise true of its predecessors, is in many respects a remarkable document. It purports to incorporate therein by reference, the first, second and fourth causes of action of the second amended cross-complaint to which, as previously stated, demurrers had been sustained without leave to amend. It then alleges that the action is brought by the appellant "on behalf of apprximately [sic] 35 persons similarly situated, named defendants, in the second amended complaint of nuisance on file herein, and also as agent for the State of California, and the person in charge of the public uses hereinafter set forth and requested." It then alleges that the El Monte School District and numerous individually named cross-defendants claim an interest in the property described in Exhibit "A", attached to the cross-complaint, which apparently comprises a portion of the property described in plaintiff's complaint, whereon are located the conditions which are sought to be abated as a public nuisance. It further alleges "that the public interest and necessity require that the said property be acquired by cross complainant as agent of the State of California, as provided in section 1001 of the California Civil Code. That cross complainant, Tony Alarcon, is a person, competent and qualified to acquire the real property and improvements thereon, described herein, as agent of the State and/or person in charge of the uses hereinafter set forth. That cross complainant seeks to take and condemn private property, to-wit: Real Estate and improvements, for the public uses hereinafter set forth. That the plaintiff and cross defendants, El Monte School District, Ernest Roll, District Attorney for Los Angeles County and the County of Los Angeles, are public bodies within the purview of subsection 21 of the section 1238 of the California Code of Civil Procedure, * * * to-wit: To demolish, clear, abate or remove buildings from the area known as 'Hicks Camp' and herein described in exhibit 'A', for the reason that the same are detrimental to the health, safety and morals of the people, and because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings predominating in said area. That the public interest and necessity require the construction by the El Monte School District of a school building and also the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land hereinabove described. In conjunction therewith, said public interest and necessity require, that buildings, dwellings and structures within said tract of land be demolished, cleared, abated and/or removed, in the interest of the health, safety and morals of the people, because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings therein, in a manner that will be most compatible with the greatest public good and the least private injury. * * * That there is grave danger of the creation of a public nuisance, unless the public uses herein referred to are provided for and the public interest and necessity stated above be adjuticated [sic]."

The cross-complaint closes with a prayer that the cross-defendants be required to set forth the nature, character, extent and value of their several estates or interest in the parcels of real property sought to be condemned and the severance damage, if any, accruing thereto; that the value of each separate interest or estate sought to be condemned and the severance damages, if any, be ascertained, and that upon payment to the defendants entitled to com-

pensation of the several amounts so ascertained, the court make and enter a final order of condemnation, "conveying to cross complainant, as agent for the state, the properties for the public use above set forth."

[2, 3] We have ignored the allegations contained in the first, second and fourth causes of action, contained in the second amended cross-complaint, which were attempted to be incorporated by reference in the third amended cross-complaint in view of the fact that the demurrers interposed to these causes of action had, as noted, been sustained without leave to amend. The attempted incorporation of these counts in the third amended cross-complaint without leave of the court is ineffective and they may not be treated as a part of the pleading in the case. 39 Cal. Jur.2d p. 339. Moreover, without here undertaking to set forth in detail the voluminous allegations of said counts, we are completely satisfied that the trial court properly sustained the demurrers thereto without leave to amend. Each of these three causes of action seemingly undertakes to state a cause of action for monetary and injunctive relief against the respondents upon some undiscernible theory for damages which the cross-complainant and others similarly situated allegedly will sustain if the plaintiff prevails in its action to abate the nuisances alleged to exist upon the properties owned by them.

[4, 5] From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine. Montebello Unified School Dist. of Los Angeles County v. Keay, 1942, 55 Cal.App.2d 839, 843–844, 131 P.2d 384.

[6–8] If, however, the third amended cross-complaint be construed as one whereby appellant as a private citizen seeks to acquire property for the purpose of constructing and operating a public school, it is likewise unauthorized by law. Section 1001 of the Civil Code, upon which appellant assertedly seeks to predicate his action, while authorizing any person, as "an agent of the State" or as a "person in charge of such use" to acquire private property under the power of eminent domain for any of the public uses provided in section 1238 of the Code of Civil Procedure is wholly without application. A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of the public uses provided in section 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use." Beveridge v. Lewis, 1902, 137 Cal. 619, 621, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581. While appellant alleges by way of conclusion that he "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the State and/or person in charge of the uses" therein set forth, the allegation must be disregarded, because we judicially know it is untrue. Wilson v. Loew's, Inc., 1956, 142 Cal.App.2d 183, 187–188, 298 P.2d 152. "The constitution declares that the legislature shall provide 'for a system of common schools', or, as expressed elsewhere in the organic law, 'a public school system.'" 23 Cal.Jur. pp. 18; Cal.Const. art. IX, secs. 5–6. "By these two sections, the constitution makes the school system a

matter of state care and supervision. The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools. And this duty to provide for the education of the children of the state, so far as the state has, by the adoption of the constitution, undertaken it, cannot be delegated to any agency." 23 Cal.Jur. pp. 21–22. As said in Piper v. Big Pine School Dist., 193 Cal. 664, 669, 226 P. 926, 928:

"It is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state."

From the allegations of the cross-complaint, it affirmatively appears that "(i)n this case it is the school district, acting through its governing board that is the agent of the state in charge of the use for which the land was sought." Montebello Unified School District of Los Angeles County v. Keay, supra [55 Cal.App.2d 839, 131 P.2d 387].

[9] The third amended cross-complaint wholly fails to state a cause of action and is patently frivolous and sham. It was therefore properly stricken by the trial court. As said by this court in Neal v. Bank of America, 1949, 93 Cal.App.2d 678, 682–683, 209 P.2d 825, 827:

"It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. Code Civ.Proc., sec. 453. However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. 41 Am.Jur. secs. 346, 347, p. 527; anno., 13 Am.St.Rep. 640. * * * In Santa Barbara County v. Janssens, 44 Cal.App. 318, 186 P. 372, it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. * * * It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

The order appealed from is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



159 Cal.App.2d 349

Oscar LUND and Bertie Lund, Plaintiffs and Respondents,

v.

W. H. COOPER and Elsie Cooper, Defendants and Appellants.

Civ. 9362.

District Court of Appeal, Third District, California.

April 14, 1958.

Rehearing Denied May 2, 1958.

Hearing Denied June 11, 1958.

Action to rescind, and recover down payment made on, contract for purchase of real property. The Superior Court, Butte County, Dudley G. McGregor, J., rendered judgment for purchasers, and vendors appealed. The District Court of Appeal, Warne, J. pro tem., held that where vendors, who were building contractors, entered into written contract providing for

sale of property and that vendors would complete incomplete dwelling house on property sold, purchasers were not in pari delicto with vendors, who were not duly licensed as contractors as required by statute, and purchasers were entitled to rescind illegal contract and recover down payment, less amount received by them from rental of property.

Affirmed.

1. Licenses ⇐40

Statutory provisions that no person engaged in the business or acting in the capacity of a contractor may bring or maintain action for collection of compensation for performance of contract for which license is required without proving that he was licensed contractor at all times during performance of contract are mandatory, statute is for protection and safety of public, and violation thereof is a criminal offense. West's Ann.Bus. & Prof.Code, § 7031.

2. Contracts ⇐139

Where money has been paid in consideration of an executory contract which is illegal, party who has paid it may repudiate agreement at any time before it is executed and reclaim the money, and in such case it is duty of court to aid one not in pari delicto, though to some extent involved in the illegality.

3. Licenses ⇐39.43

Where building contractors entered into written contract providing for sale of property and that contractors would complete incomplete dwelling house thereon, purchasers were not in pari delicto with contractors who were not duly licensed as required by statute and purchasers were entitled to rescind illegal contract and recover down payment, less amount received by them as rental of property. West's Ann.Bus. & Prof.Code, §§ 7026, 7030, 7031.

4. Interest ⇐39(3), 44

In action for rescission of contract, where amount due from defendant to plaintiff is unliquidated, interest runs only from date of judgment, but in action upon rescission in pais, right to repayment of moneys paid under contract is fixed by rescission and interest is thus recoverable from date of rescission. West's Ann.Civ. Code, § 3287.

5. Interest ⇐44

Where money due purchasers at time of rescission of contract for purchase of building was capable of ascertainment by simply deducting amount of rent received from down payment made by purchasers, purchasers were entitled to interest from date of rescission. West's Ann.Civ.Code, § 3287.

Charles L. King, Gridley, for appellants.

C. Keith Lyde, Oroville, for respondents.

WARNE, Justice pro tem.

From a judgment in favor of plaintiffs in an action to rescind and recover the down payment made on a contract for the purchase of certain real property, defendants appeal.

On January 15, 1954, the parties to this action entered into a written contract which provided that defendants would sell, and plaintiffs would buy, certain real property upon which was situated an incomplete dwelling house. The purchase price was $14,500, of which $1,500 was paid concurrently with the signing of the contract. Under the terms of the contract, plaintiffs were to apply to the Bank of America at Gridley, California, for a secured loan of not less than $7,000, which was to be applied on the purchase price, and in addition thereto were to give the plaintiffs a promissory note, secured by a second deed of trust, for the balance then remaining due. It appears that the parties discussed with the bank manager the obtaining of a loan, but plaintiffs did not make any formal application for such and it was not procured, probably because the bank was not interested in making a loan for $7,000. Title to the property was at all times vested in the defendants. The defendants, who were unlicensed contractors, agreed to and did complete the building according to the plans and specifications. On or about June 1, 1954, the build-

ing was substantially completed and plaintiffs then took possession and rented the premises to a tenant for three months and received $240 in rentals. Thereafter, on September 9, 1954, according to the court's finding, plaintiffs gave notice of rescission and on October 27, 1955, filed this suit to recover the $1,500 down payment. Defendants answered and by way of counterclaim alleged that they had been damaged in the sum of $1,500 by reason of the breach of the contract by the plaintiffs. Plaintiffs then amended their complaint by adding a cause of action wherein they alleged that the defendant W. H. Cooper acted in the capacity of a contractor, within the meaning of the Business and Professions Code, in constructing said house and purporting to sell it to the plaintiffs. They prayed that said contract be declared void and against public policy; that the defendants' counterclaim be denied and that the $1,500 be restored to them. The trial court found that the parties had entered into the agreement on January 15, 1954; that plaintiffs had paid, pursuant to the contract, $1,500 as part payment on the purchase price; that the defendant W. H. Cooper did, in executing said contract and in constructing said house thereon and in purporting to sell said house to plaintiffs, act in the capacity of a contractor within the meaning of section 7026 of the Business and Professions Code, and that it would produce a harmful effect upon plaintiffs should the court refuse to rescind the contract and restore plaintiffs to their former position, and that plaintiffs, on September 9, 1954, gave notice of rescission. The court further found that defendants had not suffered any damage by reason of plaintiffs' failure to comply with the contract and concluded that plaintiffs were entitled to judgment for the sum of $1,260 ($1,500 less the $240 rent which the plaintiffs received) together with interest at the rate of 7 per cent from September 9, 1954, and costs. Judgment was entered accordingly and this appeal followed.

Section 7026 of the Business and Professions Code defines a contractor as "any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, * * * or demolish any building, * * * or other structure, project, development or improvement, or to do any part thereof, * * *". Section 7030 of said code provides: "Any person who acts in the capacity of a contractor without a license, * * * is guilty of a misdemeanor." Section 7031 of said code provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[1, 2] It is to be noted that the requirements of section 7031 of the Business and Professions Code are mandatory. The statute is for the protection and safety of the public and a violation thereof is a criminal offense. We therefore feel that the rule of law which governs in such a case is, as stated in Smith v. Bach, 183 Cal. 259, 263, 191 P. 14, 15.

> "* * * By the weight of authority, where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in pari delicto, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require. [Citing cases.]"

[3] The plaintiffs in the instant case were not in pari delicto. In Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 153, 308 P.2d 713, 720, this court said:

"* * * [W]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not in pari delicto. [Citing cases.]"

Appellant relies on Marshall v. Von Zumwalt, 120 Cal.App.2d 807, 262 P.2d 363. In so far as that case runs contrary to what is here said, we think it also runs counter to the cases we have cited. We feel bound by the latter cases. We therefore conclude that plaintiffs were entitled to rescind and recover the money which they paid on the down payment, less the $240 rental received.

[4, 5] Defendant also contends, by suggestion, that the trial court erred in allowing interest to run from the date of rescission. There is no merit in this suggestion. In an action for rescission, where the amount due from the defendant to the plaintiff is unliquidated, the interest runs only from the date of judgment. Younis v. Hart, 59 Cal.App.2d 99, 138 P. 2d 323. However, in an action upon a rescission in pais, the right to repayment of moneys paid under the contract is fixed by the rescission and interest is thus recoverable from the date of rescission. Hayt v. Bentel, 164 Cal. 680, 130 P. 432; Potter v. Contra Costa Realty Co., 220 Cal. 31, 29 P.2d 189; also see 9 Cal.Jur.2d 642, 643, sec. 51. Further, the money due plaintiffs at the time of rescission was capable of ascertainment by simply deducting the $240 rent received from the $1,500 down payment. Civil Code, sec. 3287.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.

PEOPLE of the State of California, Respondent,

v.

Thomas M. SHEELEY, Appellant.

Cr. 3317.

District Court of Appeal, First District, Division 2, California.

April 21, 1958.

Hearing Denied June 17, 1958.

Proceeding on appeal from order of the Superior Court, City and County of San Francisco, Orla St. Clair, J., setting aside order revoking probation and sentencing defendant to state prison for a term to run concurrently with any other sentence being served. The District Court of Appeal, Kaufman, P. J., held that where defendant was convicted of robbery in the first degree and court sentenced him to prison but suspended sentence on condition that he serve one year in county jail, but after service of one year in jail and conviction of other crimes court entered order revoking probation and sentenced defendant to prison for term prescribed by law, court exhausted its jurisdiction in case and could not subsequently set aside such order and enter a new order sentencing defendant to prison for a term to run concurrently with any other sentence being served.

Reversed.

1. Criminal Law ⇐982

Court has no power to suspend a sentence except as incident to granting probation.

2. Criminal Law ⇐1001

Where defendant was convicted of armed robbery in the first degree, and court rendered its judgment sentencing him to state prison and then suspended sentence on condition that he serve one year in county jail, order was an informal grant of probation.

3. Criminal Law ⇐982

Finding of jury in prosecution for robbery is only for the purpose of determining degree of offense set forth in statute which does not distinguish between "dan-

gerous" and "deadly" weapons, and is not binding on the court for purpose of determining eligibility for probation under statute forbidding probation to any defendant convicted of armed robbery who at time of perpetration thereof was armed with a deadly weapon. West's Ann.Pen.Code, §§ 211a, 1203, 1203.2.

4. Criminal Law ⇐982

If weapon found on defendant convicted of armed robbery in the first degree at the time of his arrest is only dangerous, probation is within the discretion of the trial court. West's Ann.Pen.Code, §§ 211a, 1203, 1203.2.

5. Criminal Law ⇐1144(17)

On appeal from order setting aside revocation of probation and sentencing defendant to state prison, District Court of Appeal had to resolve every intendment in favor of action of the court below, and where there was a possibility that trial court properly exercised its discretion in granting probation, District Court of Appeal could only assume that order so doing was a valid one.

6. Criminal Law ⇐982

On defendant's subsequent conviction of a felony, court can revoke probation validly granted, and sentence defendant.

7. Criminal Law ⇐1001

When order granting probation on prior conviction was revoked and court imposed sentence to run concurrently with any sentence then being served by defendant, even if order revoking probation were invalid, there was no miscarriage of justice or prejudice with respect to a substantial right. West's Ann.Pen.Code, §§ 213, 671, 1203.1, 1404.

8. Criminal Law ⇐1001

Where defendant was convicted of armed robbery in the first degree and was sentenced to state prison but sentence was suspended on condition that he serve one year in county jail, but order did not state a probationary period probation term would be deemed to be the maximum period of imprisonment for offense, and since offense was punishable by life imprisonment, order revoking probation was within the proper statutory period.

9. Criminal Law ⇐1001, 1177

Where defendant had been convicted of armed robbery in the first degree, and court sentenced defendant to state prison but suspended sentence on condition that he serve one year in county jail, but after service of one year in jail and defendant's conviction of a subsequent felony, court entered order revoking probation and sentenced defendant to state prison for the term prescribed by law court exhausted its jurisdiction in case, and order setting aside such order and sentencing defendant to state prison for a term to run concurrently with any other sentence being served, had to be reversed. West's Ann.Pen.Code, §§ 213, 671, 1203.1, 1404.

Thomas M. Sheeley, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondents.

KAUFMAN, Presiding Justice.

On January 24, 1949, the appellant was convicted of armed robbery in the first degree. (Case No. 42238) On January 28, 1949, the court rendered its judgment, sentencing appellant to San Quentin, and then suspending the sentence on condition that he serve one year in the County Jail. In April 1953, appellant was convicted of violating Pen.Code, section 476a, sentenced to San Quentin, and again sentence was suspended on condition that he serve one year in the County Jail. (Case No. 48268) On March 13, 1956, the court was informed by the probation officer that the appellant had again been sentenced to San Quentin on another forgery charge, No. 27015. On March 13, 1956, the court revoked probation in No. 42238 and in No. 48268, and sentenced appellant to the State prison. Thereafter, on July 11, 1956, after being informed by the district attorney that the orders of March 1956, were invalid, the court set aside the orders of March 13, 1956, revok-

ing probation on Nos. 42238 and 48268 and sentenced appellant on No. 42238 to the State prison for a term to run concurrently with any other sentence being served; and on No. 48268 to one year in the County Jail with credit for time already served. Defendant appeals from the order of July 11, 1956. His appeal is taken only in No. 42238, the robbery case. Neither he nor the People appeal from any order entered in No. 48268.

Appellant, appearing in propria persona, contends that he was illegally sentenced on No. 42238 as the jail sentence indicates he was convicted of only second degree robbery, that under Penal Code, section 1203.2 the court lacked jurisdiction to revoke the 1949 order as judgment had been pronounced and suspended and he had served the year in the County Jail; that he was not properly arraigned before judgment and that he was denied a fair hearing and aid of counsel on July 11, 1956.

[1–4] The order of January 28, 1949, is an informal grant of probation as a court has no power to suspend a sentence except as an incident to granting probation. Oster v. Municipal Court, 45 Cal.2d 134, 139, 287 P.2d 755. The record indicates that on January 24, 1949, the jury found appellant guilty of armed robbery in the first degree. Penal Code, section 1203 provides: "Probation shall not be granted to any defendant who shall have been convicted of robbery * * * and who at the time of the perpetration of said crime * * * or at the time of his arrest was himself armed with a deadly weapon. * * *" The finding of the jury is only for the purpose of determining the degree of the offense as set forth in Penal Code, section 211a, which does not distinguish between "dangerous" and "deadly" weapons, and is not binding on the court for the purpose of determining eligibility for probation under Penal Code, section 1203, as the prohibition of that section applies only to "deadly" weapons. People v. Raner, 86 Cal.App.2d 107, 194 P.2d 37; People v. Coleman, 53 Cal.App.2d 18, 127 P.2d 309; People v. Connolly, 103 Cal.App.2d 245, 229 P.2d 112. If the weapon is only dangerous, then probation is within the discretion of the trial court. People v. Rainey, 125 Cal.App.2d 739, 271 P.2d 144. Appellant contends that the order suspending sentence was a valid one, and as the judgment was pronounced and its execution suspended, and he has served the year in the county jail, he cannot now be resentenced. Penal Code § 1203.2; In re Loros, 48 Cal.App.2d 680, 120 P.2d 69.

[5, 6] The attorney general argues that the order is invalid as the appellant was not eligible for probation, People v. Taylor, 135 Cal.App.2d 201, 286 P.2d 952; People v. Branch, 127 Cal.App.2d 438, 274 P.2d 31, and that although the order is void, the judgment remains valid and must be served. People v. Cravens, 115 Cal.App.2d 201, 251 P.2d 717; In re Martin, 82 Cal.App.2d 16, 185 P.2d 645. On appeal we must resolve every intendment in favor of the action of the court below, and since as pointed out above, there is a possibility that the trial court properly exercised its discretion in granting probation to the appellant, we can only assume that the order of January 28, 1949, was a valid one. However, on appellant's conviction of a felony, the court could revoke the probation validly granted, and sentence appellant. In re Larsen, 44 Cal.2d 642, 283 P.2d 1043.

[7] In the instant case, when the order granting probation in No. 42238 was revoked, the court imposed sentence to run concurrently with any sentence then being served. There was not therefore a miscarriage of justice, or prejudice in respect to a substantial right within Penal Code, section 1404.

[8] The order in question does not state a "probationary period." Penal Code, section 1203.1, provides that the maximum period of probation cannot exceed the maximum time for which sentence of imprisonment might be pronounced. Penal Code, sections 213 and 671, provide that the maximum punishment for robbery in the first degree is a life term, the minimum, five years. Where no period of probation is fixed by the court, the probation term

will be deemed to be the maximum period of imprisonment for the offense. (29 Cal. Jur.2d 363.) Thus, the order of January 28, 1949, was revoked within the proper statutory period.

[9] The order of March 13, 1956, revoked probation and sentenced appellant to prison for the term prescribed by law. The court thus exhausted its jurisdiction in No. 42238, and the order here appealed from must be reversed. The result of this reversal is to leave in effect the order of March 13, 1956, insofar as No. 42238 is concerned.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



159 Cal.App.2d 485

DYKE WATER COMPANY, a Corporation, Petitioner,

v.

SUPERIOR COURT OF ORANGE COUNTY, California, Respondent.

Civ. 5781.

District Court of Appeal, Fourth District, California.

April 17, 1958.

As Modified on Denial of Rehearing May 12, 1958.

Proceeding in prohibition to restrain the Superior Court of Orange County from proceeding with trial of injunction action. The District Court of Appeal, Barnard, P. J., held that where Public Utilities Commission had ordered water company to cease serving water to inhabitants of five tracts which had been annexed, in whole or in part, to water works district, but Commission had dismissed cease and desist petition as to another tract and had ordered that water company be granted certificate of public convenience and necessity as to that tract and had further ordered that water company should continue to provide service in four other tracts until such time as district should be ready to serve consumers in those tracts, Superior Court would have no jurisdiction to enjoin water company from using water lines and facilities installed by subdividers in tract for which certificate had been granted, and would likewise have no jurisdiction to enjoin company from using such water pipes and facilities in those tracts which Commission order permitted company to continue serving.

Writ granted.

1. Waters and Water Courses ⇐202

Public Utilities Commission had exclusive jurisdiction, subject only to review in Supreme Court, over question as to whether water works district or water company should be permitted to supply water service in area.

2. Waters and Water Courses ⇐197

Where Public Utilities Commission had ordered water company to cease serving water to inhabitants of five tracts which had been annexed, in whole or in part, to water works district, but Commission had dismissed cease and desist petition as to another tract and ordered that water company be granted certificate of public convenience and necessity as to that tract and had further ordered that water company should continue to serve in four other tracts until such time as district should be ready to serve consumers in those tracts, Superior Court would have no jurisdiction to enjoin water company from using water lines and facilities installed by subdividers in tract for which certificate had been granted, and would likewise have no jurisdiction to enjoin company from using such water pipes and facilities in those tracts which commission order permitted company to continue serving.

Paul Barksdale d'Orr, Glenn A. Lane, Los Angeles, for petitioner.

Joel E. Ogle, County Counsel, Santa Ana (Orange), Adrian Kuyper, Deputy

County Counsel, Long Beach, Robert F. Waldron, Deputy County Counsel, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is a petition for a writ of prohibition restraining the respondent court from hearing or trying an action, and from hearing or ruling upon the plaintiff's motion for summary judgment in said action, both of which matters had been set for hearing. Said action was entitled "County of Orange and Orange County Water Works District No. 3, Plaintiffs v. Dyke Water Company, a Corporation, at al., Defendants, No. 66822". The plaintiff water district will be referred to as "District No. 3".

It appears from the showing here made that the petitioner is a public utility corporation engaged in supplying water for domestic and commercial uses in portions of Orange County, under certificates of public convenience and necessity issued by the Public Utilities Commission, which will be referred to as the "Commission". In May, 1954, the Commission, in a proceeding before it, ordered this petitioner not to further extend its water system within the boundaries of District No. 3, or enter into any further contracts for water service within such boundaries, without further order of the Commission. This petitioner later extended its service into certain tracts, in accordance with contracts obligating it to serve water to said tracts, and subsequently those tracts were annexed to District No. 3.

In July, 1955, District No. 3 filed a petition before the Commission seeking an order requiring this petitioner to cease serving water to the inhabitants of five tracts all or part of which had been thus annexed to the district. In October, 1956, the Commission made its decision, dismissing the petition at to one tract and ordering that a certificate of public convenience and necessity be granted to this petitioner as to that tract, and further ordering that this petitioner continue to furnish water service in the other four tracts involved until the further order of the Commission. It was further provided that when District No. 3 should be ready to serve the consumers in these tracts, the Commission would issue a supplemental order directing this petitioner to cease and desist from furnishing water to its consumers in said tracts. A review of that decision was denied by the Supreme Court, and the Commission then issued a supplemental order on February 4, 1958, providing that District No. 3 should serve upon this petitioner a notice specifying the exact time when it was "ready to and will serve" petitioner's consumers in the specified tracts, and that concurrently with the commencing of service by the district this petitioner should cease serving consumers in those tracts.

On March 3, 1958, in an order denying this petitioner's application for a rehearing, the Commission stated that by its 1956 decision it had directed this petitioner to continue service in those tracts pending its further order; that it had also provided that when District No. 3 was ready to serve the consumers in those tracts a supplemental order would issue directing this petitioner to cease serving in such tracts; that in its supplemental order of February 4, 1958, it had provided that concurrently with the commencement of service by the district this petitioner should cease service in those tracts; that "Neither the 1956 decision nor the 1958 supplemental order questions petitioner's ownership of the water system unlawfully installed by it to serve the specified tracts. Nor do either of those orders purport to vest title to such system in the County or the District, nor direct petitioner to transfer or to 'turn over' any property or facilities"; and that "Petitioner is ordered to cease service therein 'concurrently with the commencement of service' by the County and the District. The latter will not be in a position to serve until acquisition of petitioner's facilities, by voluntary transfer or by eminent domain proceedings, or until construction of necessary separate facilities."

In the meantime, in October, 1955, the County and District No. 3 brought action

No. 66822 in the respondent court. The complaint was based upon the contention that at the time the maps of these tracts were submitted to the board of supervisors for approval the respective subdividers had agreed to install water lines and facilities in the streets offered for dedication, and that said offers of dedication of said water lines and facilities as to each of said tracts had been accepted by the board of supervisors. The sole prayer of the complaint was that the defendants be permanently enjoined and restrained from using said water lines and facilities in each of these tracts, and from interfering in any manner with the use of said lines and facilities by the plaintiffs or either of them. An answer to the complaint was filed by this petitioner, and when the case was set for trial this application for a writ of prohibition was made to this court.

[1, 2] It cannot be questioned that the Public Utilities Commission has exclusive jurisdiction, subject only to review in the Supreme Court, over the question as to which of these agencies may presently supply water service in the areas here involved. The Commission has assumed such jurisdiction but has not yet made a final or unconditional decision, except with respect to one of these tracts and in that instance any injunctive relief granted by the respondent court would have the effect of reversing an order of the Commission. With respect to the other tracts, conditional orders have been made by the Commission, for the purpose of enabling District No. 3 to put itself in a position where it will be able to serve the consumers in these tracts. For this reason this petitioner was ordered to continue service to such consumers until such time as District No. 3 is prepared to render such service, and it was further provided that a supplemental order would then issue directing this petitioner to then cease such service. Until the question of title to these water systems is decided, and this supplemental order is issued, the jurisdiction of the Commission continues, and the respondent court has no jurisdiction to interfere with these orders of the Commission, and no jurisdiction to issue the injunction prayed for until such time as District No. 3 has established its title to the existing water systems, or otherwise acquired facilities which will enable it to comply with the orders of the Commission. Miller v. Railroad Commission, 9 Cal.2d 190, 70 P.2d 164, 112 A.L.R. 221; City of Oakland v. Key System, 64 Cal.App.2d 427, 149 P.2d 195. The orders of the Commission already entered clearly indicate what District No. 3 must do before this petitioner is finally ordered by the Commission to cease service in the tracts involved, or before any such order of the Commission becomes effective.

It is ordered that a writ of prohibition issue prohibiting and enjoining the respondent court from issuing any injunction in Action No. 66822, until such time as the question of the title to the water lines and facilities involved has been determined and the County and Water Works District No. 3, are in a position to comply with the orders of the Public Utilities Commission.

GRIFFIN and MUSSELL, JJ., concur.



159 Cal.App.2d 549

Ernest V. BERRY, a Corporation, doing business under the name and style of Precision Engineering Company, Plaintiff and Appellant,

v.

CHROME CRANKSHAFT CO., a Corporation, et al., Defendants,

Chrome Crankshaft Co., a Corporation; Dura-Built Engine Co., a Corporation; Lacy A. Booker, sued herein as Lacey A. Booker, aka L. A. Booker; R. Max Temple, Harry Glazer, Simon Glazer, and Homer Keeler, Respondents.

Civ. 23031.

District Court of Appeal, Second District, Division 2, California.

April 18, 1958.

Action for injunction against use of trade secrets and secret processes and for damages. The Superior Court of Los An-

geles County, Edward R. Brand, J., denied plaintiff's motion for order requiring defendant's attorneys to withdraw, and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that evidence authorized denial of the motion.

Affirmed.

1. Appeal and Error ⇐85

An order denying motion to require attorneys to withdraw, to desist from assisting defendant or any attorney for any defendant, and to return documents submitted to one of them was appealable.

2. Attorney and Client ⇐21

Evidence authorized refusal to require defendant's attorney to withdraw on ground that he had previously represented plaintiff in related matters.

3. Trial ⇐105(2)

Incompetent testimony, such as hearsay or conclusion, if received without objection, takes on attributes of competent proof when considered upon question of sufficiency of evidence to support a finding.

4. Appeal and Error ⇐931(1), 1011(2)

On appeal, affidavits favoring contentions of prevailing party established not only facts stated therein, but also all facts which reasonably may be inferred therefrom, and where there is substantial conflict in facts presented by affidavits, determination of controverted facts will not be disturbed.

5. Appeal and Error ⇐989

Where findings are attacked for insufficiency of evidence, power of reviewing court begins and ends with determination of whether there is any substantial evidence to support them; reviewing court has no power to judge of effect or value of evidence, to weigh evidence, to consider credibility of witnesses, or to resolve conflicts in evidence or in reasonable inferences that may be drawn therefrom.

William C. Babcock and Gene W. Arant, Long Beach, for appellant.

Benjamin J. Goodman, Lyon & Lyon, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiff sued Chrome Crankshaft Co. and others for an injunction against the use of plaintiff's trade secrets and secret processes, and for damages for wrongful use of same in the past. Though at issue the cause has not been tried. In conjunction with Benjamin J. Goodman, Esq., the firm of Lyon & Lyon, Los Angeles patent attorneys, has appeared for defendant Chrome Crankshaft Co. During the taking of the deposition of Lile W. Harvey, one of plaintiff's employees, plaintiff's attorney made the claim that Mr. Lewis E. Lyon, who was examining the witness, was disqualified to represent defendant because he had previously represented plaintiff pertaining to matters involved in the instant case; demand was made that he and his firm withdraw as attorneys for defendant. The claim that Mr. Lyon had previously represented plaintiff was denied and the demand for withdrawal of Lyon & Lyon as attorneys for defendant was rejected.

[1] Thereupon, plaintiff made a motion for an order requiring Messrs. Lyon & Lyon to withdraw as attorneys for defendant, Chrome Crankshaft Co., to desist from assisting any present or future defendant or any attorney for any defendant with respect to any issue or matter involved in the suit; also requiring said Lyon & Lyon to return to plaintiff copies of three certain patent applications theretofore submitted to Mr. Lewis Lyon by plaintiff's attorney, Mr. William C. Babcock. The motion was made upon the ground "that said attorneys in early 1955 rendered legal services to their client Ernest V. Berry, who then conducted the business which is now conducted by the plaintiff corporation as his successor in interest, and during that employment acquired confidential information concerning the very trade secrets upon which the present action is founded." The motion was heard upon affidavits and oral evidence and was denied. The trial judge said: "I don't find any evidence in this record to indicate,

and upon which a finding could be made, that Lyon and Lyon or Lewis E. Lyon, or any other member of that firm was ever retained by or employed by or represented, directly or indirectly, the plaintiff in this litigation, and, therefore, the motion is denied." From the order made pursuant to this ruling plaintiff appeals. It is an appealable order. Meehan v. Hopps, 45 Cal.2d 213, 288 P.2d 267.

Counsel agree that the only question on this appeal is whether the evidence is sufficient to sustain the implied finding that Mr. Lewis E. Lyon never acted as attorney or legal consultant for plaintiff corporation or its predecessor in interest, Ernest V. Berry. Berry is president and sole owner of the corporate plaintiff.

Mr. Lewis E. Lyon made an affidavit, received in evidence, in which he said:

"That affiant did not at any time represent said Ernest V. Berry or his company and received no instructions and no information from said company or said Ernest V. Berry other than herein set forth;

"That affiant was at no time informed either by said John B. Rauen or by said Ernest V. Berry or by anyone representing said Ernest V. Berry as to the nature of contemplated arrangements between said John B. Rauen and said Ernest V. Berry or his company;

"That affiant represented said John B. Rauen solely in matters relating to patents and patent applications and did not represent John B. Rauen in any other matters or dealings he may have had with said Ernest V. Berry or Precision Engineering Company."

The exception mentioned in the first quoted paragraph obviously refers to information obtained upon inspection of plaintiff's plant and from the patent applications. That affidavit also says: "That affiant has not at any time represented in any capacity said Ernest V. Berry or his company, Precision Engineering Company, and has obtained no information in confidence with respect to either said party, his or its operations or equipment."

Mr. Lyon testified without objection that he never undertook to represent Mr. Berry personally, never did do so, and never represented Ernest V. Berry, a corporation, doing business under the name and style of Precision Engineering Company, and that no member of his firm had had any part in this transaction other than himself. Also, that he at no time believed that he was acting as attorney for anyone other than Mr. Rauen, and that Mr. Babcock (Berry's patent attorney) at no time stated to him or led him to believe that he was to act as attorney for Mr. Berry.

[2, 3] This testimony, though embracing conclusions, was sufficient to sustain the implied finding of the court's order. It is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding. In re Estate of Fraysher, 47 Cal.2d 131, 135, 301 P.2d 848; Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 466, 168 P. 1033; Yule v. Miller, 80 Cal.App. 609, 616, 252 P. 733; Swegle v. State Board of Equalization, 125 Cal.App.2d 432, 437, 270 P.2d 518; Abbott v. Limited Mut. Comp. Ins. Co., 30 Cal.App.2d 157, 163, 85 P.2d 961; Ingraham v. Smith, 83 Cal.App. 2d 807, 808, 189 P.2d 721; Riverside Rancho Corp. v. Cowan, 88 Cal.App.2d 197, 207, 198 P.2d 526; Weingetz v. Cheverton, 102 Cal.App.2d 67, 74, 226 P.2d 742; 3 Cal.Jur. 2d § 156, pp. 634, 636; 4 Cal.Jur.2d § 534, p. 388; 18 Cal.Jur.2d § 131, p. 576. In Yule v. Miller, supra, it is said (80 Cal.App. at page 616, 252 P. at page 736): "Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent. Parsons v. Easton, 184 Cal. 769, 195 P. 419; Janson v. Brooks, 29 Cal. [214], 223; Curiac v. Packard, 29 Cal. [194], 197; McCloud v. O'Neall, 16 Cal. [393], 397; Williams v. Hawley, 144 Cal. [97], 102, 77 P. 762."

[4] True, there were opposing conclusions in certain of plaintiff's affidavits (he produced no oral evidence) but it was the prerogative of the trial judge to accept that portion of the evidence which he found credible and to reject that opposed to it. "In a matter in which an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contentions of the prevailing party establish not only the facts stated therein, but also all facts which reasonably may be inferred therefrom. Where there is a substantial conflict in the facts presented by the affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal." Beckett v. Kaynar Mfg. Co., Inc., 49 Cal. 2d 695, 321 P.2d 749, 751. To the same effect, see, Hayutin v. Rudnick, 115 Cal. App.2d 138, 140, 251 P.2d 707; People v. Kirk, 109 Cal.App.2d 203, 207, 240 P.2d 630; Greenwell v. Caro, 114 Cal.App.2d 35, 38, 249 P.2d 573; 4 Cal.Jur.2d § 614, p. 495.

But the ruling at bar does not rest upon conclusions alone. Viewing the evidence most favorably to respondent's position, as we must do, the factual situation appears to be as follows. Prior to incorporation of plaintiff in October, 1955, Ernest V. Berry was engaged in business under the name of Precision Engineering Company, which business consisted of reconditioning large diesel engine crankshafts such as are used in railroad locomotives. Early in 1955 he desired to expand the business from a single plant located in Los Angeles to a nationwide enterprise with plants in Illinois and Pennsylvania. This required additional capital. Berry told Mr. Homer Keeler of this plan and the need for financing; Keeler was an exporter with whom Berry did business. He told Berry "that he knew a Mr. John Rauen who had recently disposed of his interest in the United States Spring and Bumper Company, and who might be interested in making a financial investment in Mr. Berry's company. Mr. Berry then informed your affiant that he would like to meet Mr. Rauen. Your affiant subsequently arranged a meeting between Ernest V. Berry and John Rauen." (Quoting Keeler affidavit.) Rauen became interested in the prospect of investing in the business and of inviting others to do so. Berry had certain patent applications pending and Rauen considered an investigation of their validity as essential to a decision on his part about investing with Berry. The Keeler affidavit further says: "John Rauen told your affiant that he was interested in the deal but that he wanted his patent attorneys to determine the validity of certain patents which Mr. Berry claimed to have. Mr. Rauen advised your affiant that his attorneys were Lyon & Lyon. Mr. Rauen also told your affiant that if his attorneys decided that the patents were valid, he would then make a proposal to Mr. Berry." Again, "That Ernest V. Berry personally informed your affiant that he had agreed with John Rauen that John Rauen could use his attorneys, Lyon & Lyon, to check the validity of his patents, and that he, Ernest V. Berry, would personally reimburse John Rauen for any expenses involved." Rauen had known Lewis E. Lyon for many years and had employed him from time to time in patent matters. The Lyon affidavit says: "That during February 1955 said John B. Rauen engaged affiant to investigate the pending patent claims of Ernest V. Berry, informing affiant that he was interested in the question of the patent rights of said Ernest V. Berry because he contemplated entering into a financial arrangement with said Ernest V. Berry or Precision Engineering Company, a company which affiant was then informed was owned by said Ernest V. Berry." Rauen arranged for Mr. Babcock, who was Berry's patent attorney, to furnish Lyon with required information concerning the pending applications for patent; this was done. After Mr. Lyon had examined same he expressed to Rauen a desire to see Berry's plant in order to check the actual operation against the statements in the applications. Rauen took him to the plant. There Lyon saw Berry, who showed him the operation. On no other occasion did Lyon see or talk to plaintiff until they met in court. Berry

never requested any services from him. After this inspection Mr. Lyon examined in Washington, D. C. the pertinent patent files. He then rendered a written opinion to Rauen, billed him for the same and was paid by Rauen's check. He never furnished any copy of his opinion to Berry, had no communication with him concerning it, did not bill him for it or receive any pay from him. The payment of this bill by Rauen ended the matter so far as Lyon was concerned until he was employed to represent Chrome Crankshaft Co. in a patent suit brought by Berry and in the instant litigation. The Rauen affidavit says: "That affiant was in no way acting upon behalf of Ernest V. Berry in procuring the services of Lewis E. Lyon in investigating this matter." Lyon's affidavit: "That no information was communicated to affiant in confidence by said Ernest V. Berry or his employees at said inspection, or any other time. The place of business was open to anyone and no guards, signs or other notice was observed by affiant which would indicate an attempt to maintain secrecy of any operation or equipment." Not until July 30, 1957, about two years later, did Mr. Lyon ever hear of any suggestion that he was or had been acting for plaintiff Berry in what he had done in the patent investigation and rendering opinion thereon.

[5] Counsel for appellant stress evidence favorable to their position, such as a claim that Rauen was acting as financial adviser to Berry and agent for him in employing Lyon. This was refuted by Rauen's and Keeler's evidence. "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen." Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757, 759.

In the last analysis, this appeal is the familiar effort to induce a court of review to weigh the evidence. This we do to the extent of ascertaining whether there is in the scale evidence favorable to respondent which possesses substantiality. We answer that question in the affirmative here. Further we need not go.

Order affirmed.

FOX, P. J., and HERNDON, J., concur.



159 Cal.App.2d 478

Olga Beth HOELZLE, Plaintiff and Appellant,

v.

FRESNO COUNTY, Defendant and Respondent.

Civ. 5645.

District Court of Appeal, Fourth District, California.

April 17, 1958.

Action against county for death of plaintiff's husband and for damages to his automobile which went off bridge across canal. The Superior Court of Fresno County, Milo Popovich, J., rendered judgment for defendant, and the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the evidence warranted submission of issue of contributory negligence to jury.

Affirmed.

1. Automobiles ⇐303

In action against county for death of plaintiff's husband and for damages to his automobile which went off bridge across canal, answer which denied generally and

specifically the allegations of complaint, and which alleged that husband did not exercise ordinary care to avoid accident and that his negligence proximately caused and contributed to the accident sufficiently raised issues of negligence and contributory negligence where there were no eyewitnesses to accident and complaint merely alleged that road and bridge were in dangerous and defective condition and that county failed to repair them within reasonable time after acquiring knowledge of such condition. West's Ann.Code Civ.Proc. §§ 437, 452.

2. Automobiles ⇐308(11)

In action against county for death of plaintiff's husband and for damages to his automobile which went off bridge across canal, the evidence, including tire marks along guard rail and photographs, warranted submission of issue of contributory negligence to jury even though there were no eyewitnesses.

3. Automobiles ⇐309(4)

In action against county for death of plaintiff's husband and for damages to his automobile which went off bridge across canal, evidence warranted giving of instructions relating to duty of care resting on driver of automobile and relating to speed and looking but not seeing.

Green, Green & Bartow, Clifford H. Plumley, Madera, for appellant.

Hansen, McCormick, Barstow & Sheppard, William B. Boone, Fresno, for respondent.

BARNARD, Presiding Judge.

This is an appeal from a judgment in favor of the defendant in an action to recover damages for the death of plaintiff's husband William W. Hoelzle, and for damages to his automobile.

The plaintiff's husband met his death by drowning, his body having been found in an irrigation canal several miles southwest of Firebaugh in Fresno County. In the area involved there are three canals parallel with each other, running in a northerly and southerly direction. A small country road with dirt or gravel surface runs east and west, crossing each of these canals. This was an old road, and it and the bridge here involved had been deeded to the county on April 24, 1953. The most easterly of these canals is called the "East" canal. The "Center" canal is one-quarter of a mile west of the "East" canal, and 200 yards west of the "Center" canal is the "Delta-Mendota Canal", a Federal project. The body of plaintiff's husband was found in the "Center" canal.

On April 1, 1956, the plaintiff and her husband and a Mr. and Mrs. Thompson were fishing together in the "East" canal. The women had gone there earlier in the Thompson car, and the men arrived about noon in the 1953 Studebaker owned by plaintiff's husband. About 1:00 p. m. the two men left the women and drove about a quarter of a mile south along the same canal to fish at a new location. About 3:00 p. m. the women observed that the men and their car had disappeared from that location. The women made an unsuccessful search for the men during that afternoon, and later the disappearance of the men was reported to the authorities. The bodies of the men were found on April 3 in the car of plaintiff's husband which was submerged in the "Center" canal. The car was raised from the canal by its front end and the bodies of both men were in the back seat when the car emerged from the water.

The complaint in this action alleged that the death of plaintiff's husband was proximately caused by the dangerous and defective condition of this public road and bridge, and that the defendant and its agents had failed to remedy the same within a reasonable time after acquiring knowledge of the dangerous and defective conditions. The defendant's answer "denies generally and specifically, each and every, all and singular the allegations of said complaint". As a further and separate answer and affirmative defense to the complaint the answer alleged "That William W. Hoelzle did not exercise ordinary care, caution or prudence in the premises to avoid the hap-

pening of said accident and the said accident and death of said William W. Hoelzle were directly and proximately caused and contributed to by the negligence in the premises of said William W. Hoelzle". The action went to trial with a jury, and at the close of the plaintiff's case the plaintiff objected to the introduction of any evidence by the defendant, and moved for judgment on the pleadings, on the ground that defendant's answer failed to raise any issue or state a defense. The court overruled this objection and denied this motion, and the trial proceeded. The jury returned a verdict in favor of the defendant, a motion for a new trial was denied, and the plaintiff has appealed from the judgment.

It appears from the evidence, and it is conceded, that the car involved had been traveling west on this road and that it had gone off the south side of the bridge across the "Center" canal. This bridge was 89 feet long and 15 feet wide. Instead of a railing there were guard rails on each side of this bridge consisting of 6" by 6" timbers fastened to the outside edges of the bridge. As one approached this bridge traveling west there is a gradual curve to the right, and the road rises somewhat as it approaches the bridge and depresses somewhat as it leaves the bridge on the westerly side. Several signs were installed for the benefit of west-bound traffic approaching this bridge. A standard road sign with reflectors indicating a curve to the right ahead was located 435 feet east of this bridge. About 150 feet east of this bridge there was a reflector sign with the words "One Lane Bridge". Near the east entrance to the bridge on the south side there was a sign with nine red reflector buttons on it, each button being about three inches in diameter, and on the north side there was a reflector post marking the right side of the roadway and the bridge entrance.

Some tire marks were found on this bridge for a distance of 28 feet, indicating the course the car in question had followed in going off the bridge. All of these marks were on the south edge of the bridge, and none of them were near the center of the bridge. The marks began a few feet west of the entrance to the bridge and the other end of the marks was out toward the middle of the bridge. At the eastern end the marks were against the south guard rail "and then they went on top, and then they were gone". The plaintiff introduced 20 photographs of the road and bridge in the area involved, and the defendant introduced eight. The plaintiff's photographs show that there was an exceptionally well defined line of travel along the center of this one-way bridge, which would naturally be followed by anyone using the bridge. These photographs illustrate that a car would have to move several feet off the main traveled portion of the bridge in order to reach the south edge, and they further indicate that there was nothing about the approach to the bridge which would normally cause a car to travel along the south edge of the bridge, if any reasonable care was used by the driver. The deceased had fished in this general area on other occasions and the plaintiff testified that she had fished from both sides of this bridge several times, that her husband was not with her on those occasions, and that she had driven over this bridge at least twice. There was also evidence that Mr. Hoelzle was lame in both legs and had very weak ankles. His driver's license limited him "to operate a motor vehicle equipped with automatic type clutch or transmission or vehicle equipped with hand controlled brake." His car was equipped with an automatic transmission and power brakes, with a special power booster on the brakes which he had installed.

[1] The appellant contends that the court erred in overruling her objection to the introduction of any evidence by the respondent, and in denying her motion for judgment on the pleadings; that the answer admitted the truth of all of the allegations of the complaint, since it did not specifically deny those allegations; that the answer stated no defense since it failed to sufficiently allege contributory negligence, and

presented no such issue; and that since the answer clearly admitted all of the allegations of the complaint and failed to state any defense the court erred in refusing to grant the motion for judgment on the pleadings. It is argued that since the complaint here was verified, section 437 of the Code of Civil Procedure required that the answer must be specific and directed to certain paragraphs or specific parts of the complaint, and that the answer here, being a "general denial", was not sufficient to raise any issue. Such cases as Hirons v. Clare, 38 Cal.App. 608, 177 P. 291; Muraco v. Don, 79 Cal.App. 738, 250 P. 1109; Hearst v. Hart, 128 Cal. 327, 60 P. 846, and Adjustment Corp. v. Hollywood Hardware & Paint Co., 35 Cal.App.2d 566, 96 P.2d 161 are cited in support of this contention. It is also argued that the complaint was not sufficient to raise the issue of contributory negligence since it failed to allege the specific acts of negligence upon which the pleader relied. In this connection the cases of Preston v. Hubbell, 87 Cal.App.2d 53, 196 P.2d 113; Hoffman v. Southern Pacific Co., 84 Cal.App. 337, 258 P. 397 and Crabbe v. Mammoth Channel Gold Min. Co., 168 Cal. 500, 143 P. 714, are cited.

Most of the cases cited with reference to the general denial of the answer were decided before the 1927 amendment to Section 437 of the Code of Civil Procedure. In Adjustment Corp. v. Hollywood etc. Co., the controlling point was that the answer was evasive and failed to raise an issue upon the material allegation of the complaint that the debt was due and owing. The cases cited on the question of a sufficient allegation of contributory negligence cannot be considered controlling under the circumstances appearing here. In Preston v. Hubbell certain specific acts had been pleaded and the instructions criticized related to matters outside the specific acts pleaded. In Hoffman v. Southern Pacific Co. it was held that as a general rule the defense of contributory negligence must be pleaded, but that where it appears from the plaintiff's own evidence the plea is available to the defense although it is not pleaded in the answer. The case of Crabbe v. Mammoth Channel Gold Min. Co. seems to have been decided largely on the old theory that by pleading contributory negligence the pleader admits his own negligence and then seeks to avoid the effect of it. That case was also decided before Section 437 of the Code of Civil Procedure was amended. That section now provides that an answer shall contain a "general" or a specific denial of the material allegations controverted, with a statement of any new matter constituting a defense. It also provides that the denial of the allegations controverted must be made positively or on information and belief, but it omits the previous requirement that the denial of each allegation must be specific. It also provides that the denials of the allegations controverted "may be stated" by reference to specific parts of the complaint. The answer here filed was sufficient to raise an issue with respect to the allegations of the complaint. Del Fanta v. Sherman, 107 Cal.App. 746, 290 P. 1087; Reinert v. Proud, 8 Cal.App. 2d 169, 47 P.2d 491; Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, 55 P. 2d 1251. With respect to the issue of contributory negligence no demurrer was filed to the answer, and if one had been filed and overruled the plaintiff would not be entitled to a reversal of the judgment in the absence of a showing of prejudice. Ching Yee v. Dy Foon, 143 Cal.App.2d 129, 299 P.2d 668. Section 452 of the Code of Civil Procedure provides that in construing a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. No prejudice appears here since the answer made it perfectly clear what issues the adverse parties must meet. Taken in connection with the complaint, no reasonable person could be in any doubt about the issues to be met. Since there were no eyewitnesses to this accident the precise facts were not known to either party, and this suggests an additional reason why the provision for a liberal construction of section 452 should be applied here. The appellant was in no way misled and the an-

swer was sufficient to raise the issues of negligence and contributory negligence.

[2] It is next contended that the question of contributory negligence rested solely on surmise and conjecture, and that the court erred in submitting that issue to the jury. It is argued that since there were no eyewitnesses to the accident the appellant was entitled to the benefit of the presumption that he had used due care for his own safety; that there was no other evidence to combat this presumption; that there was no evidence justifying any inference tending to show that the deceased was guilty of contributory negligence; that such an inference could not be drawn merely because the car went off the bridge; and that it is not even shown by the evidence that the deceased was driving the car at the time the accident occurred.

While the presumption of due care was here applicable, the evidence of the tire marks along the guard rail, indicating what had actually happened, tended to rebut that presumption and furnished some evidence of what had occurred, from which reasonable inferences could be drawn. This evidence and much of appellant's own evidence, including the pictures introduced, strongly tended to indicate a lack of negligence on the part of the respondent and the fact of negligence on the part of the driver of the car, and was sufficient to justify an inference on the issue of proximate cause. While there was no direct evidence that the deceased was driving the car it could be reasonably inferred that he was, since it was his car and it was specially equipped for his use. If the deceased was not driving the car the evidence which would then apply to the other occupant of the car was still material and substantial on the issue of proximate cause. As the trial judge stated when the motion for a judgment on the pleadings was made, "The issue of contributory negligence has already been presented factually by the plaintiff's own testimony" and "I think the case is replete with evidence which the jury at this stage could construe one way or the other on both issues." The evidence was sufficient to justify the submission of all of these various issues to the jury. Many questions of fact were involved, and the parties were entitled to the submission of their various theories to the jury, as justified by the evidence, and under proper instructions.

[3] Finally, the appellant contends that the court erred in giving instructions relating to the duty of care resting on the driver of a motor vehicle, and instructions relating to speed and looking but not seeing. It is argued that these instructions were improper since there was no evidence that the deceased was the driver of the car, and no evidence to support a finding of contributory negligence. The appellant requested five instructions on contributory negligence which were given, and the arguments of her attorneys to the jury were more favorable than otherwise to the conclusion that the actual fact was that the plaintiff's husband was the driver of this car. These tire marks on the bridge were sufficient to call the attention of the officers to where the car was submerged, and these marks, with the photographs introduced by the appellant, furnish rather strong evidence of what must have occurred. The case involved several factual issues which where properly submitted to the jury under instructions which were not only correct in themselves but were called for by the evidence which had been received. While these were factual questions for the jury, it is difficult to see from the evidence received how such an accident could have occurred if any reasonable care had been used by the driver of this car. The case was fairly tried and most skillfully argued to the jury, and we find no reversible error in the record.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert WITT, Defendant and Appellant.

Cr. 3372.

District Court of Appeal, First District, Division 1, California.

April 18, 1958.

Rehearing Denied May 16, 1958.

Hearing Denied June 17, 1958.

Defendant was convicted of second degree burglary. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Peters, P. J., held that upon being informed that automobile contained stolen goods and guns, though informant could not be considered reliable, police were bound to investigate further and were justified in ordering occupants from automobile and making preliminary search for weapons, and when loaded pistol was found under front seat and narcotics outfit in glove compartment, officers had reasonable and probable cause to believe that occupants of automobile were committing a felony and hence arrest of occupants and search of trunk of automobile incident thereto were not illegal.

Judgment and order affirmed.

1. Arrest ⇐63(4)

One known to police as narcotics addict and thief could not be considered a reliable informant, in absence of showing that he had previously given police information, and hence information, volunteered when he was taken into custody, that automobile contained stolen goods and guns was not sufficient in itself to justify arrest of occupants of automobile without further investigation.

2. Arrest ⇐63(4), 71
Searches and Seizures ⇐3(1)

Upon being informed that automobile contained stolen goods and guns, though informant could not be considered reliable, officers were bound to investigate further and, though they had no arrest or search warrant, were justified in ordering occupants from automobile and making preliminary search for weapons, and when loaded pistol was found under front seat and narcotics outfit in glove compartment, police had reasonable and probable cause to believe that occupants were committing a felony, and arrest of occupants upon such belief and search of trunk of automobile incident to arrest were not illegal.

3. Criminal Law ⇐404(4), 1036(4) 1169(1)

In prosecution for burglary, blackjack and guns, found in defendant's automobile but not connected with burglary, were not admissible in evidence over proper objection that such evidence was irrelevant, but in absence of objection on such ground, question of error in admitting such evidence could not be raised on appeal, and admission of such evidence did not result in prejudicial error in view of strong evidence of guilt.

4. Burglary ⇐38

Gun stolen from apartment and found in defendant's automobile was admissible in evidence in prosecution for burglary of apartment.

5. Criminal Law ⇐655(9)

Defense witness, awaiting trial on charge of burglary for which defendant was on trial, was properly advised by trial judge of his constitutional right to refuse to testify on ground of possible self-incrimination, and record of proceedings resulting in defense counsel withdrawing request that witness take the stand showed that trial judge handled the matter properly and did not suppress testimony of such witness by intimidation.

6. Criminal Law ⇐1170½(1)
Witnesses ⇐337(6)

In prosecution for burglary, defendant should not have been questioned on cross-examination concerning prior conviction for burglary with deadly weapon, if prosecuting attorney knew that such conviction was had in juvenile court, but any such impropriety and re-cross-examination of defendant as to date of birth did

not constitute prejudicial misconduct, where defendant, on redirect examination by his own counsel after trial court had stricken testimony as to prior conviction and admonished jury to disregard it, reopened the matter by giving erroneous impression as to his age at time of prior conviction and trial court thereafter repeated admonition to jury to disregard evidence as to prior conviction, particularly in view of strong evidence of guilt.

7. Witnesses ⇐337(5)

A defendant who takes the witness stand may be impeached by proof of prior felony conviction.

Herbert J. Callman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was found guilty by a jury of second degree burglary. He appeals from the judgment entered on that verdict and from the order denying his motion for a new trial.

The burglary involved occurred on October 29, 1956, between the hours of 1 and 4:45 p. m. It was of the apartment of Mr. and Mrs. Mah on Pine Street in San Francisco. During those hours the Mahs were out of their locked apartment. When Mr. Mah returned about 4:45 p. m., he discovered that it had been entered and ransacked during his absence. Two sets of silverware, a clock radio, a toy cash register containing about $50, a .41 Colt revolver, a nickel-plated .32 revolver, and a plaid handbag were missing. A metal box in the bedroom had been forced open and was lying in the middle of the bedroom floor.

The defendant was connected with the crime under the following circumstances: On October 30, 1956, at about 3:15 p. m. two San Francisco police inspectors observed one Albert Cibrian, known to the inspectors as an addict and thief and wanted as a burglary suspect, beside an automobile, later identified as the car of defendant, on Turk Street near Larkin in San Francisco. After Cibrian had walked away from the car the two inspectors took him into custody. Cibrian told the officers there was some "hot stuff" and guns in the automobile in question. The officers took Cibrian to a nearby police station and then returned to the vicinity of the automobile, and observed that defendant and one Ayaya or Ayala were sitting in the vehicle. Defendant was in the front seat behind the wheel, and Ayaya in the rear. The two officers approached the car cautiously and with drawn guns. They ordered the two men out of the car. Upon looking into the car they observed a loaded .38 caliber automatic under the front seat and found some white powder and a hypodermic needle in the glove compartment. The defendant admitted that the automobile belonged to him. Then, and not until then, the two men were placed under arrest. The trunk of the automobile was then searched. Inside were found a plaid handbag, one set of Mr. Mah's silverware, a blackjack, a Biretta automatic and a frontier type revolver. When defendant was told by one of the officers about what had been found in the trunk, he first denied knowing anything about the articles. Later he stated that he had bought the articles from a man in the Mission District for $20 on the morning of October 30th. Later he stated "I deny all the stories."

In Mah's apartment a fingerprint was discovered on a black metal box. A fingerprint expert identified this print as that of appellant, stating that the identification was absolute.

At the trial defendant testified that he was home with his mother in Belmont on October 29th, and did not leave the house all day; that on the morning of the 30th he drove to San Francisco and met Cibrian and Ayaya, and the three drove around the city, never going near Mah's apartment. He disclaimed all knowledge of the

articles found in the trunk of his car, and stated that he did not know the gun was under the front seat. He testified that at one time during the day Cibrian was left alone in the car in the Fillmore district. Defendant admitted that the first two stories he had told the police were untrue.

On this evidence the jury, after but 18 minutes of deliberation, found defendant guilty of second degree burglary.

Appellant's main contention is that all of the articles found in his car were procured as the result of an illegal search and seizure, and were, therefore, erroneously admitted into evidence. This point was raised at the trial, and a motion to exclude the evidence made. The trial court overruled the objection, denied the motion, and admitted the evidence.

[1] Appellant's argument is that he did not consent to the search of the vehicle, and that the officers did not have a search or an arrest warrant and did not have reasonable or probable cause to search the car. Appellant correctly points out that Cibrian cannot be considered to be a reliable informant because the record does not show that he had given the police information before, and was thus an unproven source of information. At most, so it is argued, the police acted on mere suspicion based upon the voluntary statement of Cibrian. It is argued that the mere suspicion that there might be stolen goods in the automobile did not justify the officers in arresting the occupants without further investigation.

The difficulty with this argument is that the police did not arrest the appellant and his companion solely upon the information secured from Cibrian. They did not arrest appellant and Ayaya until they had ascertained that there was a gun and a narcotics outfit in the car.

[2] The basic question is, did the officers act reasonably? It is clear that they did. They arrested Cibrian, a known addict and thief, who was wanted for questioning. They had just seen Cibrian in in close proximity to the car occupied by appellant and Ayaya. Cibrian told them that there were guns and stolen goods in the car. The automobile was, of course, mobile, and might move from the area at any moment. While the officers would not have acted reasonably had they, solely on Cibrian's information, arrested appellant and Ayaya and then searched the car, common sense and prudence required them to investigate. Had they not done so they would have been derelict in their duty. They approached the automobile cautiously, because they had been told there were guns in the car. They ordered appellant and Ayaya to get out of the vehicle. This was certainly a reasonable and lawful thing to do. Then they made a precautionary search for weapons. This, too, was reasonable and lawful. They found a loaded revolver under the front seat and a narcotic outfit in the glove compartment. This, of course, confirmed their suspicions. They now had reasonable and probable cause to believe that the occupants of the car were committing a felony. Then, and not until then, the arrest was made. Then, after this lawful arrest, and incidental thereto, they certainly acted as reasonable officers in searching the trunk. Here some of the stolen goods were found. Thus, the arrest and search were not illegal. See generally People v. Martin, 46 Cal.2d 106, 293 P.2d 52; People v. Jiminez, 143 Cal.App.2d 671, 300 P.2d 68.

[3, 4] It is next contended that reversible error was committed in admitting into evidence the .38 automatic, the blackjack and the Biretta automatic. These articles were not connected with the burglary involved, and, had proper objection been made, should not have been introduced into evidence. People v. Richardson, 74 Cal. App.2d 528, 169 P.2d 44; People v. Riser, 47 Cal.2d 556, 305 P.2d 1; People v. Borbon, 146 Cal.App.2d 315, 303 P.2d 560. But here proper objection was not made. One of the inspectors testified that he had found these articles when the car was searched. No objection was made to this testimony. Then when these articles were

offered into evidence the sole objection was on the ground of unlawful search and seizure. Having failed to object on the ground of relevancy, appellant is precluded from raising the point on appeal. People v. Millum, 42 Cal.2d 524, 267 P.2d 1039; People v. Dessauer, 38 Cal.2d 547, 241 P.2d 238; People v. McMonigle, 29 Cal. 2d 730, 177 P.2d 745. One revolver—the Colt—found in the search was clearly admissible. It was one of the guns stolen from the Mahs' apartment. The evidence of guilt was very strong. Thus, no prejudicial error was committed.

[5] Appellant next contends that the trial judge improperly suppressed the testimony of Cibrian by intimidating him. This serious charge against the trial judge is not only not supported by the record, but is contrary thereto. Cibrian had also been charged with the burglary here involved. He was awaiting trial on that offense. Early in the trial, on the issue of the reasonableness of the search, on *voir dire,* Cibrian was called as a defense witness and denied having told the officers that appellant's car contained stolen property and guns. Before he so testified he asked to consult with his attorney, the Public Defender. A recess was taken to summon the attorney. Mr. Postel appeared. He informed the court that, although he was not the deputy assigned to the case, he had consulted with Cibrian and recommended that he not testify, but because "there are certain pressures from the County Jail" Cibrian felt he should testify. The court immediately asked Cibrian if the "pressures" referred to were from the Police Department or from the prisoners. Postel replied that in these cases "when a man is subpoenaed as a defense witness, the people in the jail feel he should go to the aid, regardless of what may happen to him, and so on, and it is no individual." The court then asked Cibrian if he felt that he was under any pressure. Cibrian replied, "Well, I wouldn't want to say it now, sir." The court then told Cibrian that he had to make up his own mind, and that if any question were asked of him which his attorney felt was harmful the attorney would object and protect his interests. Cibrian then testified that he had not had the conversation testified to by the officers. On cross-examination Cibrian's counsel objected successfully to any questions beyond the scope of this direct examination, and several times successfully objected on the ground that the answer might incriminate the witness.

Then, when the defense called Cibrian as a witness, Cibrian was represented by the deputy who had been assigned to defend him—Mr. McNamara. He asked for a conference. The attorney then told the court that Cibrian was "highly emotional, nervous, upset, uncertain"; that he was "very apprehensive about certain things" and in "fear of eventual bodily harm" if he did not testify. McNamara stated that he had advised Cibrian not to testify, and also stated that, in his opinion, Cibrian was in no condition to testify. Under these circumstances the trial court made a sincere effort to make Cibrian understand that he had a legal right to refuse to testify on the ground of possible self-incrimination. After Cibrian had stated that nevertheless he wished to testify, the court again told him of his constitutional rights. During this discussion the attorney for appellant stated that he, the attorney, "would like to be satisfied that if Mr. Cibrian testifies, he will tell the truth." After Cibrian had testified that he was not connected with the offense involved, a consultation was had in chambers and appellant's counsel withdrew the request to have Cibrian take the stand. Both Cibrian and the attorney for appellant expressed satisfaction over the way the matter had been handled. Thus, the record demonstrates to a certainty that no attempt was made by the trial judge to intimidate Cibrian. The trial judge rightfully and properly advised Cibrian of his rights. Everything the trial judge did was called for by the circumstances. Far from being subject to criticism, the trial judge is to

be commended for the careful and judicial manner in which he handled the matter.

The next contention of appellant is that the prosecuting attorney was guilty of misconduct in improperly questioning him about a juvenile conviction. The record shows that on cross-examination appellant testified that he had never been convicted of a felony. The prosecutor then asked if it was not a fact that he had been convicted of burglary with a deadly weapon in Redwood City. The defendant then stated that when he was 16 he had been convicted as an accomplice and placed on probation, and that this occurred in October of 1950. On redirect it developed that appellant had been tried for this offense in the Juvenile Court. Counsel for appellant moved to strike the evidence and also for a mistrial. The court granted the motion to strike, carefully instructed the jury to disregard the reference to the conviction, and admonished the jury not to consider this evidence in any manner in their deliberations. The court then denied the motion for a mistrial. Then, while still under redirect by his own counsel, appellant reopened the matter by testifying that he was 17 years old in 1950. On recross the prosecuting attorney asked appellant the date of his birth and was told that it was February 3, 1932. The prosecutor then stated that appellant must have been 18 in October of 1950 when the juvenile matter arose. Counsel for appellant objected. The court pointed out that, while defense counsel had reopened the subject, it preferred that there be no further discussion of the matter. The court then repeated its former admonition to the jury, telling them to strike the matter from their minds.

[6, 7] There was no prejudicial misconduct. A defendant who takes the stand, just as any other witness, may be impeached by proof of a prior felony conviction. People v. Cobb, 45 Cal.2d 158, 287 P.2d 752; People v. David, 12 Cal.2d 639, 86 P.2d 811; People v. Tabb, 137 Cal.App. 2d 167, 289 P.2d 858. Thus, the first series of questions asked by the prosecution were proper in the absence of knowledge that the conviction was in the Juvenile Court. Once it appeared that the conviction was had in a Juvenile Court the trial court immediately struck the evidence and properly admonished the jury to disregard the reference to the conviction. The question of appellant's age in October of 1950 was then opened up by appellant's counsel. The answer given by appellant to this question was not truthful. The prosecutor brought this out on recross. The inquiry was then cut off by the trial court and the jury again admonished.

The prosecutor probably should have known that the conviction was in the Juvenile Court when he first asked about the conviction. If he had such knowledge, he should not have asked the question. But this impropriety could not possibly have been prejudicial in view of the strong evidence of guilt.

The order and judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



159 Cal.App.2d 372

Thelma O. RAYNER and Irwin J. Rayner, et al., Plaintiffs and Appellants,

v.

Henry Bermea RAMIREZ, Peter Bermea Ramirez and Rita B. Ramirez, Defendants and Respondents.

Civ. 5609.

District Court of Appeal, Fourth District, California.

April 15, 1958.

Action arising out of death of westbound motorist whose automobile struck approaching truck, which was being towed and which swerved into path of westbound motorist when towing truck swerved to left

to avoid striking child who allegedly came onto highway or shoulder thereof from side lane. From adverse judgment of the Superior Court, Kings County, Meredith Wingrove, J., the plaintiffs appealed. The District Court of Appeal, Griffin, J., held that refusal of proffered instruction, that from happening of accident an inference arises that proximate cause of occurrence was some negligent conduct on part of defendants, was not prejudical error.

Judgment affirmed.

1. Appeal and Error ⇐1078(1)

Usually, a point is deemed waived and an appellate court will not consider question not raised at trial or on motion for new trial and not referred to in briefs on appeal, particularly where no authority is cited in support of point.

2. Appeal and Error ⇐762

Where at time of trial no objection was made to instruction on unavoidable accident because such instruction was proper under prior decision and instruction was not referred to in briefs on appeal, but subsequent to filing of brief contrary case was cited by letter and in argument before reviewing court objection was raised to propriety of giving such instruction, there was good reason for failure of plaintiffs to raise point in their opening brief, and reviewing court would consider point.

3. Appeal and Error ⇐1064(1)

In action arising out of death of westbound motorist whose automobile struck approaching truck which was being towed and which swerved into path of westbound motorist when towing truck swerved to left to avoid striking child, who allegedly came onto highway or shoulder thereof from side lane, giving of instruction on "unavoidable accident" was not prejudicial error requiring reversal, even assuming giving of such instruction was error.

4. Automobiles ⇐246(21)

In action arising out of death of westbound motorist whose automobile struck approaching truck, which was being towed and which swerved into path of westbound motorist when towing truck swerved to left to avoid striking child who allegedly came onto highway or shoulder thereof from side lane, instruction on sudden peril rule was properly given.

5. Negligence ⇐121(2)

If it appears on face of plaintiffs' own evidence that accident may have resulted from any one of two or more causes, with one of which defendant may not have had any connection, foundation has not been laid for invoking doctrine of res ipsa loquitur.

6. Negligence ⇐121(2)

Failure of foundation for invoking doctrine of res ipsa loquitur exists when plaintiffs' evidence shows that his own conduct may have been proximate cause of his injury.

7. Trial ⇐191(1)

Province of jury is invaded where instruction assumes existence of a fact which is not in evidence or in respect to which there is a conflict in the evidence.

8. Appeal and Error ⇐1067

In action arising out of death of westbound motorist whose automobile struck approaching truck, which was being towed and which swerved into path of westbound motorist when towing truck swerved to left to avoid striking child who allegedly came onto highway or shoulder thereof from side lane, refusal of proffered instruction, that from happening of accident an inference arises that proximate cause of occurrence was some negligent conduct on part of defendant, was not prejudicial error.

9. Automobiles ⇐246(60)

In action arising out of death of westbound motorist whose automobile struck approaching truck, which was being towed and which swerved into path of westbound motorist when towing truck swerved to left to avoid striking child who allegedly came onto highway or shoulder thereof from side lane, court did not err in giving instruction to effect that mere fact that accident happened, considered alone, did not give

rise to legal inference that it was caused by negligence or that any party to accident was negligent.

10. Automobiles ⇐245(79), 246(58)

In action arising out of death of westbound motorist whose automobile struck approaching truck, which was being towed and which swerved into path of westbound motorist when towing truck swerved to left to avoid striking child who allegedly came onto highway or shoulder thereof from side lane, court did not err in submitting issue of contributory negligence and instructing on that question in view of evidence that decedent made little effort to clear roadway and avoid accident, but attempted to drive his automobile between towing truck and towed truck.

11. Automobiles ⇐245(25, 60)

In action arising out of death of westbound motorist whose automobile struck approaching truck, which was being towed and which swerved into path of westbound motorist when towing truck swerved to left to avoid striking child who allegedly came onto highway or shoulder thereof from side lane, question of defendants' violation of statute and question of proximate cause of death of deceased was properly left to jury. West's Ann.Vehicle Code, § 701(e, g).

12. Death ⇐64
Trial ⇐207
Witnesses ⇐352

In action by claimed wife of decedent for loss of comfort, society and support, wherein wife testified on direct examination that she was married to decedent and their marriage certificate was admitted in evidence and on cross-examination she denied she had subsequently remarried, but there was other evidence that she had subsequently remarried and copy of marriage certificate was introduced over limited objection whereupon wife admitted subsequent marriage, evidence pertaining to remarriage was properly received, at least for purpose of impeachment and had some bearing on question of loss of comfort, society and support and proffered instruction that all evidence as to subsequent marriage should be limited to purpose of impeaching wife's testimony, was properly refused.

13. Appeal and Error ⇐204(1)

In action by claimed wife of decedent, for loss of comfort, society and support, wherein wife testified on direct examination she was married to decedent and marriage certificate was admitted in evidence and on cross-examination wife denied she had since remarried but there was other testimony of remarriage and copy of marriage certificate of remarriage was admitted over limited objection, objection to admission of all evidence on subject of remarriage could not be made for first time on appeal.

14. Witnesses ⇐268(5)

Wide discretion is allowed on cross-examination to determine facts and truth of testimony given on direct examination.

Dermit Long, Hollywood, and W. W. McCray, Santa Ana, for appellants.

Hansen, McCormick, Barstow & Sheppard, and Hollis G. Best, Fresno, for respondent Henry B. Ramirez.

Crowe, Mitchell & Hurlbutt, Visalia, for respondents Peter B. and Rita B. Ramirez.

GRIFFIN, Justice.

In this action against Henry B. Ramirez, Peter B. Ramirez and Rita B. Ramirez, brought by Thelma O. Rayner, the claimed surviving wife of the deceased Ronald Rayner, and the surviving mother and father, Ruby and Irwin Rayner, a jury returned a verdict for defendants. Plaintiffs appealed from the judgment.

The main contentions on appeal are that the court erroneously instructed the jury, failed to give plaintiffs' proffered instructions and refused to strike certain evidence.

In defendants' answer, after denying negligence on their part, they pleaded contributory negligence on the part of plaintiffs' decedent and that the accident was "unavoidable". At the request of defendants an instruction was given to the effect that in law we recognize what is termed an

unavoidable or inevitable accident; that these terms do not mean literally that it was not possible for such an accident to be avoided; and that they simply denote an accident that occurred without having been proximately caused by negligence. This instruction was not referred to in the briefs as being one to which objection was made since, at the time of trial, it was proper under the decision in Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823.

[1, 2] It is the usual rule that a point is deemed waived and an appellate court will not consider a question not raised at the trial or on a motion for new trial and not referred to in the briefs on appeal particularly where no authority is cited in support of the point. 5 C.J.S. Appeal and Error § 1803, p. 1219. By letter, subsequent to the filing of the briefs, the case of Butigan v. Yellow Cab Company, 49 Cal.2d 652, 320 P. 2d 500, was cited, and in the argument before this court objection was raised as to the propriety of giving such an instruction under the facts of the case. Under the circumstances there appears to be good reason for the failure of plaintiffs to raise the point in their opening brief. We conclude it should be here considered. California National Supply Company v. O'Brien, 51 Cal.App. 606, 612, 197 P. 414.

Since the rendition of the judgment in the instant case and after all of the briefs on appeal had been filed, the majority of the Supreme Court, in the Butigan case, overruled Parker v. Womack, supra, and held that the so-called defense of unavoidable or inevitable accident has no legitimate place in our pleading (with some possible exceptions), and that it is nothing more than a denial by plaintiff of his negligence, or that his negligence, if any, was a proximate cause of the injury. It appears that at the time of trial and under the Womack decision, supra, defendants were entitled to an instruction on an unavoidable and inevitable accident. For all intents and purposes, this was the rule of law existing at the time by which the trial court and the parties were bound, and no one was bound to anticipate that at some subsequent date, after the filing of all briefs, this rule would be changed. The authorities, even in this state, are not uniform on the question as to the effect of a change of the law, during the pendency of an appeal, in relation to the determination and disposition of a cause by the appellate courts. See 5 C.J.S Appeal and Error § 1841, p. 1310. The rule in some states is that the law in force at the time the judgment is rendered is ordinarily controlling, and the rule in other jurisdictions is that the appellate court must generally decide and dispose of the case in accordance with the law existing at the time of its own decision. Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal.2d 489, 45 P.2d 972; Collins v. Consolidated Water Co., 122 Cal.App. 348, 9 P.2d 872; Morris v. Board of Education, 119 Cal.App. 750, 7 P.2d 364, 8 P.2d 502; Lowery v. Hallett, 105 Cal.App. 84, 287 P. 110; Barcelone v. Melani, 156 Cal.App.2d 631, 320 P.2d 203, hearing in Supreme Court denied; Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 306 P.2d 432; Parrott v. Furesz, 153 Cal.App.2d 26, 314 P. 2d 47; People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17; People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, and Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 P. 244, 246.

Assuming that the rule of law announced in the Butigan decision may be considered as applicable to this case, it is not clear from the Butigan decision whether the majority opinion intended to include among the "unavoidable" type, such cases as Graham v. Consolidated Motor Transport Co., 112 Cal.App. 648, 297 P. 617, where a child ran into a street; Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51, where a horse suddenly appeared on the highway; Zaferis v. Bradley, 28 Cal.App.2d 188, 82 P.2d 70 (driver's foot became wedged between pedals); Smith v. Harger, 84 Cal.App.2d 361, 191 P.2d 25 (small boy pushing on back of dump truck); Alward v. Paola, 79 Cal.App.2d 1, 179 P.2d 5; Merry v. Knudsen Creamery Co., 94 Cal.App.2d

715, 211 P.2d 905 (brake failure); La Porte v. Houston, 33 Cal.2d 167, 199 P.2d 665; Barber v. Gordon, 111 Cal.App. 279, 295 P. 377; Doggett v. Lacey, 121 Cal.App. 395, 9 P.2d 257 (cases of defective automobile mechanism not due to driver's negligence); Yates v. J. H. Krumlinde & Co., 22 Cal.App. 2d 387, 71 P.2d 298 (gust of wind caused gate to slam shut); Hester v. Hall, 17 Ala. App. 25, 81 So. 361 (hogs darting in front of a car); Rainwater v. Boatright, La.App., 61 So.2d 212 (child darted in front of a car); Holland v. Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am.St.Rep. 307 (boy on bicycle who frightens horse), and Kelly v. Gagnon, 121 Neb. 113, 236 N.W. 160 (automobile driver whose tire blows out). Other such cases could be listed at great length. 65 C. J.S. Negligence § 21, pp. 430–433; Prosser on Torts, 2d Ed. p. 167. Suffice it to say that in many jurisdictions the doctrine of unavoidable accident is recognized in such type of cases. This type was considered in Butigan v. Yellow Cab Company, 310 P.2d 132, 136, when that case was before the District Court of Appeal. It was there said:

> "Under the true concept of the rule, an unforeseeable cause cannot exonerate a party charged with negligence unless it is shown to have been the sole proximate cause of the accident, and there is no justification for giving an unavoidable accident instruction unless the jury could reasonably conclude that the sole proximate cause of the accident was one that was beyond the reasonable anticipation and control of the parties."

After a hearing was granted, in a majority opinion by the Supreme Court, 320 P.2d 500, 505, it was held that under the facts of that case an instruction on unavoidable accident was not justified and accordingly it was error to give it. The Supreme Court did not directly overrule the holdings in the cases above cited but did remark that there were situations where it might be necessary to explain the meaning of the words "unavoidable accident", for example, where a defendant is charged with a violation of section 602 of the Vehicle Code, and that "in the absence of a special situation of the type discussed above" the use of such an instruction "should be disapproved". If this decision is to be construed that the giving of such an instruction is error in all cases except those where the statute provides for such a defense, then it was error to give the instruction above mentioned. If the term "special situation of the type discussed" included such situations as formerly approved in the cases cited, as being a type where the facts allowed an instruction on "unavoidable accident" then the facts of the instant case would be within that rule and it would not be error to give such an instruction. As to this, it would appear to us some clarification would be beneficial to trial and appellate courts for their future guidance.

[3] Assuming, without deciding it was error to give it, the question then remains whether or not it was prejudicial. From the facts hereafter related and the surrounding circumstances, we conclude that if the giving of such an instruction was error, it was not prejudicial error requiring a reversal of the judgment. It does not affirmatively appear that the judgment was rendered in favor of the defendants because of the giving of this instruction but was mainly due to the actions and conduct of the plaintiff wife in reference to her testimony and her claimed damages.

The factual background, gleaned from the record, shows that on August 18, 1954, at about 6 p. m. in the daylight, Ronald Rayner was driving an Oldsmobile automobile in a westerly direction on Nevada Avenue on an oiled country roadway about 21 feet wide which ran between Coalinga and Lemoore. Defendant Henry Ramirez was driving a 1953 Chevrolet flat-bed truck with 3 or 4-foot side boards in a general easterly direction. He was towing a similar 1949 Chevrolet flat-bed truck being steered by defendant Peter Ramirez. This latter truck was registered in the name of defendant Rita Ramirez, the mother, who was not present at the time of the

accident. Henry and his brother Peter were jointly engaged in farming enterprises. They were moving their equipment by means of these two trucks. The engine of the 1949 Chevrolet ceased to function. A 9/7 inch chain about 15 to 18 feet long, with a hook on each end, was fastened to the bumper of the 1949 Chevrolet and to the trailer hitch of the 1953 Chevrolet in some fashion, and the distance between the two trucks was then from 8 to 12 feet. A smaller 3/8 inch chain was attached to the hitch and was hanging down for a distance of about 8 inches. There is a conflict in the evidence as to whether or not the smaller chain was attached to the longer chain. Near Coalinga the 1953 Chevrolet was towed onto the highway and defendants proceeded easterly in this manner for about 15 miles, traveling about 20 to 30 miles per hour. Carlos Ramirez was seated next to the driver in the towing truck. Their testimony as to what happened at the time of the accident is in some conflict. Near this place, bordered on the south, to some extent, is a row of sparsely planted trees and a house or two. Leading from those houses is a narrow road or lane which enters the highway forming a "T" intersection. A boy was riding his bicycle northerly on this lane and came on the highway or shoulder and turned suddenly around and proceeded southerly back down the lane.

Henry Ramirez testified that he was proceeding easterly in the south lane of the highway and when he first saw the boy on the bicycle the boy "was on the shoulder * * * right there on the pavement" and to prevent colliding with him, he swerved the 1953 Chevrolet truck to his left for a distance of two or three feet and then back to his right; that he did not see the Oldsmobile approaching from the east on the north half of the highway; that immediately thereafter the Oldsmobile struck the rear Chevrolet truck on its right side after it had veered over into and partially crossed the north half of said roadway; that the tow-chain broke about the time of the collision; that a side gasoline tank on the right-hand side of the rear truck was punctured and exploded; that a stream of fire engulfed both the truck and Oldsmobile and Ronald was burned to death.

Peter Ramirez testified he saw the boy on the bicycle when the boy turned on the shoulder about five feet from the highway and went back down the lane; that the towing truck turned sharply to its left and he followed it and when he was first able to see the Rayner car it was on its own side of the road about 10 feet from him and it appeared to him that after the Oldsmobile cleared the towing truck the driver attempted to pass between it and the towed truck.

An officer who investigated the accident testified the towed truck was on the north half of the highway when he arrived and he determined that the point of impact with the Oldsmobile was three to four feet south of the north edge of the highway; that a long chain was on the ground and one end was still attached to the front bumper and the other end was under the towed truck leading back to its rear end; that there was still a part of that chain attached to the trailer hitch; and that no part of the towing truck was damaged.

A 17-year-old boy who was standing near one of the houses to the south about 25 yards away testified the boy on the bicycle did not reach the shoulder of the highway but turned back about five yards from it; that he saw the trucks approaching as indicated; that the towing truck swerved to the north, and he then saw the tow-chain break, fly up and drop back down under the towed truck and the truck started going north across the road, crashed with the Oldsmobile and both caught fire. He estimated the speed of the two trucks at the time at "35 to 60" miles per hour but he said he had no definite opinion as to their speed.

[4] The jury was instructed that before a verdict could be found against defendants it was necessary to prove by a preponderance of the evidence that they were negli-

gent and such negligence was a proximate cause of the death of the deceased. Then followed an instruction on the sudden peril rule which was properly given, under the facts related. Graham v. Consolidated Motor Transport Co., 112 Cal.App. 648, 297 P. 617. It does appear that there was independent evidence of defendants' negligence aside from the claimed unavoidable feature, which might well have justified a verdict against them. An instruction in the language of section 701 of the Vehicle Code in reference to one vehicle towing another was given. An instruction in the language of sections 525 and 510 of the Vehicle Code was likewise given.

[5, 6] Complaint is made because the trial court refused plaintiffs' proffered instructions on the doctrine of *res ipsa loquitur*. It does appear that the facts and circumstances of the accident were fully explained by plaintiffs' witnesses. There is authority for the rule that if it appears upon the face of plaintiffs' own evidence that the accident may have resulted from any one of two or more causes, with one of which the defendant may not have had any connection, a foundation has not been laid for invoking the doctrine; that plaintiffs' failure of foundation exists when plaintiffs' evidence shows that his own conduct may have been a proximate cause of his injury. Meyers v. G. W. Thomas Drayage, etc., Co., 108 Cal.App.2d 529, 239 P.2d 118; Carlsen v. Diehl, 57 Cal.App. 731, 208 P. 150; 2 BAJI, 4th Ed., Inst. 206, p. 629, Note 2; Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 58 A.L.R. 129.

[7] It has been further held that the province of the jury is invaded where an instruction assumes the existence of a fact which is not in evidence or in respect to which there is a conflict in the evidence. (24 Cal.Jur. p. 841, sec. 101.) In Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, 53 A.L.R.2d 124, it was held that the conditions to be met before the doctrine of *res ipsa loquitur* may be applied are that the accident or injury must be of a kind which ordinarily does not occur in the absence of some one's negligence, that it must be caused by an agency or instrumentality in defendants' control, and that it must not have been due to any voluntary action or contribution on plaintiffs' part; that although one may be in control of the instrumentality causing injury to another, the doctrine of *res ipsa loquitur* does not apply unless it can be said, in the light of all common experience, that the accident was more likely than not the result of defendants' negligence; that when the evidence is conflicting or subject to different inferences it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* is present. See also Buck v. Standard Oil Company, 157 Cal.App.2d 230, 321 P.2d 67.

[8] From the authorities examined we conclude that it was not prejudicial error to refuse to give a proffered instruction in the language of BAJI No. 206–B, and its educational instruction No. 206–C. As will be noted, the proffered instruction would have told the jury, as a matter of law and fact that "From the happening of the accident involved in this case as established by the evidence, an inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendant * * *." The facts produced do not show, as a matter of law, that the giving of such an instruction by the court was mandatory. This case involved a collision between the driver of one car and the driver of one or more moving cars, and the possible interjection of a third agency, any one of which might reasonably be the proximate cause of the accident.

In Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 443, 247 P.2d 344, 346, it was said: "* * * res ipsa loquitur will not apply if it is equally probable that the negligence was that of someone other than the defendant", citing cases. See also Meyers v. G. W. Thomas Drayage, etc., Co., 108 Cal.App.2d 529, 533, 239 P.2d 118; Lucid v. E. I. Du Pont de Nemours Powder Co., 9 Cir., 199 F. 377, L.R.A.1917E, 182; Scellars v. Universal Service, etc., 68 Cal.App. 252,

256, 228 P. 879; Danner v. Atkins, 47 Cal. 2d 327, 303 P.2d 724, and Seneris v. Haas, supra, 45 Cal.2d at page 827, 291 P.2d at page 924, where it is said: "The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved." See also Phillips v. Noble, 50 Cal. 2d 163, 323 P.2d 385, and Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 323 P.2d 391.

[9] The court did not err in giving an instruction to the effect that " 'The mere fact that an accident happened, considered alone, does not give rise to a legal inference that it was caused by negligence or that any party to this accident was negligent.' " Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724, 727; Middleton v. Post Transportation Company, 106 Cal.App.2d 703, 235 P. 2d 855.

[10] Likewise, the trial court did not err in submitting the issue of contributory negligence to the jury and instructing on this question. While the deceased, in his conduct, was clothed with the presumption of due care (Jones v. Maynard, 141 Cal.App.2d 643, 646, 297 P.2d 461) there is evidence, if believed by the jury, that instead of turning to his right to afford the oncoming trucks the opportunity of avoiding the boy on the bicycle, deceased failed to observe the situation and made little, if any, endeavor to clear the roadway and avoid the accident, but attempted to drive his automobile between the towing truck and the towed truck. A factual question arose for the determination of the jury. Lee v. Hackney, 110 Cal.App.2d 444, 242 P.2d 933.

[11] It is next argued that defendants were guilty of negligence as a matter of law in that the evidence conclusively shows they violated section 701, subsections (e) and (g) of the Vehicle Code. The question of defendant's violation of these sections and the question of the proximate cause of the death of the deceased was properly left to the jury. Christensen v. Harmonson, 113 Cal.App.2d 175, 247 P.2d 956; Grasso v. Cunial, 106 Cal.App.2d 294, 235 P.2d 32.

[12] The last question involves plaintiff wife's testimony and conduct in reference to her marital status and alleged damages for loss of comfort, society and support. She alleged, as a surviving wife, that she was an heir at law of deceased. This allegation was denied for lack of information and belief. On direct examination she testified she met Ronald Rayner in May and was married to him on July 24, 1954, in Nevada. Their marriage certificate was admitted in evidence. The accident occurred on August 18, 1954. She had two children by a previous marriage and was divorced from their father on April 7, 1954. She lived with Ronald and his parents until his death. She said that he supported her and her two children. She was then asked on cross-examination if she had not remarried since the death of Ronald and she answered in the negative. Apparently counsel for defendants were in possession of contradictory evidence. She was then asked if she and one Carroll Bennett were not married on April 1, 1955, in Duncan, Oklahoma, by Reverend J. O. Howard, in the presence of one Carol Thomas. She denied this fact and said she did not know such persons and claimed she had been living with her parents since Ronald's death. An authenticated copy of a marriage license issued to her and Carroll Bennett, and a copy of a decree of divorce obtained by her from her former husband, with a printed notation thereon that this was not an absolute divorce and neither party could remarry for six months thereafter, was offered and received in evidence as defendants' Exhibit A, over limited objections. Thereafter she admitted Carol Thomas was her sister. She testified she did marry Ronald within the six months' period referred to in the decree, but was advised this was legal as long as she remarried in another state. She still maintained she had not remarried since Ronald's death. The minister who performed the ceremony testified, without objection, that he married

this couple at the time and place indicated in the license and that Thelma, Carroll Bennett, and the sister, Carol Thomas, were present.

Thereupon counsel for plaintiffs moved to strike "the marriage certificate" from the record. The motion was denied. Thereafter Thelma admitted she did not tell the truth about her subsequent marriage and had not even told her attorney about it. Her counsel spent much time in his argument to the jury apologizing for his client and asked that the jury not blame him or her for this, and not to consider it in arriving at a verdict. Judgment went for defendants.

The claim is that the court erred in refusing to strike from the record the evidence pertaining to Thelma's remarriage and refusing to instruct the jury that all evidence as to the subsequent marriage was limited to the purpose of impeaching her testimony and could not be considered to diminish or divert her claim.

[13, 14] At the trial, counsel for plaintiffs did not object to the cross-examination of Thelma in respect to her subsequent marriage, which she then denied. It was not until the presentation of the marriage certificate that objection was made to the introduction of Exhibit A on the grounds that it was "immaterial, irrelevant and incompetent insofar as the divorce is concerned". The motion to strike was limited to the "marriage certificate" and not to the other testimony produced showing that in fact such a marriage was performed. An objection to the admission of all evidence on the subject cannot be made for the first time on appeal. The marriage certificate was properly received, at least for the purpose of impeachment, and did have some bearing on the question of loss of comfort, society and support, particularly in view of the opening statement of plaintiffs' counsel to the jury that he intended to prove that she was compelled to and did live with and was dependent on her parents for support ever since Ronald died. Thelma's testimony was to the same effect. If it was error to impeach her on a collateral matter, as claimed by her, under Gonzales v. Pacific Greyhound Lines, 34 Cal.2d 749, 214 P.2d 809, plaintiff invited such evidence by claiming future loss of support and denying her subsequent marriage. A wide discretion is allowed on cross-examination to determine the facts and the truth of the testimony given on direct examination. Newman v. Los Angeles Transit Lines, 120 Cal. App.2d 685, 691, 262 P.2d 95. The evidence was admissible and the proffered instruction was properly refused. No prejudicial error resulted.

Although it was not indicated from the record as to which party offered the instructions here under question, at the time of the argument before this court it was conceded that they were offered by the parties they favored and no point should be made of this failure to so designate.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



159 Cal.App.2d 615

Ollie J. DURKEE, a minor, by Ollie J. Durkee, his guardian ad litem, and Louis Durkee, a minor, by Ollie J. Durkee, his guardian ad litem, Plaintiffs,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY, a corporation, Defendant and Appellant,

Ollie J. Durkee and Louis Durkee, a minor, by Ollie J. Durkee, his guardian ad litem, Respondents.

Civ. 22874.

District Court of Appeal, Second District, Division 1, California.

April 22, 1958.

Rehearing Denied May 12, 1958.

Hearing Denied June 17, 1958.

Action for wrongful death of plaintiff's decedent who was struck by defendant's passenger train while he was attempt-

ing to push his stalled pickup truck off the tracks at a crossing. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment adverse to railroad and it appealed. The District Court of Appeal, Lillie, J., held that evidence presented questions for the jury as to whether, notwithstanding fact decedent may have negligently placed himself in a position of great peril, railroad was negligent under the theory of last clear chance, in that its engineer failed to attempt to stop the train when he first saw decedent's peril, and as to decedent's contributory negligence in failing to exercise due care for his own protection.

Judgment affirmed.

1. Railroads ⇐350(13, 33)

In action for wrongful death of plaintiff's decedent who was struck by defendant's passenger train while he was attempting to push his stalled pickup truck off the tracks at a crossing, evidence presented questions for the jury as to whether, notwithstanding fact decedent may have negligently placed himself in a position of great peril, railroad was negligent under the theory of last clear chance, in that its engineer failed to attempt to stop the train when he first saw decedent's peril, and as to decedent's contributory negligence in failing to exercise due care for his own protection.

2. Appeal and Error ⇐928(1)

In dealing with the applicability of the last clear chance doctrine and the propriety of giving instructions thereon, an appellate court must view the evidence most favorable to the contention that the doctrine is applicable since plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine.

3. Death ⇐58(1)

The benefit of the presumption of due care by a decedent is available if the testimony of plaintiff's witnesses respecting decedent's acts and conduct at the time involved is not wholly irreconcilable with such presumption.

4. Appeal and Error ⇐1050(1)

In wrongful death action arising out of collision of train with decedent, error, if any, in admitting part of a deposition of railroad's engineer in which he stated he did not know if he saw any other trains or automobiles in his field of vision, after he stated at the trial that he did not recall seeing any, was not prejudicial.

5. Appeal and Error ⇐1060(1, 2)

In wrongful death action arising out of a collision between railroad's train and plaintiff's decedent, action of counsel in interrogating witnesses as to making of a written report concerning the crossing in question, offering of such report in evidence, and referring to such report in his argument, though it was not admitted in evidence, even if misconduct, was not prejudicial.

6. Appeal and Error ⇐1008(1)

The trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from asserted misconduct of counsel, and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.

Robert W. Walker, Matthew H. Witteman, Los Angeles, for appellants.

Wm. C. Wetherbee, Byron R. Bentley, Los Angeles, for respondents.

LILLIE, Justice.

This appeal involves a wrongful death action which stems from a crossing collision between appellant's passenger train and respondents' decedent Louis Durkee at the intersection of the Santa Fe main line and Commonwealth Avenue in Fullerton. Trial before a jury resulted in a verdict and judgment of $85,000 against appellant railway. A motion for a new trial was denied.

Appellant's "Grand Canyon" passenger train of four diesel engine units and eight passenger cars was traveling southeasterly over a straight track a bit below 80 miles per hour as it came within a mile of the

crossing. The train was equipped with effective brakes, a headlight was burning, a bell ringing and a whistle was sounded for the Commonwealth crossing.

The record discloses evidence that the decedent was unfamiliar with this crossing which was so elevated that it might not be apparent that it was comprised of three sets of railroad tracks. Just previous to the accident, decedent drove his 1934 Ford pick-up truck onto the crossing just before the automatic gates hit the ground. From 71 feet of skidmarks it was estimated that he approached the crossing at a speed rate of 30–35 miles per hour, applied the brakes, skidded and came to rest on the track. The truck being stalled on the eastbound track, decedent, after a futile attempt to start the motor, jumped out, ran around to the front of the truck and with his back to the approaching Grand Canyon Limited was endeavoring to push the vehicle back off of the track when the train collided with the truck, killing decedent.

Two eyewitnesses testified to the effect that before the train arrived at the crossing decedent "got the truck slightly under motion"; that he was trying for a period of five to ten seconds to push it off the track and possibly moved the truck a foot or so. Decedent's truck was on the track "probably a half a minute" before the train arrived; "the interval was very, very short, I have no estimate."

According to the evidence, the automatic signal apparatus was designed to sound a warning bell and activate flasher lights four or five seconds in advance of descent of the gates when an eastbound train crossed a circuit breaker 3,719 feet west of the crossing. The gate was lowering and flasher lights operating as decedent headed for the eastbound track, but there was some conflict in the evidence as to whether the bell and lights came on a few seconds in advance of the gate's descent or whether these events occurred simultaneously. It was respondents' contention that the signal apparatus was defective and that the bell and light gave no previous warning that the gates were about to fall.

The appellant's 68-year old engineer of the Grand Canyon Limited testified that he could see down the track for a mile and a half, but that he "couldn't be sure" whether he "saw this automobile when it first came on the track." Later this witness stated: "My recollection now is that it was stopped (on the track) when I first saw it." In his deposition the engineer had said that he didn't know whether he saw it at the moment it stopped or just prior to that.

Engineer Meith also testified: "I put the brakes on as soon as I saw the (truck) door open, which was probably a second after I saw the vehicle" when he saw the decedent start to get out of the car. The train was equipped with an automatic speed recorder, the record tape of which was introduced in evidence. According to this speed tape and expert interpretation thereof, there had been an acceleration of train speed from about 77–78 miles per hour 1,500 feet from the crossing to 79 miles per hour at the time the engineer's emergency application of brakes became effective 400 feet from the point of impact. When the accident occurred, the train was going 75 miles per hour and came to a stop 2,400 feet beyond the crossing. The train took 32 seconds to move from the circuit breaker 3,719 feet west of the crossing to the crossing.

[1] It is appellant's contention that on the basis of the factual record it was prejudicial error for the trial court to give an instruction on last clear chance and on the presumption of due care. It also predicates reversible error on the reading of a part of the deposition of the witness A. J. Meith, and finally, on prejudicial misconduct of counsel.

An examination of the record and of the cases cited leads to the conclusion that there was no error, reversible or otherwise, in the giving of the instruction on last clear chance. In respect to the doctrine itself, the court in Connolly v. Pre-Mixed Concrete Co., 1957, 49 Cal.2d 483, 486, 319 P.2d 343, 344, stated: "In Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 743, 306 P.2d 432, the last clear chance formula

was restated as follows: 'The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the evidence: (1) that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger; (2) that defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom; and (3) that thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure.' "

Resting upon a partisan survey of certain evidentiary items, appellant's position on this point is simply that there was no substantial evidence to establish any of these three basic elements, particularly of the third and last.

Obviously, in this type of case in which time elapsing between arrival at a danger point and the ultimate catastrophe is measured in seconds, the inquiry concerning exactly what was done, what could or should have been done by the respective parties, and in whom the fault lies is, by its very nature, bound to involve delicate questions of fact, difficult of solution. This is the primary function of a jury. In the instant case, after a 10-day trial resulting in a reporter's transcript of 884 pages, a jury found for plaintiff, the returned verdict indicating that notwithstanding the fact that the decedent may have negligently placed himself in a position of great peril, defendant railway was found to be at fault. That there is substantial evidence in support of such verdict can hardly be doubted.

Decedent's small truck had become stalled on defendant's track in the face of an oncoming train. Decedent, with his back to the train, endeavored to push the vehicle off the track during a period of perhaps 30 seconds. It may be, as respondents suggest that "He was oblivious to the approach of the eastbound Grand Canyon Limited and was concentrating his attention on rescuing his vehicle from a freight train some two to three hundred yards southeast of the crossing, which was enveloped in smoke and presented an unusual and confusing picture to his excited mind." No one will ever know. There was evidence of another train and smoke some two or three hundred yards from the crossing.

[2] Appellant's engineer, on the other hand, could see down the track for a mile and a half, and saw the truck either just before or when it first came on the track, or when decedent jumped out and attempted to push his truck out of danger, depending on different versions given by the engineer. There was evidence of a slight acceleration of train speed, rather than a retardation, with an emergency application of brakes too late to save decedent's life. The jury may have believed from the evidence, and evidently did so believe, that had the engineer promptly applied the brakes when he first saw the decedent's peril, the accident could have been avoided. Appellant's assertion that, "The engineer had absolutely no chance, much less a last and clear chance" is not an accurate statement; whether such chance existed was a question of fact. In dealing with the applicability of the last clear chance doctrine and the propriety of giving instructions thereon, an appellate court "must" as stated in Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, 646, "view the evidence most favorable to the contention that the doctrine is applicable * * * since plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine."

Following this rule in the present case, it must follow that the trial court was justified in giving this doctrine to the jury. The instruction, as given, by no means compelled the jury to find for plaintiff; to do so it must first find that there was evidence which brought into play the var-

ious elements of the doctrine. With the widely differing factual situations presented, each case must of necessity stand on its own merits. The fact remains that the jury is the trier of the facts.

Nor can approval be given to appellant's contention that because decedent was contributorily negligent as a matter of law, it was prejudicial error for the trial court to instruct on the presumption of due care. In view of the surrounding circumstances it cannot be said that the decedent was negligent as a matter of law; this, like other controverted matters, was a question for the jury to decide.

[3] As stated in Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 736, 306 P.2d 432, 437: "* * * the benefit of the presumption (of due care) is available if such person be deceased and the testimony of plaintiffs' witnesses respecting the deceased's acts and conduct at the time involved is not 'wholly irreconcilable' with such presumption. Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809. Our review of the record here leads to the conclusion that the testimony of the plaintiffs' witnesses was not wholly irreconcilable with the presumption."

Applicable also is the language of Sills v. Los Angeles Transit Lines, 40 Cal. 2d 630, 636, 255 P.2d 795, 799, in which the reviewing court said: "'It is always easy after an accident to see how it could have been avoided, but a man's duty before the calamity is not measured by such *ex post facto* information. * * *' A person in impending peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind which is normally exacted of a careful and prudent person under ordinary circumstances, nor to show that his inability to escape from the threatened danger was a physical impossibility."

[4] The point raised by appellant that it was prejudicial error to permit over objection the reading of a part of the deposition of the witness (engineer) A. J. Meith, in reference to various statements made by this witness as to whether he saw any other trains or cars in his field of vision, is not well taken. The witness stated at the trial that he did not "recall seeing any" while in his deposition he had answered "I don't remember" or that he didn't know. The trial court permitted a reading of this part of the deposition although stating, "I hold that it is not impeachment." It is to be noted that the statements, although differing, were not radically inconsistent. Regardless of the propriety of the trial court's action, the matter appears to be of relatively little importance and is not of such a nature in view of the entire record as to result in prejudice.

[5] The same may be said in respect to appellant's assignment of error that "Repeated prejudicial misconduct of counsel requires a reversal of judgment." This relates to cross-interrogation of witnesses as to the making of a written report concerning the crossing in question and the offering of such report in evidence, objection to which was sustained. Plaintiff's counsel also referred to such a report in argument and the jury was admonished to disregard "anything concerning a report that is not in evidence." In regard to this and other alleged items of misconduct, these cannot be deemed prejudicial. Moreover they were duly presented to the trial court on a motion for a new trial, which motion was denied.

[6] "A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong." Cope v. Davison, 30 Cal.2d 193, 203, 180 P.2d 873, 879, 171 A.L.R. 667.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.

159 Cal.App.2d 522

N. J. K. CORPORATION, a California corporation, Plaintiff and Respondent,

v.

PACIFIC VITAL FOODS STORES, Inc., a California corporation, and Lelord Kordell, Defendants and Appellants.

Civ. 22791.

District Court of Appeal, Second District, Division 1, California.

April 18, 1958.

Rehearing Denied May 13, 1958.

Hearing Denied June 17, 1958.

Action for rescission of contract of sale of retail health food store and for damages for fraud. From adverse judgment of the Superior Court, Los Angeles County, John Leslie Goddard, J., the defendants appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evidence sustained findings concerning misrepresentation by defendants as to business and profits of store, knowledge of falsity, intent to defraud, and reliance by plaintiff on such representation.

Judgment affirmed.

1. Fraud ⇐58(2, 3, 4)
Sales ⇐52(7)

In action for rescission of contract of sale of retail health food store and for damages for fraud, evidence sustained findings concerning misrepresentation by defendants as to business and profits of store, knowledge of falsity, intent to defraud, and reliance by plaintiff on such representation.

2. Appeal and Error ⇐994(3), 1010(1)

A reviewing court will not attempt a revaluation of evidence but will accept decision of trial court as to all matters of sufficiency and credibility.

3. Fraud ⇐62

In action for damages for fraud in connection with sale of store to plaintiff, which sustained loss of $10,956.25 in operation of business, evidence sustained award for such sum plus cancellation of $3,000 note given as part of purchase price by corporation, which owed one of its stockholders that amount as salary for services rendered. West's Ann.Civ.Code, § 3343.

4. Fraud ⇐60

In action by purchaser of retail health food store for damages for fraud, $2,200 paid by stockholders on behalf of purchaser to secure cancellation of an existing lease was a proper item of damage. West's Ann. Civ.Code, § 3343.

Conroy & Conroy, Edward L. Conroy, Wm. U. Handy, Los Angeles, for appellants.

Irmas & Rutter, Beverly Hills, for respondent.

DRAPEAU, Justice pro tem.

[1] The N. J. K. Corporation, of which Mr. and Mrs. Nathan Jack Smith are the sole stockholders, filed the present complaint asking rescission of a contract of sale of a retail health food store purchased from appellants, and damages for fraud. After trial before a judge, respondent corporation recovered judgment in the sum of $10,956.25, and the cancellation of a $3,000 promissory note given to appellants as part of the purchase price.

It is appellants' contention that the evidence does not support the findings; that the true measure of damages is not the loss alleged to have been suffered; that respondent was not damaged in the amount of the judgment by reason of the alleged fraud, and was not entitled to a cancellation of the $3,000 note; and that the appellants' motion for a nonsuit should have been granted.

The record discloses that when Mr. and Mrs. Smith first inquired about the health food store, appellant Kordell, vice president of Pacific Vital Foods Stores, Inc., represented that the store business grossed approximately $57,000 during 1953, whereas it appeared from the appellants' books that the entire gross sales of Pacific Vital Foods Stores, Inc., which was engaged in both wholesale distribution of health foods and

the operation of retail stores, was only $56,496.07, which amount included mail sales as well as sales from the store in question. The exact amount of such mail sales was not established.

Appellants also represented to respondents that the store business made an "operator's profit (before wages) of $15,392.00" during the calendar year of 1953, and that with an allowance of $2,400 for wages, the "owner-operator's profit or earnings" was $13,273. The books of appellant corporation, however, show that the appellants lost $8,634.19 during the fiscal year ending August 31, 1953, and during the fiscal year ending August 31, 1954, appellant corporation lost $2,852.42. Appellants' auditor was unable to determine from the books what percentage of this loss was attributable to the Broadway store. Mr. Kordell, appellant corporation's vice president, who might have produced explanatory record, did not appear or testify at the trial, and his counsel was uncertain as to Kordell's whereabouts. There was also evidence to the effect that although in the sale agreement appellant represented that they were transferring at least $7,500 worth of "salable quality" merchandise, much of which was in sealed containers, respondent found that "A good deal of it was in very poor condition. In fact, we had to discard quite a few things," such as "crackers and different kinds of nuts and fruits, and * * almost one entire counter full of things that were bad, and the macaronis and things like that that were made out of flour, they were wormy and spoiled."

Appellants concede that it was represented to respondent that the store was held under a lease rental of $400 per month, whereas appellants were only paying a rental of $350 per month. This statement was said to have been made "in good faith and inadvertence," and it is argued that since respondent obtained a $400 lease on the store, such statement cannot be deemed actionable fraud. Appellant Kordell represented that he would not compete with respondent in the "retail health food store business" within a three mile radius for a period of five years, and the Pacific Vital Food Stores, Inc., likewise agreed to "refrain from engaging in the retail health food business" in the same area and period. There was evidence, however, that on November 2–11, 1954, appellants conducted a series of free lectures within the three mile radius, and sold the same line of merchandise as that carried by respondent, at prices far below retail prices and in some cases even below the wholesale prices.

[2] In view of substantial evidence concerning appellants' conduct in reference to such representations, it cannot be said that the findings of the trial court in respect to misrepresentation, knowledge of falsity, intent to defraud, and reliance by the respondent, do not find support in the record. Such being the case, the situation is governed by the well established rule that a reviewing court will not attempt a revaluation of the evidence but will accept the decision of the trial court as to all matters of sufficiency and credibility. Appellants' explanations and contentions in reference to these matters are not persuasive. Defendants' motion for a nonsuit was properly denied.

[3] The argument advanced in appellants' briefs that "Respondent was not damaged in the sum of $10,956.25 * * * and was not entitled to cancellation of the note for $3,000.00," is likewise without merit. In this connection, appellants claim that since respondent elected to abandon its action for rescission at the trial in favor of the theory of fraud, the note could only be "cancelled as an offset to some specific damage, otherwise suffered," and that the findings in respect to damages are not supported by the evidence.

The trial court found that the plaintiff lost the sum of $10,956.25 "in the operation of this business. That of this sum, * * * ($2,200.00) was paid by Mr. and Mrs. Nathan Smith on behalf of the plaintiff to the landlord of the premises leased by the plaintiff to secure a cancellation of the then existing lease, and that this sum is owed by the corporation to Mr. and Mrs.

Smith. That further, from that sum, three thousand dollars ($3000.00) is owed by the plaintiff to Mrs. Smith as salary for services rendered to the corporation."

Hover v. Harout, 1954, 123 Cal.App.2d 860, 267 P.2d 823, concerning the items of damage awarded for fraud, has been the subject of comment by both parties. In that case plaintiff was seeking to recover damages alleged to have resulted from false statements on which plaintiff relied in leasing a theatre from defendants and producing a show therein. An award of the difference between cost of operation and income from admissions was held not excessive. In the present litigation, recovery was allowed, as heretofore indicated, for the actual, out-of-pocket losses sustained by plaintiff in operation of the business. Appellants' attempt to distinguish the Hover case from the instant situation by reason of the fact that the Hover case did not involve a purchase and sale but the lease of a theatre, is not compelling. The principle applied in the Hover case is clearly applicable to the case at bar.

Section 3343 of the Civil Code provides that "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, *together with any additional damage arising from the particular transaction.*" (Italics added.) The award in the present case was the trial court's decision, based upon the evidence, as to plaintiff's actual loss. It cannot be said that such finding is not supported by substantial evidence.

[4] There was evidence, for example, that Mr. Smith had worked at the store full time throughout the entire period of operation, and that Mrs. Smith had worked full time from March to December, and had kept the books in addition to helping run the store, all without compensation. Mr. Smith's services certainly equalled the amount of the $3,000 note. Likewise, the item of $2,200 paid to secure a cancellation of the lease, cannot be deemed an improper item of damage. Appellants' argument that the court used the old "benefit of the bargain" rule rather than that specified in Civil Code section 3343, is untenable.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



159 Cal.App.2d 335

Joseph L. FARAH and Mary T. Farah, Plaintiffs and Appellants,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California and Department of Alcoholic Beverage Control, Defendants and Respondents.

Civ. 22901.

District Court of Appeal, Second District, Division 1, California.

April 10, 1958.

Petition for writ of mandate to compel cancellation of order suspending for 15 days petitioners' on-sale general liquor license. The Superior Court of Los Angeles County, Bayard Rhone, J., rendered judgment denying petition for writ, and petitioners appealed. The District Court of Appeal, Fourt, J., held that license was subject to suspension for sale of beer to a minor, in absence of proof that licensees or their agent or employee had demanded and been shown, immediately prior to furnishing beer to minor, bona fide documentary evidence of majority and identity of customer, as provided by West's Ann.Bus. & Prof.Code, § 25660, and that documentary evidence of majority and identity of customer exhibited to waitress two or three weeks prior to sale was not shown immediately prior to sale within meaning of statute.

Judgment affirmed.

1. Intoxicating Liquors ⇐129

Department of alcoholic beverage control is a constitutional agency charged wtih enforcement of Alcoholic Beverage Control Act, and decisions of department should be affirmed by courts when supported by substantial evidence. West's Ann. Bus. & Prof.Code, § 23000; West's Ann. Const. art. 20, § 22.

2. Intoxicating Liquors ⇐6

Business of selling intoxicating liquor is attended with dangers, and under police power, state may limit the operation of such business to conditions which will minimize its evils. West's Ann.Bus. & Prof. Code, § 23000; West's Ann.Const. art. 20, § 22.

3. Intoxicating Liquors ⇐106(4)

On-sale general liquor license was subject to suspension for selling beer to a minor, in absence of proof that licensees or their agent or employee had demanded and been shown, immediately prior to sale, bona fide documentary evidence of majority and identity of customer. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a, b), 25660.

4. Intoxicating Liquors ⇐108(1)

Statutory defense to proceeding for suspension or revocation of liquor license for selling alcoholic beverage to a minor that licensee or his agent or employee demanded and was shown, immediately prior to furnishing such beverage to a minor, bona fide documentary evidence of majority and identity of such customer is an affirmative defense and licensee has the burden of showing that he is entitled to the benefits of such defense. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a, b), 25660.

5. Intoxicating Liquors ⇐108(1)

Where liquor licensee makes diligent inspection of documentary evidence of majority and identity offered by customer at or about time of sale of alcoholic beverage, licensee is entitled to rely upon apparent genuineness of such evidence as defense to proceeding for suspension or revocation of license for sale of alcoholic beverage to a minor. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a, b), 25660.

6. Intoxicating Liquors ⇐108(1)

In order to be entitled to statutory defense to proceeding for suspension or revocation of liquor license that licensee or his agent or employee demanded and was shown, immediately prior to furnishing any alcoholic beverage to a minor, bona fide documentary evidence of majority and identity of customer, licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances and must make inspection of documentary evidence and appraisal of physical appearance of customer immediately prior to sale. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658 (a, b), 25660.

7. Intoxicating Liquors ⇐6

Licensee has no inherent right to sell alcoholic beverages and engaging in such business may legitimately be subjected to rigid conditions which will limit the possibilities of sales to minors. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a, b), 25660.

8. Intoxicating Liquors ⇐108(1)

As used in statute making proof that licensee or his agent or employee demanded and was shown, "immediately prior" to furnishing alcoholic beverage to a minor, bona fide documentary evidence of majority and identity of customer a defense to proceeding for suspension or revocation of liquor license, quoted words are words of limitation in time. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a, b), 25660.

See publication Words and Phrases, for other judicial constructions and definitions of "Immediately Prior".

9. Intoxicating Liquors ⇐108(1)

Temporary automobile operator's license exhibited to waitress two or three weeks prior to sale of beer to a minor was not shown "immediately prior" to sale within statute making proof that licensee or his agent or employee demanded and was shown, immediately prior to furnishing alcoholic beverage to a minor, bona fide doc-

umentary evidence of majority and identity of customer a defense to proceeding for suspension or revocation of liquor license. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a, b), 25660.

Carl B. Sturzenacker and Walter Monarch, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

FOURT, Justice.

This is an appeal from a judgment denying appellants' petition for a writ of mandate to compel respondents to cancel their order suspending for fifteen days appellants' on-sale general liquor license.

The facts are as follows: On April 20, 1956, the plaintiffs, licensees, sold and furnished beer to a girl about nineteen years of age and permitted her to consume the beer on their premises. At the time of this sale and consumption the minor was not requested to produce nor exhibit any bona fide documentary evidence of her majority or identity. About two or three weeks before the sale above mentioned, the girl had exhibited to a waitress in the establishment a temporary automobile operator's license, upon which the date of birth had been fraudulently altered to show the age as twenty-two, instead of nineteen. The Department of Alcoholic Beverage Control, by accusation, charged the licensees with a violation of sections 25658a and b, and 24200(b) of the Business and Professions Code for the acts heretofore mentioned. The Department of Alcoholic Beverage Control found, after a hearing, that the charges were true and found that the licensees had failed to establish the defense available to liquor licensees under section 25660, Business & Professions Code, that the alterations were reasonably apparent on an inspection of the driver's license, and also that the minor could not reasonably have been mistaken for a person of the age of majority. The licensees took an appeal to the Alcoholic Beverage Control Appeals Board, which considered the matter and made its decision. The Appeals Board ordered stricken from the decision the statements as to the alteration of the driver's license being apparent and as to the unlikelihood of the minor's being mistaken for an adult, on the ground that there was no evidence in the record to support such findings. The decision of the Department, however, was affirmed, apparently upon the ground that the licensees "did not demand, nor were they shown, on April 20, 1956, documentary evidence of majority and identity." The minor admitted altering the driver's license and exhibiting it as altered over a period of time to the licensees and their employees.

It seems generally agreed by all that the licensees had ben previously imposed upon by the minor without fault on their part.

The licensees petitioned the superior court for a writ of mandate to compel the Department and the Appeals Board to set aside their decision. The writ was denied and this appeal is from that determination.

The question involved here is the interpretation of section 25660 of the Business & Professions Code, as amended in 1955. That section reads as follows:

> "In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, *immediately prior* to furnishing any alcoholic beverage to a person under 21 years of age, bona fide documentary evidence of majority and identity of the person issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the armed forces, is a defense to the prosecution or proceeding for the suspension or

revocation of any license." (Emphasis added.)

The 1955 amendment, among other things, substituted the words "immediately prior," for the word "before," just preceding the phrase "furnishing any alcoholic beverage," which had appeared in the statute before amendment.

Appellants' contentions are that a complete defense was established under the section in question; that the section does not require proof of age and identity on each occasion of service of an alcoholic beverage; that the section violates the due process clauses of the state and federal constitutions, and that a legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.

[1] The Department of Alcoholic Beverage Control is a constitutional agency (Art. XX, § 22, Calif.Const.), and is charged with the enforcement of the Alcoholic Beverage Control Act, and the decisions of the Department should be affirmed by the courts when supported by substantial evidence. 5501 Hollywood, Inc., v. Department of Alcoholic Beverage Control, 155 Cal.App.2d 748, 318 P.2d 820, and the cases cited therein.

[2] The business of selling intoxicating liquor is one attended with dangers, and under the police power the state may limit the operation of such business to conditions which will minimize its evils. Ritz v. Lightston, 10 Cal.App. 685, 689, 103 P. 363; People v. Baker, 38 Cal.App. 28, 34, 175 P. 88; Cornell v. Reilly, 127 Cal.App.2d 178, 187, 273 P.2d 572.

[3] The licensees in this case sold the liquor to the minor, and unless they can come under the protection of the provisions of section 25660 of the Business & Professions Code the license was subject to suspension.

[4] The legislature, in adopting the provisions of the above cited code section, provided a method whereby a licensee can protect himself in any case of doubt as to the age of a prospective customer: "immediately prior to furnishing" any liquor the licensee can demand bona fide documentary evidence of the majority and identity of the prospective customer. The defense is affirmative and the burden is therefore upon the licensee to show that he is entitled to the benefits of such a defense. Keane v. Reilly, 130 Cal.App.2d 407, 279 P.2d 152; Molina v. Munro, 145 Cal.App.2d 601, 302 P.2d 818.

The cases interpreting section 25660, Business & Professions Code, have generally set forth three tests by which to measure the conduct of the licensee in determining whether there has been a compliance with the provisions of the section.

[5] First, the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer at or about the time of the sale is entitled to rely upon its apparent genuineness. Dethlefsen v. State Board of Equalization, 145 Cal.App.2d 561, 567, 303 P.2d 7; Young v. State Board of Equalization, 90 Cal.App.2d 256, 202 P.2d 587.

[6] Second, a licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. 5501 Hollywood, Inc. v. Dept. of Alcoholic Beverage Control, supra, 155 Cal.App.2d 748, 318 P.2d 820.

Third, a licensee must make the inspection of the documentary evidence and his appraisal of the physical appearance of the customer "immediately prior" to the sale. People v. Garrigan, 137 Cal.App.2d Supp. 854, 289 P.2d 892.

In this case the licensees did not demand, nor were they shown any evidence of the majority or identity of the customer at the time of sale, nor during any period for at least two weeks prior thereto.

[7-9] The legislature very properly saw fit to place a definite limit and restriction upon the use of the defense, and if a licensee does not see fit to take advantage of the available defense in accordance with the plain mandate of the statute, he as-

sumes the risk of whatever hazards may lie ahead. A licensee has no inherent right to sell liquor and his engaging in the business may legitimately be subject to rigid conditions which will limit the possibilities of sales to children under the age of twenty-one years. The words "immediately prior" are words of limitation in time, and plainly, the act of questioning the minor and seeing some proof of age two or three weeks before the sale is not "immediately prior" to the sale in question.

There is no merit to the contentions of appellants.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



159 Cal.App.2d 556

NORTHRIDGE PARK COUNTY WATER DISTRICT, a Public Corporation, Petitioner,

v.

Edward M. McDONELL, Secretary of the Northridge Park County Water District, Respondent.

Civ. 9473.

District Court of Appeal, Third District, California.

April 18, 1958.

Original mandamus proceeding. The District Court of Appeal, Van Dyke, P. J., held that election on formation of county water district was valid, notwithstanding that statute required election to be held not less than 50 nor more than 60 days from date of final hearing of formation petition and that election was called and held beyond that limit, where there was statutory notice of the day of election and of purposes thereof, and there was newspaper publicity in the area, and public meetings were held, and sample ballots and polling place cards were mailed as required by law, and election was properly and honestly conducted and no one was injured by the manner in which the preliminary steps leading thereto were taken.

Peremptory writ issued.

1. Waters and Water Courses ⇐183½

Under the applicable provisions of the Water Code, notice of hearing on formation of county water district is published one day each week during the two weeks preceding the hearings; notice can be published on any day of first week and on any day of second week; publication on second day of first week and on first day of second week is in compliance with the statutory requirements. West's Ann.Water Code, §§ 30063, 30230.

2. Waters and Water Courses ⇐183½

Under the applicable provisions of the Water Code, notice of county water district formation election is published one day in each of the two weeks preceding the election; publication on the 12th and 5th days preceding the election is in compliance with the statutory requirements. West's Ann. Water Code, §§ 30063, 30293.

3. Waters and Water Courses ⇐183½

County water district bonds were validly approved in bond issue election, notwithstanding that 51 votes were cast by persons ineligible to vote, where 394 votes were cast in favor of bonds and 155 votes were cast against bonds.

4. Elections ⇐229

The result of an election will not be disturbed because of illegal votes received unless the aggregate of such votes would change the result; if the true result can be ascertained by eliminating the illegal votes the election will be upheld.

5. Waters and Water Courses ⇐183½

The purpose of Water Code provision for adjournment of hearing on petition for inclusion of land in county water district where the district's board of directors proposes that the inclusion be made subject to conditions is to enable petitioners for inclusion to object to the proposed conditions;

the provision being for their benefit, the petitioners may waive it. West's Ann.Water Code, §§ 32471, 32472.

6. Waters and Water Courses ⇐183½

In determining whether county water district was lawfully formed, the findings of county board of supervisors as to the benefits which would be enjoyed by the land proposed to be included in the district and subsequent decision of the board including and excluding lands were supported by the evidence.

7. Waters and Water Courses ⇐183½

In creating county water district, there is a presumption that in all matters the board of supervisors acted pursuant to law and that their findings as to the benefits which would be enjoyed by the land proposed to be included in the district were made after the taking of pertinent evidence.

8. Waters and Water Courses ⇐183½

Election on formation of county water district was valid, notwithstanding that statute required election to be held not less than 50 nor more than 60 days from date of final hearing of formation petition and that election was called and held beyond that limit, where there was statutory notice of the day of election and of purposes thereof, and there was newspaper publicity in the area, and public meetings were held, and sample ballots and polling place cards were mailed as required by law, and election was properly and honestly conducted and no one was injured by the manner in which the preliminary steps leading thereto were taken. West's Ann.Water Code, § 30291.

9. Waters and Water Courses ⇐183½

Where county board of supervisors on August 15 declared county water district formed and fixed boundaries subject to electoral approval and the board on October 3, without any formal continuance of the matter before the board in so far as formation proceedings were concerned, purported to rescind the August 15 resolution, and later, and on October 10, the board purported to rescind the rescinding resolution and to make certain changes in the district boundaries, any irregularity was not jurisdictional in character and was cured by validating legislation. St.1957, p. 719, §§ 1–3, 5, 6; p. 725, §§ 1–3, 5, 6.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for petitioner.

Edward M. McDonell, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Petitioner herein seeks a peremptory writ of mandate to compel respondent to publish and mail an official notice of the sale of general obligation bonds of Improvement District No. 1 of the petitioner district in accordance with an order of the board of directors of said district. Respondent has refused to perform this duty cast upon him by law, basing his refusal on various grounds.

[1] Respondent's first contention is that the petitioner district has not been lawfully formed for the reason that notice of the hearing before the Board of Supervisors of Sacramento County of the petition to establish the district and fix the boundaries thereof was published in a newspaper on the thirteenth and sixth days before the hearing, whereas the California Water Code requires publication for at least two weeks before the day when the petition is to be presented to and considered by the board. This contention cannot be sustained. Section 30230 of the Water Code provides that:

> "The county clerk of the county containing the proposed district shall publish a notice of a hearing on the formation petition once a week for at least two weeks before the time when the petition is to be presented and considered in at least one, but not to exceed three, newspapers printed and published in the county."

Standing alone, this section might well be construed to require that the first publication take place at least fourteen days before the petition is to be presented. How-

ever, this construction is rendered improper by the provisions of Section 30063 of the Water Code, which section reads as follows:

> "Whenever by this division a notice is required to be published for a designated number of weeks or once a week for a designated number of weeks, the notice need be published on only one day of each week and for only the same number of times as the number of weeks designated."

Considering these two sections together and applying section 30063 to the phraseology of section 30230 we have the following situation: The first section quoted requires publication once a week for at least two weeks. The section thus designates the number of weeks of publication and the number of publications in a week. The second section quoted then provides that where a notice is required to be published once a week for a designated number of weeks, in this instance two weeks, the notice need be published on only one day of each week and for the same number of times as the number of weeks designated, in this instance for two times. Construing the two sections together then, they provide that in forming a county water district there shall be published, prior to presentation of the formation petition, a notice which shall be published one day each week during the two weeks preceding the date of presentation. This necessarily means that it is not required that the first day of publication must be fourteen days prior to the presentation date. The notice can be published on any day of the first week and on any day of the second week preceding presentation. In this case the notice was published on the second day of the first week and on the first day of the second week and that publication complied with the statutory requirements. See City of Lindsay v. Mack, 160 Cal. 647, 648, 117 P. 924.

A discussion of the further contentions of respondent requires a more detailed recital of the various steps taken leading to the organization of the district and to the authorization of the bonds. On January 11, 1956, the County Boundary Commission of Sacramento County approved the boundaries of the proposed Northridge Park County Water District. A petiton for incorporation of the proposed district with the proposed boundaries was circulated and signed by the requisite number of qualified signers. On April 23, 1956, the petition was filed with the board of supervisors of the county and that board, on May 27th, ordered that a hearing be held on June 27th. Notice of the hearing was published on June 14th and June 21st. On the date fixed the board heard the petition and those who appeared in support of and in opposition thereto, and considered written protests and requests for exclusion. The requests for exclusion were referred to the county engineer and thereafter the board excluded all property, the owners of which requested exclusion. The matter was then continued until June 18th to determine if it was economically feasible to form a district. At the meeting on that date and after presentation of the county engineer's report the boundaries of the district were so fixed as to include the territory remaining after exclusions and it was ordered that a resolution fixing the boundaries and calling an election be prepared for adoption. There followed several postponements and on August 15, 1956, the board further considered the entire matter and determined that the petition and the notice were genuine and sufficient and complied with all other requirements for the formation of county water districts. The board considered further that certain lands it had earlier intended to include would not in fact be benefited by the formation and operation of the district and those lands were excluded. The boundaries of the district as so modified were declared by resolution and it was ordered that the organization election should be held October 30th. A meeting of the board was held on October 3rd and at this meeting a resolution was adopted purporting to vacate the orders made and the resolutions adopted on August 15th. One week later and at another meeting the board took action pur-

porting to set aside the resolutions of October 3rd. At the same meeting, the board adopted a resolution purporting to amend the resolutions of August 15th as to the boundary descriptions for the district and further ordering that, except as so amended, the resolutions of August 15th should remain in full force and effect. Notice of the election to be held October 30th was published on October 18th and October 25th. The election was held as noticed. Three hundred and sixty-three votes were cast in favor of formation of the district and sixty-seven votes were cast in opposition. Thereafter, the district was declared formed, its name was adopted, the Secretary of State issued his certificate reciting it had been duly incorporated, the directors who had been elected received their certificates of election and in due course took office. The respondent was elected secretary of the board of directors and since that time the district has functioned as a county water district.

On October 15, 1957, and after the district had, as stated, been functioning as such for almost a year, there was filed with the board of directors of the district, 43 petitions fo annexation of territory to the district. Notice of hearing of these petitions on October 31st was published October 17th and October 24th. On the hearing date the board of directors declared the area encompassed in the annexation petitions to be annexed to the district, but declared further that the area should be included in what had become Improvement District No. 1 within the water district. On September 16, 1957, the board of directors adopted a resolution declaring the necessity of incurring bonded indebtedness in connection with the acquisition of a water supply and of storage and transmission facilities. A hearing was held and a resolution was thereafter adopted by the directors determining that a portion of the district designated as Improvement District No. 1 would be benefited by the proposed works. A further resolution was adopted, ordering that the proposition for the issuance of the bonds for the purposes stated be submitted to the electors and the election was set for November 5th. Notice thereof was duly given. Ballots and precinct cards were mailed to the voters and all the election procedures were admittedly followed. The election was held and it appeared that 394 votes had been cast in favor of the bond issue and 155 as opposed. Included in the votes cast were votes of 51 persons residing in the area which it was then proposed to annex to the district as a part of said Improvement District No. 1. On December 3, 1957, the board of directors adopted a resolution ordering the issuance of $1,000,000 worth of bonds and calling for bids thereon. The board ordered the district's secretary, respondent herein, to make the required publication. This he refused to do and these proceedings were then initiated.

[2] Respondent contends that the proposed bonds will not be valid for the reason that there was insufficient publication of the notice of election on the issue of district formation. This contention is in substance the same as that which we have discussed in relation to respondent's contention that there was insufficient publication of the date of hearing of the original formation petition. Section 30293 of the Water Code provides that the county clerk shall give notice of the formation election by publishing notice "once a week for at least two weeks prior to the formation election." This section also is subject to the provisions of Section 30063 of the Water Code which we have hereinbefore quoted. The notice was published on the twelfth and fifth days preceding the election. Here again we hold, for the reasons heretofore given, that this notice complied with the statutory requirements since it was published one day in each of the two weeks preceding the election.

[3, 4] Respondent contends that the bonds, if issued, will be invalid because unqualified persons were permitted to vote in the bond issue election. It appears that electors residing in the area proposed to be added to the district and to Improvement District No. 1 therein were permitted to vote although those lands had not yet been

admitted. Thus there were 51 votes cast by persons ineligible to vote. Three hundred and ninety-four votes were cast in favor of the bonds and 155 were cast against them. The bonds received a majority of all valid votes cast. Under such circumstances, nothing more being shown, the bonds were validly approved. As said in 29 C.J.S. Elections § 219, p. 322:

> "While it is well settled that where enough illegal votes are cast at an election to change the result or leave it in doubt the election is void, yet it is equally well settled that the result of an election will not be disturbed because of illegal votes received unless the aggregate of such votes would change the result. If the true result can be ascertained by eliminating the illegal votes the election will be upheld."

[5] Respondent contends the bonds, if issued, will be invalid for the reason that the lands admitted to the district after formation and added to Improvement District No. 1 within the district were not legally admitted. This contention is based upon the following facts: Petitions for annexation were received by the board on October 15, 1957. A hearing on these petitions was set for October 31st following. After this hearing the board declared the area described in the petitions to be included, but imposed upon their inclusion the condition that they be made part of Improvement District No. 1. Section 32471 of the Water Code provides that: "If any conditions are prescribed by the board, it shall adjourn the hearing for not less than thirty nor more than sixty days." No such adjournment was ordered, probably because each petition contained an express consent that the lands be included in Improvement District No. 1 and an express waiver of the code requirement of adjournment. Section 32472 of the Water Code provides that if, during adjournment, protests are filed to inclusion, under the prescribed conditions, by a majority in number of the holders of title to the land proposed to be included, representing a majority in acreage of said land, the board shall dismiss the petition; otherwise the land shall be included subject to the conditions. It is apparent that the adjournment provision is to enable petitioners for inclusion to object to the proposed conditions and for no other purpose. This statutory provision being for their benefit, they may waive it, as they did. Allen v. Hance, 161 Cal. 189, 118 P. 527; Remillard v. Blake & Bilger Co., 169 Cal. 277, 283, 146 P. 634.

[6, 7] Respondent contends that the findings of the board of supervisors as to the benefits which would be enjoyed by the land proposed to be included in the district and the subsequent decision of the board including and excluding lands are not supported by the evidence. The contention cannot be sustained. Factually, the record shows substantial evidence in support of the challenged findings. The minutes of the board indicate that a number of persons appeared at the formation hearing and were heard by the board; that others sent communications addressed to the issue before the board; that the county engineer appeared and reported the results of the investigations he had made on the feasibility of the proposed district. There is, of course, a presumption that in all matters the board acted pursuant to law and that their findings were made after the taking of pertinent evidence. There is a recital that the board in all matters concerning formation considered relevant and competent testimony. The record here presents nothing to the contrary. Factually, therefore, this contention of respondent cannot be sustained.

[8] Respondent contends that the board of supervisors called the formation election for a date beyond the limit fixed by Section 30291 of the Water Code which requires that the election shall be held not less than fifty nor more than sixty days from the date of final hearing of the formation petition. This election was called and held beyond that limit. But it appears that, in addition to the statutory notice of the day of the election and of the purposes thereof, there was newspaper publicity in the area, public meetings were held and in addition

thereto sample ballots and polling place cards were mailed as required by law. No claim is made that the election was not properly and honestly conducted. If an election has been honestly and fairly conducted and no one has been injured by the manner in which the preliminary steps leading thereto have been taken no reason exists for declaring it invalid. In re East Bay Municipal Utility District Water Bonds of 1925, 196 Cal. 725, 239 P. 38; see, also, Board of Supervisors of Placer County v. Rechenmacher, 105 Cal.App.2d 39, 232 P.2d 514; City of Crescent City v. Griffin, 31 Cal. App.2d 133, 87 P.2d 414; Hayes v. Kirkwood, 136 Cal. 396, 69 P. 30. We hold the election to have been validly conducted.

[9] Finally, respondent contends that the board of supervisors lost jurisdiction to call the formation election by reason of what occurred, as hereinbefore related, after the adoption of the August 15th resolutions declaring the district formed and fixing the boundaries subject to electoral approval. It appears that after passing the resolution of August 15th and without any formal continuance of the matter before the board in so far as formation proceedings were concerned, the board on October 3rd purported to rescind the August 15th resolution, and later, and on October 10th, purported to rescind the rescinding resolution and to make certain changes in the district boundaries. For what reason the board passed the resolution of October 3rd does not appear in the record, but in any event the proceeding constituted nothing more than irregularity not jurisdictional in character which it was competent for the legislature to validate by curative legislation, which subject we next discuss.

In 1957, the Legislature passed two acts known respectively as the first and the second validating acts of 1957. Stats.1957, Chapters 133 and 134, pp. 719, 725. Each of these acts, in Section 1 thereof, includes county water districts in its definition of the term "public body". Section 2 in each of said acts provides:

> "All public bodies heretofore organized or existing under, or under color of, any law are hereby declared to have been legally organized and to be legally functioning as such public body. Every such public body shall have all the rights, powers, and privileges, and be subject to all the duties and obligations of such a public body regularly formed pursuant to law."

Section 3 of each of said acts provides:

> "The boundaries of every public body as heretofore established, defined, or recorded, or as heretofore actually shown on maps or plats used by the assessor, are hereby confirmed, validated, and declared legally established."

Section 5 of each of said acts provides, in part:

> "All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization, issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. * * *"

The validating acts contain the following (Sec. 6 of each act):

> "(a) The foregoing provisions of this act shall operate to supply such legislative authorization as may be necessary to validate any such acts and proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken.
>
> "(b) The foregoing provisions of this act shall be limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions."

With the possible exception of the objection to the contention of respondent, based upon the publication of notice of the day for the presentation of the formation petitions to the board of supervisors, all of

the defects claimed to have occurred in the proceedings thereafter to and including the resolution ordering the issuance of bonds after the bond election are within the validating and curative effects of the two validating acts referred to. In Chase v. Trout, 146 Cal. 350, at pages 358 and 359, 80 P. 81, at page 83, the principles concerning the scope and effect of curative legislation such as is presented here was stated as follows:

"* * * In Ensign v. Barse, 107 N. Y. [329], 338, 14 N.E. 400, 15 N.E. 401, the court says, speaking of a subsequent validating act: 'If the thing wanting or omitted which constitutes the defect is something, the necessity for which the Legislature might have dispensed with by prior statutes, or if something has been done, or done in a particular way, which the Legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute.' * * * The proposition is thus stated by other authorities: 'Where directions upon the subject might originally have been dispensed with or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature.' Williams v. Board of Supervisors, 122 U.S. [154], 163–164, 7 S. Ct. 1244, 30 L.Ed. 1088. * * * A curative statute or clause may preclude all investigation except 'the single inquiry whether, in the case presented, the effect of applying the statute is to deprive the party of his property without due process of law.'"

The principles above enunciated in Chase v. Trout have been confirmed repeatedly in succeeding California authorities including City of Fairfield v. Hutcheon, 33 Cal.2d 475, 202 P.2d 745.

The bonds when issued will be valid. Let the peremptory writ issue.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

159 Cal.App.2d 468

John T. LASLEY and California Landscape Contractors Association, Inc., a California corporation, Plaintiffs and Respondents,

v.

William BALDWIN, Plumbing Inspector of the City of Sacramento, Defendant and Appellant.

Civ. 9354.

District Court of Appeal, Third District, California.

April 17, 1958.

Rehearing Denied May 13, 1958.

Hearing Denied June 11, 1958.

Action involving question whether landscape contractor, in order to install lawn-sprinkling systems, was required to have a license as a master plumber as provided by city ordinance. The Superior Court, Sacramento County, Ralph McGee, J., held that landscape contractor did not have to have license as master plumber and plumbing inspector of city appealed. The District Court of Appeal, Warne, J. pro tem., held that city could not require holder of a landscape contractor's license from state to be also licensed as a master plumber as a condition precedent to constructing lawn-sprinkler systems.

Judgment affirmed.

1. Licenses ⇐39.46

Individual who had secured from state a landscape contractor's license could not be required, in order to install lawn-sprinkling systems within boundaries of city, to also be licensed as master plumber under city ordinance. West's Ann.Bus. & Prof.Code, § 7090 et seq.

2. Municipal Corporations ⇐592(1)

Matter of landscaping is of general and state-wide concern and where state adopted a broad and comprehensive plan for licensing landscape contractors city could not impose additional requirements in field which was fully occupied by state.

West's Ann.Bus. & Prof.Code, § 7090 et seq.

3. Licenses ⇐39.43

An individual who has secured a landscape contractor's license may employ other duly licensed contractors to install lawn-sprinkling systems. West's Ann. Bus. & Prof.Code, § 7090 et seq.

4. Licenses ⇐39.46

Fact that city could not require a person who held a landscape contractor's license to be also licensed as a master plumber as a condition precedent to constructing a lawn-sprinkling system did not interfere with city's right of inspection to determine whether or not construction and installation of lawn-sprinkling system were proper and safe and met requirements of Health & Safety Code. West's Ann.Health & Safety Code, § 1 et seq.; West's Ann.Bus. & Prof.Code, § 7090 et seq.

Lewis, Lewis & Lewis, Everett M. Glenn, Burton Lancaster, Sacramento, for appellant.

Richard M. Grossberg, Sacramento, for respondents.

WARNE, Justice pro tem.

This is an appeal from a judgment declaring that the holder of a C–27 landscape contractor's license issued by the state of California has the right to install lawn sprinkler systems within the boundaries of the city of Sacramento without further qualifications, examination or testing by the city.

Appellant took the position that the installing of a lawn sprinkler system required the doing of plumbing and therefore refused respondents the license since they were not master plumbers as required by section 212 of Ordinance No. 1541 of the city of Sacramento. Section 212 of the ordinance provides: "Before any person, firm or corporation shall carry on, or engage in the business of plumbing he or it shall first procure a Master Plumber's License and pay the annual license fee imposed on such business." Section 100 of the same ordinance defines plumbing work as follows: "The term 'Plumbing Work' as herein provided shall cover all water and sewer pipes, drainage and waste pipes, and vent pipes, repairing and clearing of stoppages, in, or pertaining to, any building or lot upon which same is situated, * * * also all material and work used in new construction and reconstruction; alterations or buildings that are moved or placing of new or replacing of old pipes, fixtures and appurtenances thereto belonging which are used to conduct water or gas through, to and from, and be ready for the inspection in all cases distribute it in or about any building for any use whatsoever; also all pipes in connection with the vapor or waste of any kind which may be discharged into the sewers or drains or vent pipes."

[1, 2] Though not licensed as master plumbers, respondents are, however, licensed by the state of California as landscape contractors, that is, specialty contractors, "whose principal contracting business is the execution of contracts, usually subcontracts, requiring the art, ability, experience, knowledge, science and skill to intelligently grade and prepare plots and areas of land for architectural horticulture and the decorative treatment, arrangement, planting and maintenance of gardens, lawns, shrubs, vines, bushes, trees and other decorative vegetation; construct pools, tanks, fountains, pavilions, conservatories, hot and green houses, retaining walls, fences, walks, drainage and sprinkler systems; arrange, fabricate and place garden furniture, statuary and monuments, in connection therewith, or to do any part or any combination of any thereof in such a manner that, under an agreed specification, acceptable landscaping projects can be executed." Such license is desig-

nated "Class C–27—Landscaping Contractors." 16 Calif. Administrative Code, ch. 8, sec. 747. Since respondents hold a Class C–27 landscaping contractor's license, issued by the state of California, we feel that to require respondents to be licensed as master plumbers in addition thereto, in order to install sprinkler systems, would violate respondents' rights under their state landscape contractor's license. The state has adopted a board and comprehensive plan for licensing contractors throughout the entire state, for the examination as to their qualification and fitness to engage in their various activities and being only those who prove themselves qualified by satisfactorily passing examinations, and for punishing those who prove themselves incompetent or unfaithful to the trust reposed in them. Business and Professions Code, Div. 3, ch. 9. These are matters of general and statewide concern, and a city may not impose additional requirements in a field which is fully occupied by a state statute. Pipoly v. Benson, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515; Collins v. Priest, 95 Cal.App. 2d 179, 181, 212 P.2d 269. It therefore follows that the appellant does not have the right to require the holder of a Class C–27 landscape contractor's license, to be also licensed as a master plumber as a condition precedent to constructing lawn sprinkler systems.

[3] Appellant argues that to uphold the decree in this case means simply that any contractor, whether "general engineering," "general building" or "specialty" contractor could employ other persons as his employees to do the work involved, by the employment of persons having a state license whose qualifications are established, not by their own examination but by that taken by another. While the decree permits the holder of a C–27 landscape contractor's license to himself personally do the actual work of installing a sprinkler system including the plumbing, it also provides that: "if such a contractor hires an agent, servant or employee to install or supervise the installation of such a system, the said agent, servant or employee must himself be the holder of a valid and subsisting license authorizing him to perform the services of installing or supervising installation of lawn sprinkler systems," that is, a Class C–27 landscaping contractor's license. We see no reason why the party obtaining the contract may not employ other duly licensed contractors to do the work.

[4] Nor does the injunctive portion of the decree leave the city without power to regulate in the field of plumbing. The right of inspection is expressly reserved to the city both by law and the decree. Certainly an incident to such inspection is the right to inspect materials, and the right to determine whether or not construction and installation are proper and safe or meet with the requirements of the Health and Safety Code.

No other points need be discussed.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



159 Cal.App.2d 582

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph Vernon SMALL, Defendant and Appellant.

Cr. 3474.

District Court of Appeal, First District, Division 2, California.

April 21, 1958.

Rehearing Denied May 21, 1958.

Hearing Denied June 17, 1958.

Defendant was convicted of possessing marijuana and from the judgment of the Superior Court, City and County of San Francisco, Walter Carpeneti, J., the defendant appealed. The District Court of

Appeal, Kaufman, P. J., held, inter alia, that the evidence sustained the conviction.

Affirmed.

1. Criminal Law ⇐1159(2)

The verdict of jury cannot be set aside for insufficiency of evidence unless it appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support conclusion reached.

2. Criminal Law ⇐562

Where question involves sufficiency of evidence to sustain verdict, each case must be considered on its own facts.

3. Poisons ⇐9

Evidence sustained conviction of possessing marijuana. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇐553

Statements given by witness who had been believed by trial court can be rejected only if there exists a physical impossibility that statements are true or the falsity of statements is apparent without resorting to inferences and deductions.

5. Poisons ⇐9

In prosecution for possessing marijuana, whether defendant threw a package into the bushes and whether package which officer picked up was the identical one which defendant had thrown was for jury. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law ⇐554

Notwithstanding defendant's testimony exculpates him, it is for jury to say whether he will be believed.

Thomas L. Berkley, Frederic L. Harvey, Jr., Berkeley, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The defendant, Joseph Small appeals from a judgment of conviction entered on a jury verdict of guilty of possessing marijuana in violation of Health and Safety Code, section 11500. His sole contention on appeal is that the judgment should be reversed because of the insufficiency of the evidence.

The record reveals the following facts: Officer Gibeau of the San Francisco Police Department testified that on April 10, 1957, at about 1:15 p. m. he and Officer Dyer were investigating an assault which had occurred the previous day. As the officers drove by Jefferson Park they saw three men standing and talking in the park. One of these men (not the defendant) roughly answered the description of the assault suspect. Officer Dyer got out of the car and approached the three men while Officer Gibeau parked the car. Officer Gibeau then walked toward the men from the South, and heard Officer Dyer call to the men, who had started walking westward, to stop, and two of the men stopped, but the third, the defendant, who had a small dog, continued walking. Officer Gibeau called, "I am a police inspector. Stop, I want to talk to you," but the defendant continued to walk, then began to run and threw something into a clump of bushes. Officer Gibeau fired a shot after which the defendant stopped and was taken to the officers' car with Officer Dyer. Officer Gibeau returned to the clump of bushes, and among gum wrappers, leaves and other debris, found a wax paper with a rubber band containing thirty marijuana cigarettes. He showed this package to the defendant who denied throwing anything into the bushes.

The defendant, testifying in his own behalf stated that on the day in question he had been walking his small dog in the park. There he met and talked to two acquaintances, Mr. Wilson and Mr. McNear. He unleashed his dog and then ran after it to chase the other dogs away. He did not see the officers as they approached or hear Officer Dyer until he heard a shot. He

stated that he was running in pursuit of his dog and did not throw anything into the bushes. Mr. Wilson, testifying for the defendant, stated that Officer Dyer had flashed his badge and identified himself while he, the defendant and Mr. Prince were talking. He also stated that the defendant's dog which was loose, was being chased by other dogs and that the defendant was trying to catch his dog, and that he did not see the defendant throw anything into the bushes.

Defendant contends that his flight and other suspicious factors are not sufficient to sustain the conviction and that the evidence does not support the conclusion that he threw the package subsequently found in the bushes.

[1–3] From the above it is clear that the jury heard testimony which conflicted on several important matters. The verdict indicates that the jury chose not to believe the defendant's version of the facts. The verdict of the jury cannot be set aside for insufficiency of the evidence unless it appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911. Defendant relies on People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180 to argue that the test is that the evidence is such that it can be said that no reasonable doubt of the defendant's guilt existed. In discussing this rule and that of the Newland case in People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 613, the court said that the Zammora case was contrary to the firmly established rule of the Newland case. Defendant also cites People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80, which is equally inapplicable here. It should also be pointed out that in both the Draper and Zammora cases there were numerous defendants, and the chief difficulty was establishing which defendant had committed the offense in question. Where the question is the sufficiency of the evidence to sustain the verdict, each case must be considered on its own facts. People v. Rascon, 128 Cal.App.2d 118, 274 P.2d 899.

Defendant's second contention is based chiefly on the following testimony of the prosecuting witness relating to the object which the officer saw the defendant throw into the bushes.

"The Witness: A. It was white in color, and as I recollect, it was about an inch in circumference, the part that I saw; it had mass, shape, and appeared to be an object.

* * * * * *

"Mr. Hanley: Q. There were other objects—or were there, in the bushes, papers and things of that sort? A. There was debris, papers, leaves.

"Q. Did anything that you observed appear to have the shape or form of what you observed the Defendant to throw?

"Mr. Skillin: Just a minute. That is objected to as calling for an opinion and conclusion of the witness.

"The Court: The objection is sustained. You may rephrase the question, Mr. Hanley.

"Mr. Hanley: Q. Would you describe what you saw otherwise in the clump of bushes, Mr. Gibeau?

"The Court: You mean other than this Exhibit 1 for identification?

"Mr. Hanley: Q. Other than that, yes. A. Gum wrappers, white pieces of paper, such as advertisements of grocery stores that are placed at your door, small torn pieces of paper, white leaves—faded leaves.

"Mr. Skillin: I am sorry, I didn't hear the last.

"The Court: Faded leaves.

"Mr. Hanley: Q. Did you see anything which appeared to be white, about an inch in circumference, and as you described, a mass or substance? A. No, sir, I did not.

"The Court: That is, other than the exhibit?

"Mr. Hanley: Q. Other than the exhibit, yes, your Honor. Incidentally, Mr. Gibeau, concerning People's Exhibit No. 2-C for identification, that is the condition of the ground when we arrived yesterday for photographs, is that correct? A. That is correct.

"Q. I mean, there was no cleaning up or no throwing things in the bushes or anything of that type? A. No."

Defendant maintains that because People's Exhibit No. 1 is about four inches in circumference, the evidence does not support the conclusion that the package found in the bushes was thrown by the defendant. In People v. Physioc, 86 Cal.App.2d 650, the court pointed out at page 652, 195 P.2d 23, at page 24: "It was a question of fact for the jury to determine from the foregoing evidence whether the match box the officer retrieved was the same one defendant had thrown." That rule applies in this case.

[4] Statements given by the witness who had been believed by the trial court can be rejected only if there exists a physical impossibility that the statements are true or the falsity of the statements is apparent without resorting to inferences and deductions. People v. Huston, 21 Cal.2d 690, 134 P.2d 758; People v. Lyons, 47 Cal.2d 311, 303 P.2d 329; People v. Walker, 154 Cal.App.2d 143, 315 P.2d 740.

[5, 6] We think the jury could fairly infer from the testimony that the defendant threw a package into the bushes and that the package the officer picked up was the identical one which the defendant had thrown. Even though the defendant's testimony exculpates him, it is for the jury to say whether he will be believed. People v. Borrego, 211 Cal. 759, 297 P. 17; People v. Ashley, 42 Cal.2d 246, 267 P.2d 271.

No prejudicial error appearing in the record before us the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

159 Cal.App.2d Supp. 869

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ralph E. POWER, aka Ralph E. Powers, Defendant and Appellant.

No. 221586.

Appellate Department, Superior Court, San Diego County, California.

April 4, 1958.

Defendant was convicted in the Municipal Court, South Bay Judicial District, Lowell Howe, J., of violation of labor code by nonpayment of wages, and he appealed. The Superior Court held that where agreed wage was paid and received by employee without complaint or protest, but employee subsequently sought additional compensation on ground that he should have been employed under union contract providing for higher wage, mere civil dispute was involved and labor code provisions regarding offenses in failing to pay wages would violate constitution prohibition against imprisonment for debt if applied to such situation, and hence would not be so applied.

Reversed and remanded with directions.

1. Constitutional Law ⇐83(3)

Every doubt should be resolved in favor of liberty of citizen in enforcement of constitutional provision against imprisonment for debt. West's Ann.Const. art. 1, § 15.

2. Constitutional Law ⇐48, 83(3)
Labor Relations ⇐1642

Where agreed wage was paid and received by employee without complaint or protest, but employee subsequently sought additional compensation on ground that he should have been employed under union contract providing for higher wage, mere civil dispute was involved and labor code provisions regarding offenses in failing to pay wages would violate constitution prohibition against imprisonment for debt if applied to such situation, and hence would

not be so applied. West's Ann.Const. art. 1, § 15; West's Ann.Labor Code, § 216.

3. Labor Relations ⇐1644

The statute making nonpayment of wages an offense is applicable only to wilful withholding of agreed wage, which in law amounts to fraud, and is inapplicable to claim for additional compensation. West's Ann.Const. art. 1, § 15; West's Ann.Labor Code, § 216.

Procopio, Price, Cory & Schwartz, by Kenyon C. Keller, San Diego, for defendant and appellant.

James Don Keller, Dist. Atty., by Albert L. Wells, San Diego, Deputy, for plaintiff and respondent.

Pauline Nightingale, Leon H. Berger, Los Angeles, Conrad Lee Klein, Hollywood, for Division of Labor Law Enforcement, Department of Industrial Relations, of California, amicus curiae.

Before TURRENTINE, P. J., and BURCH and GLEN, JJ.

BY THE COURT.

The defendant appeals from a misdemeanor conviction upon three counts of violation of the State Labor Code. He was charged in the first count with a violation of Section 216; in the second count with a violation of Section 222; in the third count with a violation of Section 204, and in the fourth count with a violation of Section 207. He was acquitted on the fourth count but convicted on the other three.

The facts involved, insofar as they are necessary to a decision of this matter, are not in substantial dispute. In June, 1955, the defendant employed one Silas Brewer in connection with his business. At the time of the employment it was mutually agreed that Brewer should receive as pay the sum of $1.50 per hour. In October, 1955, by like mutual agreement, this pay was increased to $1.65 per hour. Brewer continued in the employment until May, 1956. Both rates of pay are in excess of any minimum wage law. There is no question but that the wages agreed upon were at all times paid to and received by Brewer at the times and in the manner required by law.

The contention arises from the fact that at the time of his employment there was in existence an agreement between defendant and the Shopmen's Local No. 627. The contention was made after the termination of Brewer's employment that by this agreement he should have been paid $1.75 an hour, the defendant contending that Brewer was employed simply as a handyman or general utility man and that his wages were not covered by the union contract. It will be unnecessary for the court in this opinion to determine the question of the construction of the agreement for the reason that the important point is that Brewer was hired at an agreed rate of wages and was paid that wage, and this dispute did not arise until after the termination of his employment.

In the first count defendant was charged with a violation of Section 216 of the Labor Code which makes it a misdemeanor for one having the ability to pay, to unlawfully refuse to pay wages when due, or who falsely denies the wages with the intent to harass, oppress, hinder, delay or defraud the employee. The other two counts here involved did not contemplate any other additional facts but were merely added in the process of trying to plead as many counts, based on the same facts, as could be found in the Labor Code.

The proper determination of the issues involves the correct construction of Section 216 of the Labor Code and whether that section applies to a situation such as is here presented. The courts have had occasion several times to consider the constitutionality of this section, particularly with reference to the claim that it violated Article 1, Section 15 of California Constitution prohibiting imprisionment for civil debt, or in other words, the use of the criminal statutes to collect civil obligations.

[1] "As in the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liber-

ty of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt." 11 Am.Jur. 1128, § 327; see also 16 C.J.S. Constitutional Law § 204(1), p. 1004.

The statute was first upheld in In re Oswald, 76 Cal.App. 347, 244 P. 940. This decision has been disapproved in part by the Trombley case hereafter referred to.

In the case of In re Trombley, 31 Cal.2d 801, 193 P.2d 734, the Supreme Court of California carefully considered all of the decisions upon this subject and again considered the validity of this statute. In this case it is made clear that the criminal procedure may not be used to defeat the constitutional guarantee against imprisonment for debt. It is held, however, that the statute is valid as applying to a situation where an employer wilfully or for the purpose of oppressing or defrauding his employee intentionally or fraudulently withholds his wages. The court stated the rule as follows: "It has long been recognized that wages are not ordinary debts, that they are preferred over other claims, and that because of the economic position of the average worker, and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." In re Trombley, supra, 31 Cal.2d at page 809, 193 P.2d at page 740.

Sacred as are wages paid labor, they would appear to be no more sacred than necessary support for a wife. It is now recognized that when the obligation of support for wife is based on an integrated property settlement agreement, that it is solely a civil contract and cannot be enforced by contempt proceedings which are quasi criminal in their nature. Bradley v. Superior Court, 48 Cal.2d 509, 310 P.2d 634. This was followed by the case of Plumer v. Superior Court, Cal.App., 317 P.2d 995,* and especially in regard to the obligation of a parent to support his children which is based upon the provisions of an integrated property settlement agreement where the court in 317 P.2d at page 997 said:

> "We think it clear, that the provisions for the support of the wife and child as set forth in the property settlement agreement in the instant matter as interpreted by the decision of the Supreme Court, do not fall within the category of law-imposed alimony but rather are contractual and therefore not enforceable by contempt."

It therefore ruled that the contempt proceedings were void as forbidden by the constitutional provisions against imprisonment for debt. It is interesting to note that contempt proceedings are quasi criminal in their nature and that each of these decisions is based upon the provisions of California Constitution Article 1, paragraph 15.

It is a reasonable inference at least, that the foregoing two decisions are applicable in prosecutions for violations of the State Labor Code of the character now before us, as pointed out in the dissenting opinion of Mr. Justice Traynor in the Bradley case, 48 Cal.2d at page 525, 310 P.2d at page 643 in quoting at length from the Trombley case.

In each of the foregoing cases where the Labor Code has been upheld and convictions have been sustained, there has been involved the wilful refusal in the nature of a fraud to pay the wages agreed upon, leaving the employee without his agreed compensation.

It will be seen at once that no such situation is here involved. The employee in question agreed to work for a certain wage and that wage was paid and received without complaint or protest. The sole question involved was that thereafter he sought compensation in addition to his agreed wages by claiming that he should have been employed under a contract with the union. There was involved in such matter nothing but a civil dispute.

In order to determine a proper construction of the law as applied to this situation, it is useful to consider several other situa-

* A hearing of this case was granted by the Supreme Court and it is now pending therein.

tions and the law as applied thereto. It is to be remembered that we do not have involved any statute requiring a payment of any particular wage, but a question of the enforcement of the contract rights. If a contractor agreed to do a piece of work for an agreed price and the work was done and the price paid, he would have no standing in court in an attempt to collect additional compensation on the grounds of mistake in figuring his price. If in a situation such as here involved, at the end of the employment the employer would have made demand upon the employee for a return of the portion of the wages paid upon the ground that he had intended to pay him the minimum union scale and had mistakenly paid him more, the court would unhesitatingly deny such relief upon the grounds of estoppel and upon the ground of accord and satisfaction. It is obvious that if by statute it was made a misdemeanor in such instance for the employee to fail to promptly repay such overpayment, such statute would promptly be held unconstitutional. It is not a sound situation where laws apply to one part of the population and not to the other.

[2, 3] It follows that if Section 216 of the Labor Code could be susceptible of supporting a prosecution under such facts as are here involved, it would be unconstitutional to the extent of such construction. Sound rules of construction, therefore, require that the section be construed as applicable only to the wilful withholding of the agreed wage (which in law amounts to a fraud), and that it is not applicable to a claim for additional compensation such as here involved.

What has been said disposes of the other counts. Section 204 makes it a misdemeanor to fail to pay wages twice a month. No such situation was presented in this case and the third count should not have been submitted to the jury. Section 222 of the Labor Code makes it a misdemeanor to wilfully, and with intent to defraud, withhold any wage arrived at through collective bargaining. The constitutionality of Section 222 seems not to have been passed upon. If this section is susceptible to a construction such that it authorizes a prosecution for misdemeanor under any circumstances other and different than that involved in Section 216, then it is clearly void.

Appellant, among other things, assigns as error the failure of the employee or the union, on his behalf, who were relying on the contract between Shopmen's Local 627 and the appellant, to invoke any of the arbitration procedures set forth in the contract before invoking the aid of the Labor Commissioner in his official capacity, the civil remedies provided by law, or the criminal provisions of the Labor Code. Since the judgment must be reversed for reasons heretofore stated, we deem it unnecessary to pass upon the additional assignments of error.

The judgment of the Municipal Court therefore must be reversed, and the case is remanded with directions to dismiss the complaint.



159 Cal.App.2d Supp. 881

In the Matter of the Agreed Case Between Paul ZIEGELMAIER and Eleanore Ziegelmaier, husband and wife, Plaintiffs and Appellants,

v.

Rudolph RASMUSSEN and Gloria Rasmussen, husband and wife, Defendants and Respondents.

C. A. 236.

Appellate Department, Superior Court, Alameda County, California.

April 21, 1958.

Proceeding to determine whether vendors of property were entitled to interest for unpaid balance of purchase price from date that purchasers entered into possession or from date when escrow agreement was closed. The Municipal Court in and for the Oakland-Piedmont Judicial District, Homer W. Buckley, J., rendered judgment for

purchasers, and vendors appealed. The Superior Court, Ledwich, J., held that where escrow agreement provided that purchasers were to pay interest on balance due on purchase price but did not state time when interest was to commence, and unpaid balance of purchase price was in excess of 70% of total purchase price, vendors were entitled to interest from date that purchasers entered into possession.

Reversed and Municipal Court directed to enter judgment in favor of vendors.

Hoyt, J., dissented.

1. Interest ⇐39(1)

Where escrow agreement entered into in connection with sale of property provided that purchasers were to pay interest on balance due on purchase price but did not state time when interest was to commence, and unpaid balance of purchase price was in excess of 70% of total purchase price, vendors were entitled to interest from time that purchasers entered into possession, and not merely from later date when escrow was closed.

2. Interest ⇐39(1)

Where sales contract shows an intent to pay interest on unpaid purchase price but simply fails to specifically state time at which interest is to commence, the law implies an agreement that purchaser in possession and enjoying benefits thereof shall pay interest on unpaid purchase price from date of his possession in absence of anything in contract to indicate a contrary intention.

Marks & Pedersen, San Francisco, for appellants.

Young & Young, Quincy, for respondents.

LEDWICH, Judge.

This case was submitted to the trial Court and is submitted to this Court pursuant to a stipulated set of facts under Code of Civil Procedure, § 1138, and an agreement of sale between appellants and respondents, which is Exhibit A to the complaint, dated June 18, 1956, wherein appellants are the sellers and respondents are the buyers. The property covered by the agreement is a summer resort in Plumas County.

The escrow was closed August 15, 1956, but respondents, pursuant to the agreement, entered into possession of the property on June 18, 1956, and received all of the rents and profits therefrom from June 18, 1956. The sole question presented to this Court is whether or not appellants are entitled to interest on the unpaid balance of the purchase price, namely, $123,000, from June 18, 1956, or only from August 15, 1956. No date for the commencement of interest was specified in the agreement.

The trial Court held that interest ran only from August 15, 1956, the date of closing the escrow. In so holding we think the trial Court was in error.

The agreement was not silent on interest. Paragraph E, page five of the agreement, provides for interest as follows:

> "E. The sellers agree to deliver their property free and clear of all encumbrances. Sellers agree to carry a note and first deed of trust secured by property at Bucks Lake. Above described in the amount of $123,000.00, payable as follows (interest at 5% per annum)—$12,000.00 on or before September 15, 1956, the balance of approximately $111,000.00 to be paid in 15 equal installments of $7400.00 each."

Paragraph E of the agreement definitely shows the intent of the parties that the unpaid balance of the purchase price was to draw interest at 5% per annum. There is nothing in the agreement that interest was to commence only at the time the escrow was closed, which could have been a matter of several months. In the meantime the buyers would be enjoying the rents and profits of the sellers' property and the sellers receiving no return whatever upon the balance of purchase price unpaid.

[1] The total purchase price was $155,000 for the real and personal property, and

approximately $10,000 for the inventory of stock in trade. The unpaid balance of the purchase price, $123,000, was in excess of 70% of the total purchase price. It would be most inequitable for the buyers to receive all the rents and profits from the property purchased, while the sellers received no income on over 70% of the consideration that they were to receive, until some indefinite date in the future when the escrow might be closed. The language of Paragraph E, which provides for interest on the unpaid purchase price, should not be so construed in the absence of anything to that effect in the agreement.

The trial Court, in its "Memorandum Opinion" cites cases to the effect that where no interest is reserved none can be claimed, and cites the following authorities: Upton v. Gould, 64 Cal.App.2d 814, 817, 149 P.2d 731; Gibbs v. Mendoza, 103 Cal.App. 183, 186, 284 P. 250; 75 A.L.R. 316; 25 A.L.R. 2d 953; 55 Am.Jur. 773.

The holding of these authorities may be summarized by the following statement from Upton v. Gould, 64 Cal.App.2d at page 817, 149 P.2d at page 732:

> "It is the generally well-settled rule that where a contract makes *no provision* for the payment of interest no interest can be charged or collected prior to the time that payment falls due."

After citing several California cases, the Court continues:

> "The contract here is *silent* on the subject of interest." (Emphasis ours.)

[2] It cannot be said, in view of Paragraph E of the agreement, that this contract makes "no provision for" or "is silent on the subject of interest." It clearly shows an intent to pay interest on the unpaid purchase price but simply fails to specifically state the time at which interest is to commence. Under such circumstances the rule in equity is that the purchaser in possession and enjoying the benefits thereof shall pay interest on the unpaid purchase price from the date of his possession. The law implies such an agreement in the absence of anything in the contract to indicate a contrary intention. The well considered case of Volk v. Atlantic Acceptance & Realty Co., 142 N.J.Eq. 67, 59 A.2d 387, 391, declares the rule we deem applicable to this case as follows:

> "* * * Where the purchaser is in possession, equity will in general require him to pay interest on the unpaid purchase-money. The parties may, indeed, control the matter by their stipulations, but so strongly does equity hold to the principle that a purchaser in possession shall pay interest, that it will look at any agreement which appears to prevent the application of the rule, in the light of the general principle, and since it interposes only according to conscience, will refuse to compel execution of it where it grossly violates the rule."

And on page 392 of 59 A.2d

> "And so, in the absence of some incompatible equity, it seems to be the predominant weight of judicial opinion in courts of equitable jurisdiction that in the ordinary case to accord the purchaser the beneficial enjoyment of the possession of the property without liability for any interest on the retained purchase money, is inequitable."

The above rule is the generally prevailing rule. See 25 A.L.R.2d 953 and 75 A. L.R. 316, at page 343.

The judgment is reversed, and the Municipal Court is directed to enter judgment in favor of plaintiffs and appellants and against defendants and respondents for interest on the sum of $123,000 from June 18, 1956, to August 15, 1956.

WAGLER, P. J., concurs.

HOYT, Judge.

I dissent: Paragraph E of the contract clearly means that sellers agree to accept a note secured by a first deed of trust on the property at Bucks Lake, that this note will be in the amount of $123,000, bear interest at 5% per annum, and be payable in installments as stated in Paragraph E. In my opinion this paragraph not only does

not show an intent to pay interest prior to the date of the note, but in fact negatives any such intent.

Upton v. Gould, 64 Cal.App.2d 814, 149 P.2d 731, establishes the principle that where no interest is reserved, none can be claimed. Under the contract in question no interest was reserved for the period of time prior to the execution of the note. It would therefore seem to follow under this case that the courts of this State should not require the payment of interest in situations where it is not reserved in the agreement.

Volk v. Atlantic Acceptance & Realty Co., 142 N.J.Eq. 67, 59 A.2d 387, 392, holds that equity in ordering specific performance of an agreement of purchase and sale which does not provide that the purchaser in possession shall pay interest on the unpaid purchase money will, *"in the absence of some incompatible equity"* require the purchaser to pay interest on the retained purchase money. In the instant case, under the facts before us, in my opinion it cannot be said that there is no incompatible equity.



159 Cal.App.2d Supp. 854

CALIFORNIA BANK, etc., Plaintiff,

v.

Ruth B. SCHLESINGER, etc., et al., Defendants,

Ruth B. Schlesinger, etc., Defendant and Appellant,

Herbert Shultz, etc., et al., Defendants and Respondents.

Civ. A. 9433.

Appellate Department, Superior Court, Los Angeles County, California.

March 26, 1958.

Bank brought interpleader action against divorced wife, who claimed homestead exemption, and her judgment creditors. The Municipal Court of the Los Angeles Judicial District, May Lahey, J., entered judgment adverse to the divorced wife, and she appealed. The Appellate Department of the Superior Court, David, J., held that where title to certain joint tenancy property was homesteaded by husband and wife, and thereafter on March 2, 1948 wife secured final divorce decree, which did not assign homestead, and on September 18, 1950, her former husband quitclaimed his joint tenancy interest to her, and after divorce she continued to reside alone on realty and executed trust deed on it to secure note, and there was a foreclosure of trust deed on January 15, 1957, and bank brought interpleader action on February 14, 1957 against her and her creditors, who held judgments on debts incurred by her after divorce, homestead exemption from execution existed following divorce, and she was entitled to all interpleaded funds, which were less than statutory exemption.

Judgment reversed with directions to enter a judgment for divorced wife.

1. Homestead ⇐23

Where title to certain joint tenancy property was homesteaded by husband and wife, and thereafter on March 2, 1948, wife secured final divorce decree, which did not assign homestead, and on September 18, 1950, her former husband quitclaimed his joint tenancy interest to her, and after divorce she continued to reside alone on realty and executed trust deed on it to secure note, and there was a foreclosure of trust deed on January 15, 1957, and bank brought interpleader action on February 14, 1957, against her and her creditors, who held judgments on debts incurred by her after divorce, homestead exemption from execution existed following divorce, and she was entitled to all interpleaded funds, which were less than statutory exemption. West's Ann.Civ.Code, §§ 146, 161a, 1238, 1242–1244, 1260, 1263, 1265–1269, 3529.

2. Homestead ⇐84

A homestead can be declared on property held in joint tenancy or tenancy in common. West's Ann.Civ.Code, § 1238.

3. Homestead ⇐81

As between a creditor and claimant of a homestead exemption, state of claimant's title is immaterial. West's Ann.Civ.Code, § 1238.

4. Homestead ⇐110
Partition ⇐12(3)

Where there is a homestead on a joint tenancy, each party, by homesteading, waives right to set aside his or her separate interest by partition, and each loses the right to convey the realty unilaterally or to bind it for debts. West's Ann.Civ.Code, §§ 1242, 1265.

5. Homestead ⇐15

The only way to terminate a homestead on a joint tenancy is by the modes provided in the Civil Code. West's Ann.Civ.Code, §§ 146, 1243, 1244, 1265.

6. Homestead ⇐15

Homesteading gives exemption from forced sale under the Civil Code, and thereafter exemption is a continuing right, until there is an abandonment by the parties, or by the sole party claiming the homestead. West's Ann.Civ.Code, §§ 1243, 1265.

7. Homestead ⇐77

On any sale by homestead claimant, homestead exemption attaches to proceeds of sale. West's Ann.Civ.Code, § 1265.

8. Divorce ⇐253

In a pending divorce action, court may make a temporary assignment of the homestead at any stage of the proceeding. West's Ann.Civ.Code, § 146.

9. Divorce ⇐249(6)

Disposition of homestead on divorce is regulated by section of the Civil Code dealing with community property and homestead and disposition on divorce or separate maintenance, and since interest of each joint tenant is separate property, applicable provision for disposition on divorce is provision that if homestead was selected from separate property of either, it shall be assigned to former owner, subject to power of court to assign it for a limited period to the innocent party. West's Ann.Civ.Code, § 146.

10. Homestead ⇐158

Homestead exemption of divorced wife continues after divorce and after relinquishment by divorced husband of his property interest to her, and after she ceases to have a family. West's Ann.Civ.Code, §§ 146, 1265.

11. Divorce ⇐249(6)

Under sections of the Civil Code dealing with establishment of homestead and with community property and homestead and disposition on divorce or separate maintenance, it is mandatory, to extent that property interest of each of the spouses in divorce action is separate, that court assign homestead on such interest to each separate property owner on divorce, and, as they are already joint tenants, it is unnecessary to make any order as to title. West's Ann.Civ.Code, §§ 146, 1265.

12. Divorce ⇐249(6)

Failure of court in divorce action specifically to assign homestead back to former owner as required by the Civil Code is immaterial, since that which is required to be done is considered done in such instances. West's Ann.Civ.Code, §§ 146, 1265, 3529.

13. Divorce ⇐249(6)

Right of one spouse on divorce to secure assignment in property rights of the other, which have been created by the homestead, perishes by failure to secure assignment of that homestead right in property of the other spouse in the divorce decree. West's Ann.Civ.Code, §§ 146, 1265.

14. Homestead ⇐158

Dicta that divorce terminates homestead exemption rights because it terminates the family relationship is not the law

in California since adoption of sections of the Civil Code dealing with establishment of homestead and community property and homestead and disposition on divorce or separate maintenance. West's Ann.Civ. Code, §§ 146, 1265.

15. Homestead ⇐159

Death does not destroy homestead or homestead exemption. West's Ann.Civ. Code, § 1265.

16. Homestead ⇐18

A childless widower is entitled to maintain homestead exemption. West's Ann. Civ.Code, § 1265.

17. Homestead ⇐161

Nonresidence does not destroy homestead exemption. West's Ann.Civ.Code, § 1265.

18. Homestead ⇐162(1)

Temporary absence does not constitute an abandonment of homestead. West's Ann.Civ.Code, § 1265.

19. Homestead ⇐161

Removal to another state and acquisition of residence there does not destroy homestead exemption. West's Ann.Civ. Code, § 1265.

20. Courts ⇐107

Language used by court in an opinion is to be understood in light of facts and issue then before the court.

21. Statutes ⇐190

Where code provisions are plain and unequivocal on point in controversy, it is hardly necessary to cite adjudicated cases to support the point, since statute law must control, whether such cases are in harmony therewith or not.

22. Courts ⇐92

Obiter dicta is not binding in later controversies.

23. Courts ⇐92

An oft repeated dictum does not overrule a prior decision specifically determining the question.

24. Courts ⇐90(6)

Conformity with a prior decision is never required, if conformity will perpetuate a manifest error or absurdity.

25. Courts ⇐89

A single decision, made without taking notice of a statute and in fact, setting aside the statute, cannot be invoked as authority under rule of stare decisis.

Albert Weiner, Los Angeles, for appellant.

I. R. Shultz, Los Angeles, for respondent Herbert Shultz, etc.

Bertram S. Harris, Los Angeles, for respondent Pacific Thrift and Loan.

Frank Alef, Los Angeles, for respondent Eugene P. Adashek.

DAVID, Judge.

[1] In this case, title to certain joint tenancy property was homesteaded by husband and wife. Thereafter on March 2, 1948, the wife, the defendant here, secured a final decree of divorce which did not assign the homestead as it could have done under Civil Code, sec. 146. On September 18, 1950, the defendant's former husband quitclaimed his joint tenancy interest to her. After the divorce, she continued to reside alone upon the property, and executed a trust deed upon it to secure a note. The creditors hold judgments upon debts of the defendant Schlesinger, incurred after the divorce, and are given judgment herein against the net proceeds held by the interpleading plaintiff for the defendant after foreclosure of the trust deed and payment of the note. The foreclosure occurred on January 15, 1957. This action in interpleader was commenced February 14, 1957. We conclude that the homestead exemption from execution existed following the divorce, and defendant is entitled to all of the funds interpleaded, since they are less than the exemption (Civil Code, sec. 1260, pars. 1, 2) and their exempt character con-

tinued following the foreclosure sale to the time of this action (Civil Code, sec. 1265).

[2, 3] It is now established that a homestead can be declared upon property held in joint tenancy or tenancy in common. Civil Code, sec. 1238; In re Estate of Kachigian, 1942, 20 Cal.2d 787, 790, 128 P.2d 865. As between a creditor and the claimant of a homestead exemption, the state of the latter's title is immaterial. Brooks v. Hyde, 1869, 37 Cal. 366.

[4–8] What were the incidents to a homestead on a joint tenancy? (1) By homesteading, each party waives the right to set aside his separate interest by partition (Walton v. Walton, 1943, 59 Cal.App. 2d 26, 31 et seq., 138 P.2d 54; Kaupe v. Kaupe, 1955, 131 Cal.App.2d 511, 280 P.2d 856; see Barber v. Babel, 1868, 36 Cal. 11, 17, and Hannon v. Southern Pac. R. Co., 1909, 12 Cal.App. 350, 358, 107 P. 335). (2) Each party loses the right to unilaterally convey the property (Civil Code, sec. 1242; Swan v. Walden, 1909, 156 Cal. 195, 103 P. 931) or to bind it for debts (cf. Bartholomew v. Hook, 1863, 23 Cal. 277); (3) the *only* way to terminate the homestead is by the mode provided in Civil Code, secs. 1243–1244, 1265 and 146. Consult: Tipton v. Martin, 1886, 71 Cal. 325, 328, 12 P. 244; Lubbock v. McMann, 1889, 82 Cal. 226, 22 P. 1145; see Mills v. Stump, 1912, 20 Cal. App. 84, 88–89, 128 P. 349. (4) The homesteading gives exemption from forced sale under Civil Code, sec. 1243. Thereafter, this exemption is a continuing right, until there is an abandonment by the parties, or by the sole party claiming it. Upon any sale by the claimant, the exemption attaches to the proceeds (Civil Code, sec. 1265). (5) In a pending divorce action, the court may make a temporary assignment of the homestead at any stage of the proceeding; and upon dissolution is to make certain assignments of the homestead.

[9, 10] The disposition of a homestead upon divorce is now regulated by Civil Code, sec. 146. Since the interest of each joint tenant is separate property (Kaupe v. Kaupe, supra, 1955, 131 Cal.App.2d 511, 513, 280 P.2d 856), the applicable provision for disposition on divorce is subparagraph Four: "If * * * selected from the separate property of either, * * * it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the [innocent party]." Civil Code, sec. 1265 is general in its terms: "From and after the time the [homestead] declaration is filed for record, the premises therein described constitute a homestead." There then is a statement as to survivorship when the homestead has been established by a married person, and when "in other cases"; and then provides: "in *no case* [emphasis added] shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale." In a case, such as this, the homestead exemption of the ex-wife continued after divorce and after the ex-husband's relinquishment of his property interest to her (City Store v. Cofer, 1896, 111 Cal. 482, 44 P. 168; Brandon v. Faria, 1929, 99 Cal.App. 594, 597, 279 P. 192; In re Estate of Teel, 1949, 34 Cal.2d 349, 352, 354, 210 P.2d 1; continues after claimant ceases to have a family: Roth v. Insley, 1890, 86 Cal. 134, 24 P. 853). If a homestead can be assigned (Civil Code, sec. 146), it obviously continues as a *homestead* after divorce. It would defeat Civil Code, secs. 146 and 1265 if it were held that "since divorce terminated the family, there was no *homestead* to assign" to the former owner.

[11, 12] To the extent that the property interest of each of the ex-spouses was separate, it was mandatory under Civil Code, secs. 146 and 1265 that the court assign the homestead upon such interest to each separate property owner upon divorce. As they were already joint tenants, it was unnecessary to make any order as

to title. The statute is mandatory, as to the homestead. A failure of the court specifically to assign the homestead back to the former owner, however, is immaterial. That which is required to be done is considered done (Civil Code, sec. 3529) in such instances. This was the implied holding under like circumstances in City Store v. Cofer, 1896, 111 Cal. 482, 44 P. 168. In this case, the entire title was vested in the ex-wife before the creditors' claims were reduced to judgments, but remained subject to the homestead exemption. City Store v. Cofer, supra, 1896, 111 Cal. 482, 44 P. 168; Zanone v. Sprague, 1911, 16 Cal.App. 333, 342, 116 P. 989; Roth v. Insley, supra, 1890, 86 Cal. 134, 24 P. 853; cf. Walton v. Walton, supra, 1943, 59 Cal.App.2d 26, 138 P.2d 54; Dougherty v. White, 1924, 112 Neb. 675, 200 N.W. 884, 885, 36 A.L.R. 425. In City Store v. Cofer, supra, 1896, 111 Cal. 482, 44 P. 168, it was unsuccessfully contended that the divorce *ipso facto* terminated the homestead exemption, citing Shoemake v. Chalfant, 1874, 47 Cal. 432, 435, and Burkett v. Burkett, 1889, 78 Cal. 310, 20 P. 715, 3 L.R.A. 781.

[13] Under Civil Code, sec. 146, the right of one spouse upon divorce to secure an assignment in the property rights of the other, created by the homestead, perishes by failure to secure an assignment of that homestead right in the property of the other ex-spouse in the divorce decree. Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989; Lang v. Lang, 1920, 182 Cal. 765, 190 P. 181.

Claimants rest their case upon the general statement made as dicta in some cases and merely recited in others, usually in relation to title, that divorce terminates the homestead exemption rights because it terminates the family relationship. Remley v. Remley, 1920, 49 Cal.App. 489, 490, 193 P. 604; Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181; passim, Walton v. Walton, supra, 1943, 59 Cal.App.2d 26, 29, 138 P.2d 54. The incongruity of such dicta with Civil Code, secs. 146 and 1265 has not gone unnoticed by the profession. Consult: 26 Cal.L.Rev. 475 (1938); Healey, Disposition of Homestead on Divorce and Death (1954), 29 Los Angeles Bar Assn. Bulletin 131, 151.

[14] Any such unqualified statement, as applied to all incidents of a homestead, is certainly not the law in California, since the adoption of the code sections in question. The termination of the family by the majority of children, the death of one of the spouses, or a change in residence, continued residence once having been considered essential, have been abrogated as controlling factors. Superseding early statutes (Stats. 1860, p. 311 and 1862, p. 519, sec. 5) and court decisions based upon them to the contrary (such as Santa Cruz Bank of Savings v. Cooper, 1880, 56 Cal. 339; Revalk v. Kraemer, 1857, 8 Cal. 66, cited in Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181; cf. In re Estate of Boland, 1872, 43 Cal. 640), Civ.Code, secs. 1266–1269 make available to "any person other than the head of a family" a homestead exemption against creditors' claims. Hohn v. Pauly, 1909, 11 Cal.App. 724, 106 P. 266; cf. Stat. 1860, p. 87, sec. 1; Gary v. Estabrook, 1856, 6 Cal. 457. Under the specific terms of the earlier statutes and prior to enactment of Civil Code, secs. 1265, 1263, 1266–1269, it had been held that "no family, no homestead." Change was noted in 29 C.J. p. 932, note 86, citing Watson v. His Creditors, 1881, 58 Cal. 556 and Santa Cruz Bank of Savings v. Cooper, supra, 1880, 56 Cal. 339, both under the 1862 statute; Gee v. Moore, 1859, 14 Cal. 472 and Revalk v. Kraemer, supra, 1857, 8 Cal. 66, under the 1851 statute. This is no longer the rule, under Roth v. Insley, supra, 1890, 86 Cal. 134, 24 P. 853, citing Civil Code, sec. 1265.

Confusing and contradictory statements are found in many homestead cases. There are instances in which later cases have cited earlier ones, which have been overruled in the interim, or which have been superseded by later statutes or code sections. Case law dependant upon the terms

of early statutes has been applied, though such statutes have long since been repealed and superseded, or amended to overcome the previous case law. Under the early homestead acts by which only husband or wife, or head of the family, could declare a homestead, the homestead was held to be abandoned or dissolved, upon a variety of circumstances. Some cases announced, as do the present code sections, that once a homestead, always a homestead, unless abandoned as provided by the code (Taylor v. Hargous, 1854, 4 Cal. 268, 273; Tipton v. Martin, supra, 1886, 71 Cal. 325, 12 P. 244), and that a transfer of property rights in which both husband and wife joined did not terminate the homestead (Bowman v. Norton, 1860, 16 Cal. 213). Hence, the parties could not seek partition (Barber v. Babel, supra, 1868, 36 Cal. 11, 17). Under the specific terms of early acts, the homestead was held to terminate when a family ceased to exist because of death of one of the parties (Revalk v. Kraemer, supra, 1857, 8 Cal. 66, 74; Shafter, J., in McQuade v. Whaley, 1867, 31 Cal. 526, 535; Gee v. Moore, supra, 1859, 14 Cal. 472, 476–477; Johnston v. Bush, 1874, 49 Cal. 198); or when minor children composing the family reached their majority so that one parent ceased to be head of a family (as required by Stats. 1860, p. 311; Gambette v. Brock, 1871, 41 Cal. 78, 79); or by desertion by one of the spouses (cf. 29 C.J. p. 933, sec. 345 and notes 89–99; 40 C.J.S. Homesteads § 159) though this would not work an abandonment of the homestead exemption as to the other spouse (Lies v. De Diabler, 1859, 12 Cal. 327); or by nonresidence of a claimant (Gregg v. Bostwick, 1867, 33 Cal. 220; cf. Mann v. Rogers, 1866, 35 Cal. 316); or by cessation of residence on the homestead thereafter (cf. Dawley v. Ayers, 1863, 23 Cal. 108; Barber v. Babel, supra, 1868, 36 Cal. 11, 20); contra (Holden v. Pinney, 1856, 6 Cal. 234); or by non-possession by a claimant (In re Crowey, 1886, 71 Cal. 300, 12 P. 230); or when a widow remarried (In re Estate of Boland, supra, 1872, 43 Cal. 640).

The act of 1867–8, p. 117, sec. 3, specifically provided that homesteads declared by joint tenants or tenants in common were subject to partition by the parties. Higgins v. Higgins, 1873, 46 Cal. 259.

[15–19] In contrast to previous California homestead laws, the effect of Civil Code, secs. 1265 and 146 was to maintain the declared homestead as an estate in land, which only could be abandoned or relinquished in the statutory mode, not by cessation or change of the status of the personal relationships upon which the homestead was declared (Roth v. Insley, supra, 1890, 86 Cal. 134, 24 P. 853). Death does not destroy the homestead nor the exemption (Watson v. Peyton, 1937, 10 Cal. 2d 156, 73 P.2d 906; Dickey v. Gibson, 1896, 113 Cal. 26, 45 P. 15; Ions v. Harbison, 1896, 112 Cal. 260, 44 P. 572; Sanders v. Russell, 1890, 86 Cal. 119, 120, 24 P. 852; In re Ackerman's Estate, 1889, 80 Cal. 208, 22 P. 141; Tyrrell v. Baldwin, 1889, 78 Cal. 470, 475, 21 P. 116; In re Estate of Ronayne, 1951, 104 Cal.App.2d 53, 231 P.2d 105). A childless widower is entitled to maintain the homestead exemption. Robinson v. Dougherty, 1897, 118 Cal. 299, 50 P. 649. Non-residence does not destroy the exemption (Tipton v. Martin, supra, 1886, 71 Cal. 325, 327, 12 P. 244, and discussion; cf. Bowman v. Norton, supra, 1860, 16 Cal. 213; Barber v. Babel, supra, 1868, 36 Cal. 11, 18; Herrold v. Reen, 1881, 58 Cal. 443; Porter v. Chapman, 1884, 65 Cal. 365, 4 P. 237). Temporary absence does not constitute an abandonment (Thatcher v. Van Bever, 1934, 139 Cal.App. 658, 34 P.2d 740); nor removal to another state and acquisition of residence there (Tipton v. Martin, supra, 1886, 71 Cal. 325, 12 P. 244; Lubbock v. McMann, supra, 1889, 82 Cal. 226, 229, 22 P. 1145).

In Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989, a homestead was declared on the separate property of the husband by his declaration. In a divorce proceeding, there was no assignment of the homestead under Civil Code, sec. 146, but it was held the property reverted to the hus-

band, the former owner, when the decree was silent; and though indicating (16 Cal. App. at page 338, 116 P. at page 991) that the homestead as a separate estate in the wife was destroyed by divorce, still recognized that the husband, as former owner, was entitled to the homestead exemption of his estate (16 Cal.App. at page 342, 116 P. at page 992) citing City Store v. Cofer, supra, 1896, 111 Cal. 482, 44 P. 168. It perhaps is important to note that Brady v. Kreuger, 1896, 8 S.D. 464, 66 N.W. 1083, 1085, and Rosholt v. Mehus, 1894, 3 N.D. 513, 57 N.W. 783, 23 L.R.A. 239, were cited. These cases hold no more than that where the divorced wife holds no interest, even as dower, in the husband's separate property, and no longer being a wife could never be a widow, all of *her* claims upon the husband's property ceased upon divorce. In other words, the qualified joint tenancy during marriage that she had in her husband's property was no more. This was the contention of the appellant in Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, supported by the single citation of Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989, as disclosed in the briefs on file. Zanone v. Sprague did not hold that as to creditors, her own interest was no longer protected by the homestead; since Civil Code, sec. 1265 specifically provides that as to property assigned to its former owner upon dissolution of the marriage, the exemption extends to "the debts of *the* owner."

In Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, neither Civil Code, sec. 146 nor Civil Code, sec. 1265 was cited to the court, nor was City Store v. Cofer, supra, 1896, 111 Cal. 482, 44 P. 168, though its rule was expressly recognized in Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989, which was argued to the court. As disclosed by the opinion, and the briefs filed upon the appeal, Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, was an appeal from an interlocutory judgment in partition under Code Civ.Proc. sec. 752, brought by an ex-wife against her former spouse, to divide the homesteaded community property. The record on appeal indicates that record title to the property homesteaded was in the husband alone. Although the pleadings in the divorce action did not put the disposition of property in issue (separate property would not be an issue) nor disposition of the homestead, it was assigned to the plaintiff husband, by the final decree. Perhaps, the trial court believed at that juncture that under Civil Code, sec. 146, such assignment was automatic and mandatory as to homesteaded property formerly belonging to the husband, as evidenced by the record title. The ground of divorce was the desertion of the wife, which at least prior to Civil Code, sec. 1265 and 1243 was by some authorities held to be an abandonment of the homestead upon her part but not on the part of the innocent spouse. 29 C.J. p. 933, sec. 345, note 99; 40 C.J.S. Homesteads § 159.

The final decree of divorce secured by Lang, assigning the homestead to him, became a final judgment. Thereafter, the former wife instituted a suit to partition the homesteaded property under C.C.P. sec. 752, claiming that in fact it was community property. Mr. Lang interposed a general demurrer, claiming (a) the divorce decree was final and conclusive as to his property rights, (b) that if not, the homestead had not been abandoned; and could only be abandoned as provided in Civil Code, sec. 1243; and that while the homestead continued, no action for partition could be entertained. Hannon v. Southern Pac. R. Co., supra, 1909, 12 Cal.App. 350, 358, 107 P. 335. His demurrer having been overruled, he failed to answer; and upon his default the trial court upheld the wife's claim that the property was community and entered an interlocutory judgment to partition the property. The appeal was brought to the Supreme Court after decision by the District Court of Appeal. The District Court of Appeal held that since the division of property was not placed in issue in the divorce action, the trial court's judgment assigning the husband all the homestead rights was not conclusive upon the ex-wife, plaintiff therein; and partition of the com-

munity property was appropriate. Cases cited in that court were Coats v. Coats, 1911, 160 Cal. 671, 118 P. 441, 36 L.R.A., N.S., 844, which did not relate to divorce, but annulment; De Godey v. Godey, 1870, 39 Cal. 157; Biggi v. Biggi, 1893, 98 Cal. 35, 32 P. 803; Kirschner v. Dietrich, 1895, 110 Cal. 502, 42 P. 1064; Brown v. Brown, 1915, 170 Cal. 1, 147 P. 1168.

The Supreme Court reached the same conclusion on this point.

In Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, the term "homestead" is used in the sense of the property right imposed by the homestead upon the legal title, rather than as the homestead exemption from claims of creditors. Where the homestead is placed on community property by husband and wife, it restricts the right of disposition by the husband or wife of their several interests. There is a mutual encumbrance against severance or disposition, reciprocally against the other's interest. In holding that dissolution of the marriage terminated the "homestead", the precise point was that partition was no longer inhibited by the reciprocal interest of each in the community property interest of the other. In re Estate of Winslow, 1898, 121 Cal. 92, 53 P. 362. Partition of the property might have proceeded under Civil Code, sec. 147,[1] if properly claimed in the divorce action. Since it was not, the Court held partition was available under C.C.P. sec. 752. The case of Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989, upon which the Supreme Court relied, cited the case of City Store v. Cofer, supra, 1896, 111 Cal. 482, 44 P. 168, but indicated that it was not necessary to decide any question as to the continuance of the homestead exemption. City Store v. Cofer, supra, was neither cited nor negatived by the Supreme Court (182 Cal. at page 771, 190 P. at page 183) as it referred to Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989. Even if the homestead as to the interest of one party should cease, a homestead exemption may be held by one joint tenant or tenant in common, though the homestead may not extend to the other tenant's interest. In re Estate of Kachigian, supra, 1942, 20 Cal.2d 787, 128 P.2d 865; Walton v. Walton, supra, 1943, 59 Cal.App.2d 26, 138 P.2d 54.

[20] Language used in an opinion is to be understood in the light of the facts and the issue then before the court. Porter v. Bakersfield & Kern Electric Ry. Co., 1950, 36 Cal.2d 582, 590, 225 P.2d 223, on the proposition *no claim, no lawsuit.*

[21–25] Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, did not determine the rule when joint tenancy property was concerned. The court did not consider the mandatory language of Civil Code, secs. 146–147, that upon divorce the homestead selected from the separate property of the parties *"shall be assigned"* to the former owner. As authority, the opinion should be confined to the facts therein under consideration (chief of which was defendant's default and admission of the allegations of the complaint in partition). The language "no family, no homestead" is not *stare decisis* as to subsequent decisions when such application will be plainly inconsistent with the statute. Cardenas v. Miller, 1895, 108 Cal. 250, 39 P. 783; Wood v. Roach, 1932, 125 Cal.App. 631, 638, 14 P.2d 170. "But where, as in this case, the Code provisions are plain and unequivocal upon the point in controversy, it is hardly necessary to cite adjudicated cases to support the same, as the statute law must control, whether such cases are in harmony therewith or otherwise." Dover v. Pittsburg Oil Co., 1904, 143 Cal. 501, 505, 77 P. 405, 406. *Obiter dicta* is not binding in later controversies (Greenfield v. Mather, 1948, 32 Cal.2d 23, 194 P.2d 1; cf. Mix v. Ingersoll Candy Co., 1936, 6 Cal.2d 674, 679, 59 P.2d 144); and an oft repeated dictum does not overrule a prior decision specifically determining the question. Cohn v. Central Pac. R. Co., 1886, 71 Cal. 488, 12 P. 498. Conformity never is required if it would perpetuate a manifest error or absurdity. Childers v. Childers, 1946, 74 Cal.App.2d

1. Now Civil Code, § 146.

56, 61–62, 168 P.2d 218. A single decision, made without taking notice of a statute and in fact, setting aside the statute, cannot be invoked as authority under the rule of stare decisis. Field, C. J., in Duff v. Fisher, 1860, 15 Cal. 375, 382.

We cannot presume that Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, determines more than Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989, respecting the rights of one ex-spouse in the separate property of the other. We cannot accept the assumption that "no family, no homestead" was meant to apply to any other rights of the parties. We cannot presume the Supreme Court meant to subvert the legislative intent that the homestead exemption should continue as to the separate property of the parties after divorce (Civil Code, secs. 146 and 1265) by the sophistry that upon divorce, there were no homestead exemption rights to continue. The Supreme Court had declared its intention otherwise in City Store v. Cofer, supra, 1896, 111 Cal. 482, 44 P. 168. It seems clear that there is no conflict between City Store v. Cofer, supra, and Lang v. Lang, supra, but that they in fact complement each other, if Lang v. Lang is held to the precise holding, which was, as in Zanone v. Sprague, supra, that one who did not secure an assignment of the homestead interest in the property of the other spouse, or in the property interest of the other spouse in the divorce decree, had no further rights in such property of the other owner; and City Store v. Cofer, supra, declares that in the possession of the former owner of the separate property, pursuant to Civil Code, secs. 146 and 1265, that owner's several interest still is covered by a homestead exemption from creditors.

That the Supreme Court in Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181, intended this construction, and that the language that the termination of the family terminated the homestead, related only to the precise situation before the court, is supported by the citation of Rosholt v. Mehus, supra, 3 N.D. 513, 57 N.W. 783, 23 L.R.A. 239, and Bahn v. Starcke, 1896, 89 Tex. 203, 34 S.W. 103. The Texas statute made the continuance of the homestead dependent upon the family relationship. Consult: 29 C.J. p. 934, sec. 346, text and note 19. In California, Civil Code, secs. 146 and 1265 provide otherwise. The Texas statute did not provide for assignment of the homestead, but only for division of the property on divorce. Bahn v. Starcke, supra. As cited in Lang v. Lang, supra, and Zanone v. Sprague, supra, 1911, 16 Cal.App. 333, 116 P. 989, the cases of Brady v. Kreuger, supra, 8 S.D. 464, 66 N.W. 1083, Rosholt v. Mehus, supra, 3 N.D. 513, 57 N.W. 783, 23 L.R.A. 239, and Bahn v. Starcke, supra, 89 Tex. 203, 34 S.W. 103, go no further than to support the rule announced in Civil Code, sec. 146 that dissolution of a marriage terminates the wife's homestead interest in what had been her husband's separate property, unless assigned to her.

As of 1920, the date of Lang v. Lang, supra, a homestead could not be created in joint tenancy property. The relations attending such a homestead, now valid, were beyond its purview. Cf. In re Estate of Kachigian, supra, 1942, 20 Cal.2d 787, 790, 128 P.2d 865.

Likewise, it should be noted that in 1920, when Lang v. Lang was decided, the wife's interest in the community property interest of the husband was stated to be a mere expectancy (McKay v. Lauriston, 1928, 204 Cal. 557, 565, 269 P. 519), which logically could be defeated when she ceased to be such, unless some interest was assigned her in a divorce decree. It became a "present, existing and equal interest" in 1927 by adoption of Civil Code, sec. 161a. This negatives the effect of any present analogy with the South Dakota and Texas cases. Cf. 27 C.J.S. Divorce § 180, p. 837; Cassas v. Cassas 1954, 73 Wyo. 147, 276 P.2d 456, 464. Lang v. Lang did not decide that Mr. Lang was not entitled to a homestead exemption as against creditors as to property partitioned to him; "he was no longer entitled to a homestead exemption of the *character here involved*" so as to prevent partition. [182 Cal. 765, 190 P. 183.] The

"character here involved" did not concern any exemption from execution, but only the reciprocal rights of each of the ex-spouses in the property interests of the other in the former community property, after the divorce.

Grupe v. Byers, 1887, 73 Cal. 271, 14 P. 863, superficially resembles the factual situation in the instant case. The decision supports the validity of the trust deed executed by the defendant herein, after marriage was dissolved. Since 1951 this result would follow under Civil Code, secs. 1242 and 1265. Later cases, such as In re Estate of Teel, supra, 1949, 34 Cal.2d 349, 210 P.2d 1, which held the homestead is not abandoned, are inconsistent with Grupe v. Byers.

In Shoemake v. Chalfant, supra, 1874, 47 Cal. 432, at page 434, it clearly appears from the reported argument for respondent that the divorce decree provided that upon dividing the property between the spouses that each held his or her interest "free of all claims on the part of the other, or those claiming by, through or under him or her" and "We do not argue that merely because Shoemake was divorced from his wife the homestead was destroyed, but that the decree splitting up the property destroyed it. And we cannot now inquire whether the Court ought to have so decreed or not." The court apparently adopted this view and stated as to the exemption claimed to exist on the property partitioned to one, from a levy made by the other (47 Cal. at page 435), "The decree was as effectual in its results as would have been a declaration of abandonment."

The case is not authority, therefore, for the view that upon divorce, the homestead exemption ceases. This is made quite apparent by considering the legislative history of Civil Code, sec. 146. As effective at the time the Chalfant case was tried, Civil Code, sec. 146 required that the community property be equally divided, "and the Court granting the decree must make such order for the division of the community property, or the sale and the equal distribution of the proceeds thereof, as the nature of the case may require." No other option was given. However, by the provisions of Code amendments 1873–74, chapter 612, p. 191, sec. 33, the entire section was rewritten, and the provisions for assignment of the homestead were added. Such a fundamental change was unnoticed in later cases which erroneously stated, "no family, no homestead".

Remley v. Remley, 1920, 49 Cal.App. 489, 490, 193 P. 604, held that upon assignment of the homestead pursuant to Civil Code, sec. 146, its character as such was destroyed, citing Shoemake v. Chalfant, supra, 1874, 47 Cal. 432, which did not so hold; Grupe v. Byers, supra, 1887, 73 Cal. 271, 14 P. 863, which is now overruled; and Simpson v. Simpson, 1889, 80 Cal. 237, 22 P. 167. This latter case did not so hold. It held that in a purported assignment of a homestead, the attempt to limit an estate and attempt to create a trust were bad; and hence that the ex-husband had no remaining estate which he could claim against the wife. Its principal authority was the dicta of Lang v. Lang, supra, 1920, 182 Cal. 765, 190 P. 181.

We are satisfied that Civil Code, secs. 146 and 1265 continued the homestead protection to defendant (Johnson v. Brauner, 1955, 131 Cal.App.2d 713, 717–718, 722, 281 P.2d 50), and in her alone after quitclaim from her husband, while she occupied the premises as a home (Roth v. Insley, supra, 1890, 86 Cal. 134, 24 P. 853; Hall v. Fields, 1891, 81 Tex. 553, 17 S.W. 82; Philbrick v. Andrews, 1894, 8 Wash. 7, 35 P. 358; Dougherty v. White, supra, 1924, 112 Neb. 675, 200 N.W. 884, 36 A.L.R. 425; Blandy v. Asher, 1880, 72 Mo. 27). Treating the foreclosure sale as a sale authorized by her, the excess proceeds are exempt. Civil Code, sec. 1265.

The judgment is reversed with directions to enter judgment for appellant Schlesinger.

SWAIN, J., concurs.

BISHOP, Presiding Judge.

I concur. It is apparent that the cases are not all consistent, and I do not join in the endeavor to save the face of Lang v. Lang, 1920, 182 Cal. 765, 190 P. 181, by an attempt to differentiate it. It, with its "no family, no homestead", is so at odds with other cases, and with the provisions of sections 146 and 1265, Civil Code, that I cannot accept its conclusion that with the divorce decree the homestead is at an end, without failing to follow those cases that find the homestead still survives. While I adhere to the principle that this court should follow, not disregard, decisions of our higher courts, even should they seem to me to be in error, I cannot govern my action by this principle when the decisions lead in two different directions.

159 Cal.App.2d 702

May L. CHAN, Roy Lee, Harold J. Boenner and Bonnie L. Boenner, Plaintiffs and Appellants,

v.

Lee ANDERSON and Mary Anderson, Defendants and Respondents.

Civ. 17678.

District Court of Appeal, First District, Division 2, California.

April 28, 1958.

Action for a declaratory relief under an agreement to purchase a bait and tackle business, together with the stock in trade. Judgment for the defendants in the Superior Court, County of Alameda, A. T. Shine, J., and the buyers appealed. The District Court of Appeal, Dooling, J., held that a mathematical error which resulted in an undisputed shortage in the inventory should have been set off against the total purchase price in that amount; that the buyers failed to prove the claim of additional shortage of over $10,000 in the inventory; and that the claim asserted by the buyers was not subject to the defense of laches.

Judgment reversed with directions.

1. Evidence ⇐461(1)

Under the parol evidence rule, the intention of the parties as clearly expressed in the writing cannot be varied by parol. West's Ann.Civ.Code, § 1625.

2. Evidence ⇐461(1)

Where buyers in purchasing a bait and tackle business together with the stock in trade provided in agreement of sale that the stock in trade if depleted by sales should be replaced by the sellers and if such was not done cash to be paid on closing of transaction should be correspondingly reduced, intention of parties thus clearly expressed in writing could not be varied by parol. West's Ann.Civ.Code, § 1625.

3. Sales ⇐188

Under an agreement for sale of a bait and tackle business together with stock in trade and providing that if stock in trade was depleted by sales it should be replaced by sellers and if such was not done, cash to be paid on closing of the transaction should be correspondingly reduced, buyers were entitled to a setoff against total purchase price in the amount of mathematical error which resulted in an undisputed shortage in the inventory.

4. Sales ⇐417

In buyers' suit for shortages in an agreement for sale of bait and tackle business together with the stock in trade, evidence did not establish claim of additional shortage of over $10,000 by the buyers.

5. Sales ⇐409

In buyers' suit for shortages in inventory under an agreement for sale of a bait and tackle business together with the stock in trade, claim asserted by the buyers was a legal one for damages for partial failure to perform the contract and laches could not be a defense to a legal, as distinguished from an equitable, claim.

Hilary H. Crawford, Hilary H. Crawford, Jr., San Francisco, for appellants.

Lewis P. May, Oakland, Richard G. Logan, Oakland, of counsel, for respondents.

DOOLING, Justice.

Plaintiffs appeal from a judgment in favor of defendants in an action for declaratory relief. Plaintiffs on May 4, 1954, pursuant to a written agreement executed by the parties purchased from defendants a bait and tackle business together with the stock in trade, for $25,000. The agreement recited that the seller "has an inventory of stock in trade on hand in his place of business at the present time of approximately Twenty-four thousand Seven hundred seven and 15/100 Dollars * * *."

The contract also contains the following provision: "In the meantime and until the sale herein provided for is consummated, the said Anderson shall keep up the stock in trade and shall replace in the inventory any articles which shall be sold in the regular course of business or otherwise and shall

keep proper accounts of any and all stock in trade sold from and after execution of this Agreement and of all stock in trade purchased, and in the event that the cost of articles purchased shall be less in amount than the value of articles sold, then the amount of cash to be paid on closing of this transaction shall be correspondingly reduced by the difference between such sales and purchases.

The contract also contained a covenant by the sellers not to engage in a competing business.

The complaint alleged that the inventory figure of $24,707.15 was excessive in the amount of $1,496.94 by reason of mathematical errors in computing the figures and the answer did not deny this but admitted that there had been a mathematical error in such computation. It was proved without contradiction that this error was not discovered by plaintiffs until some time after the sale was completed. Plaintiffs also claimed an additional shortage in inventory of over $10,000. Claims of other breaches have been abandoned on appeal.

Under the terms of the contract plaintiffs paid $15,000 down and executed promissory notes for the balance of the purchase price. Installments aggregating $2,500 which fell due prior to the trial of this action were paid under protest.

The trial court found that under the contract the defendants sold to the plaintiffs "no particular amount of inventory or stock in trade, as expressed in dollar value, and that * * * defendants sold, and the plaintiffs bought, for a single lump sum, to wit, $25,000.00, all of [the business] including, but without specific values set thereon" the good will, the trade name and the agreement to refrain from competition "together with all of the inventory * * * of stock in trade, as was on hand at the time of the sale * * *."

The court further found that the inventory did contain a mathematical error but that plaintiffs were not damaged thereby since they "did not purchase the inventory * * * at any given total value, but simply purchased * * * whatever stock there was on hand at the time of the sale."

The court found plaintiffs guilty of laches by reason of their delay in bringing suit, and found as to the claimed $10,000 shortage in inventory that the subsequent inventory upon which plaintiffs relied to prove such shortage was wholly inaccurate and unreliable.

The finding that the plaintiffs purchased whatever stock there was on hand without regard to the inventory value is negatived by the statement in the agreement of the value of the inventory coupled with the express provision of the contract, above quoted, that the stock in trade if depleted by sales should be replaced by the sellers and if this was not done "the amount of cash to be paid on closing of this transaction shall be correspondingly reduced * * *." The written contract thus makes clear on its face that the value of the inventory was a material element of the sale.

[1–3] Under the parol evidence rule the intention of the parties as thus clearly expressed in the writing cannot be varied by parol. Civ.Code, § 1625; Hale v. Bohannon, 38 Cal.2d 458, 465, 241 P.2d 4; 18 Cal.Jur. 2d, Evidence, §§ 255–256, pp. 737–740. It follows that as to the mathematical error which resulted in an undisputed shortage in the inventory the trial court was in error in finding that the plaintiffs were not entitled to a set-off against the total purchase price in that amount.

[4] The finding that the claim of an additional shortage of over $10,000 was not proved is supported by the testimony of a witness that one of the plaintiffs deliberately falsified the subsequent inventory in some particulars, and by the manner of its taking by a group of people, several of whom were not produced on the trial to verify their figures.

[5] The claim asserted by plaintiffs is a legal one for damages for partial failure to perform the contract and laches cannot be a defense to a legal, as distinguished from

an equitable claim. Mandracio v. Bartenders Union, Local 41, 41 Cal.2d 81, 85, 256 P.2d 927; Bagdasarian v. Gragnon, 31 Cal.2d 744, 752, 192 P.2d 935; Brownrigg v. DeFrees, 196 Cal. 534, 539, 238 P. 714.

Appellants also complain of the judgment for costs but since that will fall with the reversal of the judgment we need not consider that claim further.

Judgment reversed with directions to take such further proceedings as may be necessary to give plaintiffs a set-off in the amount of the admitted mathematical error in the inventory.

KAUFMAN, P. J., and DRAPER, J., concur.



159 Cal.App.2d 808

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Freeman JONES, Defendant and Appellant.

Cr. 6019.

District Court of Appeal, Second District, Division 3, California.

April 29, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, McIntyre Faries, J., of driving automobile without owner's consent, and he appealed. The District Court of Appeal, Parker Wood, J., held that in prosecution for grand theft of automobile and for driving automobile without owner's consent, defendant's intention to deprive owner of possession of automobile was a fact question for trial judge.

Affirmed.

1. Automobiles ⇐356
Larceny ⇐68(2)

In prosecution for grand theft of automobile and for driving automobile without owner's consent, defendant's intention to deprive owner of possession of automobile was a fact question for trial judge. West's Ann.Vehicle Code, § 503.

2. Automobiles ⇐355(10)
Criminal Law ⇐317

In prosecution for driving automobile without owner's consent, there was competent and substantial evidence to establish defendant's guilt and hence prosecution was not bound by deputy sheriff's testimony that defendant said he took the automobile with consent of a person whom he thought to own automobile, but, when defendant did not testify, trial judge could infer that defendant intended to deprive owner of possession. West's Ann.Vehicle Code, § 503.

Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with grand theft (of automobile) in Count I, and with violating section 503 of the Vehicle Code (driving automobile without consent of owner) in Count II. In a nonjury trial he was adjudged not guilty as to Count I, and guilty as to Count II. He appeals from the judgment.

Appellant contends that the evidence was insufficient to support the judgment.

Section 503 of the Vehicle Code provides: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same * * * is guilty of a felony * * *."

Testimony on behalf of the People was in substance as follows: On March 12, 1957, about 1 a. m., Mr. Roncelli parked his Mercury automobile on Lake Street in Altadena, in front of a beer cafe. About 1:30 p. m. on that day, when he returned to the place where he left his automobile, the automobile was not there. He did not know the defendant and he did not give anyone permission to take the automobile. About 2:55 a. m. of that day, a police officer saw defendant sitting "behind the wheel" in Mr. Roncelli's automobile which was parked on Avenue 64 in Pasadena. The automobile was at the curb, and the parking lights of the automobile were lighted and the key was in the ignition.

A deputy sheriff, called as a witness by the People, testified that later on that same day defendant told him, as follows: defendant had been drinking at the beer cafe in Altadena and had been talking with a person by the name of Shorty Serber; Shorty asked defendant "to drive him home" and told defendant that Shorty's Mercury automobile, with the key in the ignition, was parked on Lake Street; defendant got into the automobile and drove it to the cafe to pick up Shorty, and he saw Shorty get into another automobile; then defendant decided to go to Sawtelle to get assistance "as an alcoholic"; on his way to Sawtelle he was stopped by the police officers.

Defendant did not testify or call a witness in his behalf.

Appellant's argument is to the effect that there was no proof that he had the intent to deprive the owner of the possession of the automobile; and that since the prosecution presented, as a part of its case in chief, the testimony of the deputy sheriff to the effect that defendant said he took the automobile with the consent of Shorty and he thought Shorty was the owner of the automobile, the prosecution is bound by that testimony.

[1, 2] The question as to whether defendant had the intent to deprive the owner of the possession of the automobile was a question of fact for the determination of the trial judge. In People v. Acosta, 45 Cal.2d 538, at page 542, 290 P.2d 1, 4, it was said: "The courts may sometimes say that the prosecution is 'bound by' extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt." In the present case there was competent and substantial evidence which would establish defendant's guilt. It is clear that the automobile was taken and driven by defendant without the consent of the owner. Defendant was found in the automobile, by police officers, about an hour and a half after the owner had parked the automobile. At that time no one was in the automobile with defendant. Although defendant said that a person, referred to as Shorty, asked defendant "to drive him home," defendant also said that when he was driving the automobile to the cafe to pick up Shorty he saw Shorty get into another automobile, and then defendant decided to go to Sawtelle, and on his way there he was stopped by the police officers. It is clear that defendant was not taking Shorty home. It is also clear, from defendant's statement, that after Shorty got into the other automobile defendant was not driving the automobile (of Mr. Roncelli) pursuant to any claimed permission given by Shorty or anyone. The acts of defendant contradict any implication in his statement that he drove the automobile from the cafe with the consent of the owner. The trial judge was not required to believe that defendant thought that the person, referred to as Shorty, was the owner of the automobile. Defendant chose not to testify and explain the circumstances under which he was in Mr. Roncelli's automobile. The judge could infer that defendant intended to deprive the owner of the possession

of the automobile. The evidence was sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



159 Cal.App.2d 513

C. O. SPARKS, Inc., a corporation, Mundo Engineering Company, a corporation, Plaintiffs and Respondents,

v.

PACIFIC COAST PAVING CO., Inc., a corporation, Malven and Nicklas, a corporation, United Pacific Insurance Company, a corporation, et al., Defendants,

Malven and Nicklas, a corporation, and United Pacific Insurance Company, a corporation, Appellants.

Civ. 22672.

District Court of Appeal, Second District, Division 1, California.

April 18, 1958.

Rehearing Denied May 13, 1958.

Hearing Denied June 17, 1958.

Action against prime contractor and surety on performance bond by persons furnishing materials, labor and use of equipment to subcontractor, to recover the amount unpaid to such persons by the subcontractor, on the theory that such persons were third party beneficiaries within the terms of the prime contract and the bond. The Superior Court of Los Angeles County, J. F. Moroney, J., rendered judgment for plaintiffs, and the prime contractor and its surety appealed. The District Court of Appeal, Fourt, J., held that the complaint was sufficient to state a cause of action on such theory.

Affirmed.

1. Contracts ⇐332(3)
Principal and Surety ⇐155

Complaint against prime contractor and surety on its performance bond by person furnishing materials, labor and equipment to paving subcontractor, to recover amount unpaid to such persons by subcontractor, on theory that such persons were third party beneficiaries within terms of prime contract and bond, stated a cause of action.

2. Principal and Surety ⇐59

Where prime contractor's performance bond incorporated the prime contract, all of the provisions of the contract became provisions of the bond.

3. Contracts ⇐187(2)
Principal and Surety ⇐151

Where prime contract required contractor to furnish and pay for all the labor, tools, equipment and materials and furnish bond which was to guarantee payment in full of all claims for labor and materials and which was to be applicable to use and benefit of all persons performing labor or furnishing materials, contractor and surety were required to pay third party who supplied materials, even though third party's contract to supply materials was with subcontractor and subcontractor was paid by contractor and subcontractor failed to pay third party.

4. Principal and Surety ⇐151

A common law undertaking which is furnished to a general contractor for faithful performance of agreement with subcontractor for supplying of labor and materials for structure is not a pledge for the sole benefit of the general contractor, but inures to the benefit of any person who performs labor or furnishes materials which are used in the structure pursuant to the provisions of the subcontract.

John F. Reed and Francis M. Reiter, Los Angeles, for appellant Malven and Nicklas.

Anderson, McPharlin & Conners, by Robert Haase, Jr., Los Angeles, for appellant United Pac. Ins. Co.

Herbert Gall, John U. Gall and Edward Fitzpatrick, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment in favor of the plaintiffs and against Malven and Nicklas, a corporation, as a prime contractor, and against United Pacific Insurance Company, a corporation, as surety, under a private works contract.

On March 22, 1954, Malven and Nicklas, a corporation, hereinafter referred to as "the contractor," entered into a contract with Bramwell Construction Company, a California corporation, hereinafter referred to as "the owner," a division of Safeway Stores, Inc., a corporation, organized under the laws of Maryland, for the construction of a store building, including certain paving of a parking lot.

Paragraph one of the contract reads as follows:

"First: Contractor agrees, at the expense of contractor, to comply with all laws, ordinances and regulations, to obtain and pay for all permits and licenses except the general building permit which will be obtained and paid for by owner, *to furnish and pay for all of the labor, tools, and for all appliance,* equipment and materials except such appliance, equipment and materials which the specifications provide are to be furnished by owner, and to pay all sales taxes and other taxes thereon, and *to perform all work,* or, to engage and pay subcontractors to perform such work, required under the plans, general conditions and blueprints hereinafter referred to, and addenda thereto, and/or required for the proper completion of the work hereinafter described." (Emphasis added.)

Paragraph eleven of the contract is as follows:

"Contractor agrees to furnish to owner, at contractor's expense and prior to the time contractor commences work under this contract, a bond in the sum of $239,376.00 written by a surety company satisfactory to owner, *guaranteeing and conditioned for the full, complete and faithful performance of this contract* by contractor and *for the payment in full of all claims and/or liens for labor* performed or materials furnished in connection herewith. Such bond shall be in a form satisfactory to owner and *shall include a clause making it applicable to the use and benefit of all persons who perform labor or furnish material in connection herewith.*" (Emphasis added.)

On April 5, 1954, pursuant to the contract, the contractor executed a bond as principal, with United Pacific Insurance Company, hereinafter referred to as "the surety," in the sum of $239,376. The bond, in part, reads as follows:

"Whereas, the Principal has by means of a written Agreement, dated March 22, 1954 entered into a contract with the Owner for Construction of a Retail Store Building, Parking Lot and Related Improvements at 1355 South Avalon, Wilmington, California, a copy of which Agreement is by reference made a part hereof;

"Now Therefore, the condition of this Obligation is such that, if the Principal shall faithfully perform the Contract on his part and shall fully indemnify and save harmless the Owner from all cost and damage which he may suffer by reason of failure so to do and shall fully reimburse and repay the Owner all outlay and expense which the Owner may incur in making good any such default,

"and further, that if the Principal shall pay all persons who have contracts directly with the Principal for labor or materials, failing which such persons shall have a direct right of action against the Principal and Surety under this Obligation, subject to the Owner's priority,

"then this Obligation shall be null and void, otherwise it shall remain in full force and effect."

On May 4, 1954, the contractor entered into a subcontract with Pacific Coast Paving Co., Inc., hereinafter referred to as "the paving company," wherein the paving company was to do certain grading and improvements and furnish certain materials, all called for in the contract between the owner and the contractor.

On or about August 26, 1954, the paving company entered into an oral contract with the plaintiffs to, and the plaintiffs did, furnish certain materials, labor and use of equipment in connection with the performance of the subcontract.

The plantiffs were never paid for their work, materials and equipment, although the contractor did pay the paving company and did secure a release from the paving company stating in substance that the paving company had paid all bills incurred by it in connection with the subcontract. Based upon the release the contractor paid the paving company the balance of its contract price for the work.

The plaintiffs brought the action to recover the amount unpaid to them by the paving company on the theory that they were third party beneficiaries within the terms of the prime contract and the bond. The cause went to trial on the second amended complaint which set forth, among other things, a copy of the contract and of the bond in full, and alleged that the contract and the bond were made for the benefit of third persons furnishing labor and material on the work called for in the contract, including among others the plaintiffs. It further alleged that the plaintiffs furnished work, materials and equipment in connection with the contract and were not paid, and that the reasonable value of their work, materials and equipment was $6,498.50. Judgment was in favor of the plaintiffs, against the contractor and against the surety.

The contractor contends that the amended complaint does not state a cause of action; that the contract between the contractor and the owner was an agreement to furnish a bond or agreement to pay third persons; that the bond and the contract must be read together; that the bond is a statutory bond and sufficed under the circumstances, and that the plaintiffs were covered under the bond.

The surety contends that its liability was restricted and did not cover the plaintiffs and no cause of action was conferred upon them, and further that where the terms of the bond and the contract conflict the terms of the bond should control.

[1] A reading of the complaint convinces us that a cause of action was properly stated. See Woodhead Lumber Co. v. E. G. Niemann Investments, 99 Cal.App. 456, 278 P. 913; C. F. Shell v. Schmidt, 126 Cal.App.2d 279, 272 P.2d 82; W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 153 P. 743; Sunset Lumber Co. v. Smith, 91 Cal.App. 746, 267 P. 738; Pacific States Electric Co. v. United States Fidelity & Guaranty Co., 109 Cal.App. 691, 293 P. 812.

A reading of the provisions of the contract indicate that the contract called for a bond "guaranteeing and conditioned for the full, complete and faithful performance of this contract by contractor and for the payment in full of all claims and/or liens for labor performed or materials furnished in connection herewith," and that the contractor agreed to "pay for all of the labor, tools, and for all appliance, equipment and materials * * * required for the proper completion of the work hereinafter described." In other words, the contractor agreed to pay third party persons who supplied materials.

[2] The bond which was furnished in this case incorporated the contract therein, and thereby all of the provisions of the contract became provisions of the bond as a performance bond. W. P. Fuller & Co. v. Alturas School District, supra; Sunset Lumber Co. v. Smith, supra; Pacific States Electric Co. v. United States Fidelity & Guaranty Co., supra. It was appropriately said in Pacific States Electric Co. v. United States Fidelity & Guaranty Co., supra, 109 Cal.App. 691, at pages 693–694, 293 P. at page 813:

"A bond which is given for the faithful performance of a contract, to which it refers, binds the surety for labor performed and materials furnished thereunder as completely as though the surety were a party to the contract. (Citing cases.) In the case last cited [Ryan v. Shannahan, 209 Cal. 98, 285 P. 1045] it is said: 'It is also elementary that a bond given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually made and executed the contract itself. Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as a whole or as constituting an indivisible contract.'"

[3] Surely it meant, in this particular case, that the contractor was to furnish the materials and was to pay for them, and it was not meant that he could engage a subcontractor who would secure the materials and perform the work and then neglect or refuse to pay for such, and leave the plaintiffs here to stand the loss.

Had the surety desired to make it otherwise, and to have limited and restricted liability to certain specific persons and no others, it would have been a simple matter to have so stated in the bond in unequivocal language. However, in this particular case, had there been any such express limitations the bond undoubtedly would not have been acceptable to the owner who manifestly was interested in seeing to it that all of those who performed work and labor on its building and works were going to be paid.

The bond in this case was a common law bond and not one in conformity with the provisions of section 1185.1, Code of Civil Procedure. The contract was filed with the County Recorder, but the bond was not so filed.

[4] A common law undertaking which is furnished to a general contractor for the faithful performance of an agreement with the subcontractor for the supplying of labor and materials for a structure is not a pledge for the sole benefit of the general contractor, but inures to the benefit of any person who performs labor or furnishes materials which are used in the structure, pursuant to the provisions of the subcontract. Sunset Lumber Co. v. Smith, supra, 91 Cal.App. at page 751, 267 P. at page 740; W. P. Fuller & Co. v. Alturas School District, supra, 28 Cal.App. at page 613, 153 P. at page 745.

We find no prejudicial error.

Judgment affirmed.

WHITE, P. J., and LILLIE, J., concur.



159 Cal.App.2d 586

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert William WHITE, Defendant and Appellant.

Cr. 6132.

District Court of Appeal, Second District, Division 1, California.

April 21, 1958.

Hearing Denied June 17, 1958.

Prosecution for possession of heroin. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Lillie, J., held that evidence supported findings that police officers who had been watching defendant and who had been informed of defendant's activities through informants who had proven reliable in past, had reasonable cause for arrest without warrant and that search of defendant's room following his arrest in street, was consented to by defendant.

Affirmed.

1. Arrest ⇐63(4)

Peace officer may make an arrest without a warrant when person arrested has committed a felony, although not in his presence, when a felony has in fact been committed and the arresting officer has reasonable cause for believing that person arrested committed it. West's Ann.Pen. Code, § 836.

2. Criminal Law ⇐736(1)

What are reasonable grounds for justifying an arrest without a warrant is always a question of fact.

3. Arrest ⇐63(4)

An arrest without a warrant may be made by police officers acting solely on advice of a reliable confidential informant, and in such case trial court must determine from evidence, before it can conclude that arrest without a warrant was the result of reasonable reliance on confidential informant first, whether informant was reliable and second whether officer relied on information in making arrest. West's Ann. Pen.Code, § 836.

4. Arrest ⇐63(4)

Proof that officer's reliance on information supplied by confidential informant was reliable may consist, among other things, of identity of informant and officer's past experience with him.

5. Criminal Law ⇐394

In prosecution for possession of heroin, evidence sustained finding that police officers who had been given information as to defendant's activities from two different confidential informants and who had also had defendant under their personal surveillance, had reasonable grounds for arrest of defendant without a warrant.

6. Searches and Seizures ⇐7(27)

It is not necessary for People to show that search and seizure were reasonable as incident to a proper arrest when search is made with defendant's consent.

7. Criminal Law ⇐394

In prosecution for possession of heroin, evidence sustained finding that defendant, who had been arrested without a warrant on the streets by police officers, voluntarily gave consent to search of room.

8. Searches and Seizures ⇐7(28)

Fact defendant is under arrest at time he consented to search does not per se make such consent involuntary, but such fact may be one of the factors that the court can consider in determining whether consent was freely given.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Robert William White was accused by information of possession of heroin in violation of section 11500 of the Health and Safety Code of the State of California. Having waived his right to a trial by jury defendant submitted the matter to the court on the transcript of the preliminary hearing. Defendant moved to suppress the evidence, People's Exhibit 1, on the ground that it had been obtained as the result of an unlawful search and seizure. The court denied the motion and after hearing all the evidence found the defendant guilty as charged. Defendant's motion for a new trial and application for probation were denied and he was sentenced to the state prison for the term prescribed by law.

Defendant seeks a reversal of the judgment of conviction on the ground that the trial court erred in denying defendant's motion to suppress the evidence. He urges that the search of his room following his arrest elsewhere was not a proper incident of his arrest. People's Exhibit 1 to which defendant's motion to suppress was directed and which is the subject of his first point on appeal consists of a Pall Mall cigarette package containing a green balloon filled with 7½ grams of heroin. It was found by the arresting officer in a box in plain sight on a chair in defendant's room located

at 1610 West 27th Street, Los Angeles, California.

Around 9 p. m. on June 24, 1957, Officer Charles J. Fatuzzi of the Narcotics Division of the Los Angeles Police Department received a telephone call from a confidential informant who told him that the defendant was at a hot dog stand at Normandie and Adams Boulevard and that he had in his possession approximately twenty $10 papers of heroin. He further advised the officer that the defendant lived at 27th Street and Raymond and had heroin in his room which was located in the upper right portion of the building. At approximately 1:30 a. m. the next day, four and one-half hours later, another informant advised the officer that defendant was in the area of 27th and Normandie selling heroin and that he then had in his possession ten $10 papers.

In reliance upon the information obtained from these informants Officer Fatuzzi and another officer went to Normandie and Adams Boulevard where they kept the hot dog stand and the defendant under surveillance. They saw White in the company of a known addict walk to 27th Street and go south on Kenwood. During this time they observed the defendant talk to several people and engage in certain conduct which in the opinion of the officer amounted to selling of narcotics. At 2 a. m., about one-half hour after he received information concerning the defendant from the last informant, Officer Fatuzzi arrested the defendant and searched him. He took from him an open pocket knife but found no narcotics in his possession. Taking him to his room at 1610 W. 27th Street the officer searched it and found a cardboard box containing People's Exhibit 1 on a chair by the bed. Asked if it was all there was in the house the defendant replied, "You have it all. There is no more here. I am not a real big peddler like you think."

The defendant testified that he had lived at 1517 Adams Boulevard and was in the process of moving to the 27th Street address; that he had last been in the room only hours before his arrest; that he knew nothing about the heroin found in his room; that he thought it was tooth powder and that it did not belong to him.

Appellant's first point is that the heroin found in his room and introduced against him at the trial as People's Exhibit 1 was illegally obtained. His real contention is that his arrest was unlawful because the officers did not have reasonable and probable cause therefor. There is no claim by the People that the officers made the arrest or searched the premises with a warrant.

[1–3] The rule of arrest without a warrant is almost too common for the citation of authority. A peace officer may make an arrest without a warrant when the person arrested has committed a felony, although not in his presence, when a felony has in fact been committed and the arresting officer has reasonable cause for believing the person arrested to have committed it (Penal Code, section 836). What are reasonable grounds, however, is always a question of fact. It is well established that an arrest without a warrant may be made by police officers acting solely on advice of a reliable confidential informant (People v. Dean, 151 Cal.App. 2d 165, 311 P.2d 85). In such a case there are two matters the trial court must determine from the evidence before it can conclude that the arrest without a warrant was the result of reasonable reliance on a confidential informant—first, whether the informant was reliable and, second, whether the officer relied on the information in making the arrest. People v. Burke, 47 Cal. 2d 45, 301 P.2d 241; People v. Dean, supra. "It is the officer's credibility and the soundness of his reasons for relying upon his informant that must impress the court before it can determine that the officer was authorized to make the arrest." People v. Dean, supra, 151 Cal.App.2d at page 167, 311 P.2d at page 87.

[4] Evidence that the officer's reliance on the information was reliable may consist, among other things, of the identity of the informant and the officer's past experience with him (Willson v. Superior

Court, 46 Cal.2d 291, 294 P.2d 36). An officer, in arresting without a warrant, is justified in acting solely upon information from a confidential informant where he is known to the officer and is believed by him to be trustworthy and reliable (People v. Dean, supra; People v. Vice, 147 Cal.App. 2d 269, 305 P.2d 270; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50).

[5] In the instant case two confidential informants were involved in the defendant's arrest. The one who called the officer at 9 p. m. on the night before the arrest is an addict well-known to him for two years. In the past he had given the officer information upon which he made five narcotics arrests, all resulting in conviction. This past experience with informant established him in the mind of the officer as trustworthy insofar as information of this kind was concerned and it appears that the officer was fully justified in relying upon that which he gave concerning the defendant. It was he who gave the officer a description of the defendant and told him where he could be found, what he was then doing, where he lived, and that he had heroin in his possession and in his room. The second informant, although not personally known to the officer, called him four and one-half hours later and gave him substantially the same information with the exception of the location of the defendant's room and that narcotics could be found there. The similarity of this information with that given by the informer known and trusted by the officer lends some credence to the facts related by him to Officer Fatuzzi. In view of this the officer had good reason to rely upon that given to him by this information.

Appellant contends that because defendant had no narcotics in his possession when arrested this fact renders the information given by the informants unreliable and worthless. There are two answers to this contention: First, the arrest took place five hours after the first informant called the officer and told him defendant had twenty $10 papers of heroin on his person and only one-half hour after the second informant called and told him defendant had ten papers of $10 heroin in his possession. The officers found defendant at the location given to them by both informants and where the latter informant told him the defendant was selling heroin. Furthermore, the officer kept defendant under surveillance for one-half hour before his arrest and observed him talk to several people and carry on various activities which in the mind of the arresting officer constituted the making of narcotics sales. Defendant during this time was in the company of a known narcotic addict. It is reasonable to believe from this evidence that although five hours before his arrest the defendant started out with twenty papers of heroin and had ten left one-half hour prior to his arrest, that he disposed of them to others he was seen talking to during this time and that by the time he was arrested he had disposed of the entire amount heretofore in his possession. Second, the fact that later it was discovered that the informer was mistaken as to some part of the testimony he gave the officer does not make his reliance thereon unreasonable as long as the officer knows his informant and that he is reliable.

In concluding here that the arrest of defendant was in reliance on information of a reliable confidential informant and that the trial court did not abuse its discretion in so holding, we point to the record which clearly shows that the officer had sufficient knowledge and information concerning his informants which would justify reasonable reliance on them and that he presented these facts to the trial judge who determined from the credibility of the officer and the nature of the facts offered that he was sound in relying on the informers. Considering the evidence as a whole, we find that the officer acted with reasonable and probable cause in arresting the defendant; that no abuse of the court's discretion appears in the record and that the trial court was justified in concluding that

the arrest was lawful, and in admitting People's Exhibit 1 as legally obtained evidence.

[6, 7] Appellant's second point goes to the search of the defendant's room after his arrest on the street. He claims that such a search was not a proper incident of his arrest. In urging this point defendant ignores the clear evidence in the record showing a free and voluntary consent on the part of the defendant to search his room; and the well-known rule that it is not necessary for the People to show that the search and seizure were reasonable as incident to a proper arrest when the search is made with defendant's consent. In People v. Burke, supra, the defendant urged a similar point and the Supreme Court at p. 49 of 47 Cal.2d, at page 243 of 301 P.2d, stated: "It was not necessary here, however, for the People to show that the search and seizure were reasonable as incident to proper arrest, for they showed that defendant freely consented to the search of his apartment which disclosed the evidence which defendant has since claimed was illegally obtained." In that case, the officer said to the defendant, "You don't mind then if we search your apartment do you?" and the defendant answered, "No, go ahead." Whether in a particular case consent was voluntarily given is a question of fact to be determined in the light of all the circumstances (People v. Gorg, 45 Cal.2d 776, 291 P.2d 469; People v. Michael, 45 Cal.2d 751, 290 P.2d 852). The evidence of consent in the instant case is even stronger than that in People v. Burke, supra. Here the defendant on three separate occasions after his arrest told the officers they could search the room in which the narcotics were found. After searching defendant on the street, the officers asked him if they could search his room to which he answered, "Certainly. Go ahead." Upon being asked where he lived, he told them, "at 1527 West Adams." Having been previously told by informant of the location of defendant's residence the officers drove him directly to 1610 West 27th Street, where officers again asked defendant if he minded a search of his room, to which he replied, "Go ahead. I don't live here anyway." Taking two keys from defendant's pocket, the officer with one opened the front door of the building whereupon defendant said, "I don't live here," and the following conversation occurred between them:

(Officer) Q. "Then you don't mind if we search?"

(Defendant) A. "Certainly. Go ahead. I don't live here."

Although during this time defendant may have hoped to mislead the officers by denying he lived at that location, he nevertheless on three occasions told them they could search the room. The officers then located the landlady who identified the defendant as the person to whom she rented room No. 1 on Sunday morning, June 23rd. It was in this room the heroin was found. On the stand defendant admitted that room No. 1 was his room and that he had last been in it only hours before his arrest. We conclude that the trial court was justified in finding a voluntary consent of the defendant to a search of his room.

[8] The fact that the defendant was under arrest at the time he consented to the search does not *per se* make such consent involuntary. People v. Lujan, 141 Cal. App.2d 143, 296 P.2d 93. However, it is clear that such a fact may be one of the factors the court may consider in determining whether consent was freely given. "The fact that defendant is under arrest at the time of giving consent is one of the factors, but not the only one, to be considered in determining whether it was freely given; the trial judge who sees and hears the witnesses is best able to pass upon the matter." People v. Robinson, 149 Cal.App.2d 282, at page 287, 308 P.2d 461, at page 464. Mere arrest in itself is not such an assertion of authority as to make an otherwise free consent involuntary. The defendant testified briefly that one of the officers hit him in the stomach while the other ran up to the room. The officer denied hitting defendant in the stomach

and the matter was not further developed by the defendant. The court in People v. Michael, 45 Cal.2d 751, at page 753, 290 P.2d 852, at page 854, stated: "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." The question is one of fact to be decided by the judge who must determine and declare as a matter of law whether the evidence secured through the search is admissible. People v. Gorg, supra; People v. Burke, supra.

We find nothing in the record pointing to an abuse of the trial court's discretion in finding that the search in question was the result of defendant's voluntary consent, in declaring that the search was a proper incident of defendant's arrest and that People's Exhibit 1 secured through the search was admissible.

The judgment is affirmed.

WHITE, P. J., concurs.

FOURT, Justice.

I concur in the judgment.

This is another case arising in Los Angeles county where the defendant was charged in the information with a prior conviction of a narcotic offense, and a certified copy of the commitment in such prior case was received in evidence without objection. Although the defendant testified in his own behalf, he offered no evidence with reference to the certified copy of the commitment and his attorney stipulated that the person named in the commitment was the defendant.

At the time of the hearing of the defendant's application for probation the judge said, "The Court makes no finding as to the question of priors." Sentence was then imposed upon the defendant as though he were a first offender, contrary to the clear wording of the statutes made and provided in such cases. See concurring opinion in People v. Rixner, 157 Cal. App.2d 387, 321 P.2d 91, and opinion in People v. Barbera, Cal.App., 323 P.2d 815.



Ella S. LAIRD, Plaintiff and Respondent,

v.

T. W. MATHER, Inc., a corporation, Defendant and Appellant.*

Civ. 22486.

District Court of Appeal, Second District, Division 1, California.

April 21, 1958.

Rehearing Denied May 12, 1958.

Hearing Granted June 17, 1958.

Action for injuries sustained in defendant's store. Motions for directed verdict, judgment nowithstanding the verdict and for new trial were denied and from the judgment and order denying motion for judgment notwithstanding the verdict, entered by the Superior Court, Los Angeles County, John Gee Clark, J., the defendant appealed. The District Court of Appeal, Lillie, J., held, inter alia, that in action for injuries to seventy-nine year old patron who fell on bottom step of a stairway leading to basement of defendant's department store evidence that handrail started at top of basement stairway and continued down the stairs to a point approximately a step and a half above the basement floor, that patron used the handrail and upon reaching end of handrail assumed that patron was on basement floor, stepped forward, and fell over the last step and a half, and that patron had visited store about twice a year sometimes using elevator and at other times using the stairway sustained findings that defendant was negligent, that defendant's negligence was proximate cause of injury and that patron was not contributorily negligent.

Affirmed.

* Opinion vacated 331 P.2d 617.

1. Judgment ⇐199(3.2)

On motion for judgment notwithstanding verdict in considering whether judgment is supported, evidence must be viewed in favor of plaintiff who obtained judgment.

2. Negligence ⇐134(5, 11), 135(1)

In action for injuries to seventy-nine year old patron who fell on bottom step of a stairway leading to basement of defendant's department store, evidence that handrail started at top of stairway and continued down the stairs to a point approximately a step and a half above the basement floor, that patron used the handrail and upon reaching end of handrail assumed that patron was on basement floor, stepped forward and fell over the last step and a half, and that patron had visited store about twice a year sometimes using elevator and at other times using the stairway sustained findings that defendant was negligent, that defendant's negligence was proximate cause of injury and that patron was not contributorily negligent.

3. Negligence ⇐136(26)

In action for injuries to seventy-nine year old patron who fell on bottom step of stairway leading to basement of defendant's department store, whether patron in exercise of due care had right to believe that handrail ostensibly installed to conduct one safely from ground floor to basement was correctly designed for that purpose and that such handrail would not terminate before bottom of stairway was reached was for jury.

4. Negligence ⇐136(27)

That seventy-nine year old department store patron who fell on bottom step of stairway leading to basement of store might have seen the last step had she looked did not make her guilty of contributory negligence as matter of law.

5. Evidence ⇐317(9)
Negligence ⇐125

In action for injuries sustained when plaintiff fell on bottom step of stairway leading to basement of defendant's department store, testimony of defendant's maintenance supervisor that prior to accident involved he had a conversation with defendant's vice president and controller to effect that supervisor had heard from one of employees that someone had almost fallen on the stairs, that vice president had directed supervisor to put extensions on the rails and that such had been ordered but had not been installed was properly admitted to show knowledge of condition of stairway and handrail on part of vice president as against contentions that such testimony constituted evidence of prior accidents and that it was inadmissible because there was no showing that prior accidents had occurred under similar circumstances, and that such evidence was hearsay.

6. Evidence ⇐558(7)

In action for injuries sustained by fall on stairway in defendant's department store, wherein defendant's witness, a qualified expert, had made sweeping statement that stairs and railings were in compliance with proper practice anywhere in the world, plaintiff's counsel properly directed cross-examination into channels calculated to show that broad statement made by witness could not have been true for purpose of testing credibility of the witness.

7. Witnesses ⇐319, 328, 329, 342

A wide latitude is permitted for purpose of testing accuracy, veracity, knowledge and credibility of witnesses.

8. Appeal and Error ⇐1048(6)
Evidence ⇐558(7)

In action for injuries sustained by fall on stairway in defendant's department store, wherein defendant's witness, a qualified expert, had made sweeping statement that stairs and railings were in compliance with proper practice anywhere in the world, permitting plaintiff's counsel to cross-examine witness on the municipal building code of city of Los Angeles although accident occurred in Pasadena was not improper and was not prejudicial.

9. Negligence ⇐138(2)

An instruction embodying presumption of due care can be properly given except in a case in which presumption has been

overcome by facts established by uncontradicted testimony of the party who would be benefited by the presumption or his witnesses, under circumstances which afford no indication that testimony is product of mistake or inadvertence and when fact so proved is wholly irreconcilable with presumption sought to be invoked.

10. Negligence ⇐122(2), 138(2)

Under circumstances including showing that testimony of 83 year old woman whose memory was faulty given some four years after accident was manifestly uncertain as to what exactly took place other than the fact that she fell at foot of stairway in department store and that she was unable to testify "fully" as to her acts and conduct, presumption of due care was not dispelled by her testimony and hence it was not error for trial court to give due care instruction.

11. Trial ⇐295(7)

In action for injuries to 79 year old patron who fell on stairway in defendant's department store, in view of evidence and instructions considered as a whole, giving of instruction authorizing jury to consider fact that attention of store patrons ordinarily is attracted by display of wares and may be more or less absorbed by transactions which they have in mind was not reversible error.

Moss, Lyon & Dunn, Sidney A. Moss, and Henry F. Walker, Los Angeles, for appellant.

Adams, Duque & Hazeltine, Los Angeles, for respondent.

LILLIE, Justice.

Ella S. Laird, plaintiff herein, instituted this action to recover damages for personal injuries sustained when she fell on the bottom step of a stairway leading to the basement of defendant's department store. As a result of the fall Mrs. Laird, age 79, suffered a broken hip, causing permanent disability. Trial before a jury resulted in a verdict for plaintiff in the sum of $9,540.18. Motions for a directed verdict, judgment notwithstanding the verdict and for a new trial were denied. Defendant appeals from the judgment and from the order denying its motion for judgment notwithstanding the verdict. It is not contended that the amount of the verdict is excessive.

The basement of defendant's department store was used for the sale of merchandise. It is conceded that Mrs. Laird was a business visitor. From photographs and other evidence it appears that handrails started at the top of the basement stairway and continued down the stairs to a point approximately a step and a half above the basement floor. Plaintiff testified that on the day of the accident she used the handrail to help herself down the stairway and that upon reaching the end of the handrail she assumed that she was on the basement floor, stepped forward, and fell over the last step and a half. Plaintiff visited the store about twice a year, sometimes using the elevator and at other times making use of the stairway. Mrs. Laird, past 83 at the time of trial, could not remember whether she was looking down at the steps, but stated, "Well, I was looking out ahead of me, toward the—out into the room where the lights were."

Plaintiff contended at the trial that one of the purposes of a handrail is to guide a person to the floor below and that since the handrails here did not continue the full length of the stairway, an unsafe condition existed which was the cause of the accident. The defendant claimed plaintiff was guilty of contributory negligence in letting go of the handrail without looking to see whether there was any other step.

Appellant's contention that the trial court erred in refusing to grant a judgment notwithstanding the verdict is predicated on the theory that the proprietor of a business establishment is not negligent in failing to anticipate that persons will not exercise ordinary care or use their own faculties, particularly of sight, to ascertain where they are walking and that a person who fails to do so is, as a matter of law, precluded from recovering dam-

ages. To rule otherwise, urges appellant, would make the land possessor an insurer of the safety of all invitees who, descending a stairway on the premises, did not use their eyes to protect themselves.

[1] Decisions cited by appellant in support of this point are not persuasive. Some of these cases merely confirm the rule that no inference of negligence arises from the mere proof of a fall on a stairway. Had there been no other evidence in the instant case but proof that the plaintiff fell, such rule would undoubtedly apply. But such is not the case here. The evidence was sufficient to establish both the negligence of the defendant in maintaining the stairway and proximate cause. Appellant concedes that "in considering whether the judgment is supported, the evidence must be viewed in favor of respondent" but nevertheless contends that plaintiff, as a matter of law, is precluded from recovering damages. Its contention is untenable.

[2] Under the evidence disclosed by the record the jury was presented a question of fact and called upon to determine whether maintenance of the defendant's stairway with stair rails ending before reaching the bottom of the stairway amounted to negligence, which was a proximate cause of plaintiff's injury, and whether the plaintiff's failure to observe conditions and look where she was going was contributory negligence, which would preclude recovery. The jury determined this question of fact in favor of the plaintiff and it cannot be said upon a review of the entire record that such determination was not supported by substantial evidence.

[3] This same matter was canvassed by the trial court on a motion for a directed verdict, motion for judgment notwithstanding the verdict and on a motion for a new trial, and likewise determined in plaintiff's favor. Clearly, plaintiff was not precluded, as a matter of law, from recovering judgment. It was not unreasonable to conclude from the evidence that Mrs. Laird was in the exercise of due care, having had a right to believe that a handrail ostensibly installed to conduct one safely from ground floor to basement was correctly designed for that purpose and that such handrail would not terminate before the bottom of the stairway was reached. Furthermore, there was evidence to the effect that this condition had been previously called to defendant's attention and that changes had been ordered by it but not yet effected.

Insofar as the law is concerned, the present case is not unlike Gerard v. Wilson Holding Co., 79 Cal.App.2d 553, 180 P.2d 380. In that case respondent fell from steps leading from the side entrance of an apartment building. There was a guard rail at the outer edge of the upper platform but no rail on the outside of the steps or the lower platform. As she left the door she stepped onto the upper platform and assuming that the guard rail extended down the steps, reached for it and finding none, lost her balance and fell. The court held she was not guilty of contributory negligence as a matter of law. Said the court at page 555 of 79 Cal. App.2d, at page 381 of 180 P.2d: "When respondent stepped onto the upper platform her hand engaged the railing and she had a right to expect that the same protection would extend along the steps as that which had been installed on the platform."

[4] From the fact that Mrs. Laird might have seen the last step had she looked, it does not follow that she was guilty of contributory negligence as a matter of law. This was a question of fact for the jury. Such is the holding in many cases, for example, Walsh v. Maurice Mercantile Co., 20 Cal.App.2d 45, 49, 66 P.2d 181, 183, in which the court stated: "Conceding that if plaintiff had looked she might have seen the scale, nevertheless, in the circumstances, she was reasonably justified in assuming that the aisle was unobstructed, and her failure to see it was not necessarily negligence." A similar holding is found in Rau v. Redwood City Woman's Club, 111

Cal.App.2d 546, at page 550, 245 P.2d 12, at page 15, in which the court stated: "Whether plaintiff's action was reasonable and prudent under the circumstances was for the jury to decide as an issue of fact."

[5] The appellant further contends that the trial court erred in admitting evidence relating to prior accidents, which error is alleged to be highly prejudicial. This point relates to testimony of one George Falk, defendant's maintenance supervisor. He testified that prior to Mrs. Laird's accident, he had a conversation with Mr. Kalik, defendant's vice president and controller, to the effect that he had heard from one of the employees that someone had almost fallen on the stairs, that Kalik had directed him to put extensions on the rails, and that these had been ordered but had not been installed.

Appellant's classification of this testimony as evidence of "asserted prior accidents" and the argument that it was objectionable because there was no showing that the prior accidents had occurred under similar circumstances and that such evidence was hearsay and not binding on appellant are without merit. A careful reading of the entire testimony of Mr. Falk shows that the trial court merely allowed the witness to testify in respect to the matter of notice given to the defendant concerning the condition of the stairway and Mr. Kalik's directions to put extensions on the stair rails. Evidence of prior accidents or asserted prior accidents as such was not allowed by the trial court. In fact, the trial judge summarized the matter correctly in the following words: "This is my position: I believe that these statements of other employees to this witness cannot be deemed to be proof that those acts did occur, but the conversation which he may have had with the employer would be admissible as notice to him of a condition which may or may not have been dangerous, according to the circumstances." That portion of Mr. Falk's testimony relative to his conversation with Mr. Kalik was admissible to show knowledge of the condition of the stairway and handrail on the part of Mr. Kalik. This is sustained under the general rule stated in Gilbert v. Pessin Grocery Co., 132 Cal. App.2d 212, 216, 282 P.2d 148, 153, "One of the legitimate purposes of evidence of other accidents is the proving of notice to defendant of existence of a dangerous condition. When that is the objective a report made to defendant's responsible agent is not subject to the hearsay rule."

[6–8] Appellant maintains that the trial court erred in permitting plaintiff's counsel to cross-examine a defense witness on the Municipal Building Code of the City of Los Angeles, although the accident occurred in Pasadena. The record discloses that defendant's expert witness, Mr. Shields, a civil engineer practicing in southern California had, on direct examination, affirmed that the stairway and handrails conformed to "standard engineering practice in the City of Pasadena as of December 17, 1952." On cross-examination, plaintiff's counsel asked whether the witness limited his answers to standard engineering practice in Pasadena to which he replied: "No, sir. That would also be anywhere in the world, so far as I am concerned." The witness was then asked whether the stairs would have conformed to such practice "in all of the City of Los Angeles" to which an affirmative answer was given. On further cross-examination the expert stated that he was familiar with the Municipal Building Code of Los Angeles. In overruling objection to this testimony, the trial court called attention to the fact that the witness had "enlarged it to the world" and that Los Angeles "is a good part of the world."

No prejudicial error is discernible in respect to this matter. The witness, a qualified expert, had made the sweeping statement that the stairs and railings were in compliance with proper practice anywhere in the world. Plaintiff's counsel then directed the cross-examination into channels calculated to show that the broad statement made by the witness could not have been true. This he had a right to do

to test the credibility of the witness. Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850; People v. Houser, 85 Cal.App.2d 686, 193 P.2d 937. Under the long established rule that a wide latitude is permitted for the purpose of testing accuracy, veracity, knowledge and credibility (Newman v. Los Angeles Transit Lines, 120 Cal.App.2d 685, 262 P. 2d 95; Laguna Salada Union Elementary School Dist. v. Pacific Development Company, 119 Cal.App.2d 470, 259 P.2d 498), we cannot hold such cross-examination improper, and that appellant suffered prejudice therefrom.

Appellant's next ground for reversal is that since plaintiff testified fully as to her acts and conduct in descending the stairs there is no room for the application of the presumption of due care and the giving of the instruction thereon was prejudicially erroneous.

[9] On the authority of Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269, and the many other cases approving the rule in that case, the instruction embodying the presumption of due care can be properly given except in a case in which the presumption has been overcome by facts established by the uncontradicted testimony of the party who would be benefited by the presumption or his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence and when the fact so proved is wholly irreconcilable with the presumption sought to be invoked.

[10] In reviewing the record in the instant case, we find nothing in the plaintiff's testimony that is wholly irreconcilable with the presumption of due care, nor can we find that the presumption has been overcome by facts established by the uncontradicted testimony of the plaintiff. Appellant in its argument fails to take into consideration that contributory negligence was a vital issue in the case and involved the question where Mrs. Laird was looking immediately prior to and at the time of the accident. Here the presumption of due care aided the plaintiff only with respect to the issue of fact of whether she was contributorily negligent. On the critical point of her conduct and where she was looking, Mrs. Laird testified at different times that she wasn't looking down at the steps, that she was looking out into the basement; that she wasn't looking at any merchandise and that she really didn't recall where she was looking. Contrary to this, Mr. Harmon testified that she had stated to him just after she fell that she had been "looking at the merchandise out in the open in the front of the stairwell."

Under this state of the evidence it cannot be said that plaintiff's evidence was "uncontradicted" or that it established without conflict all of her acts and conduct immediately prior to and at the time of the accident. As to whether plaintiff's testimony was given under circumstances which afford no indication that it was the product of mistake or inadvertence it is proper to consider facts pertinent to her condition at the time she testified. The record shows that the trial took place almost four years after the accident; that plaintiff's condition had by then greatly deteriorated primarily because of the injury she received as a result of the accident herein and through infirmities of old age; that she was 83 years old; that her memory was faulty and very poor; and that she failed to recall not only where she was looking immediately before and at the time she fell but other matters of importance relating to the incident. Mrs. Laird's testimony was not full or complete. She could not remember where the steps were located, their height, construction or their color. She could not recall whether there was merchandise on the counters, whether the stairs were in the same condition when she used them before, if the steps were lighted or where she was looking just before she fell.

We cannot apply the case of Rozzen v. Blumenfeld, 117 Cal.App.2d 285, 255 P.2d 850, and similar cases cited by appellant holding that the instruction embodying the presumption of due care should not be given where the "plaintiff testified fully as

to her acts and conduct" to a situation such as this in which the testimony of a 83-year old woman, whose memory is faulty, given some four years after the accident, is manifestly uncertain as to what exactly took place other than the fact that she fell at the foot of the stairs. The record shows she was not able to testify "fully" as to her acts and conduct.

We hold therefore, under all the circumstances of this case, the presumption of due care was not dispelled and it was not error for the trial court to give the due care instruction.

[11] Finally, appellant charges reversible error in the giving of B.A.J.I. Instruction No. 213–E which informed the jury that, "In applying the rules of law that have been and will be stated by the court to the facts of this case, and in judging the conduct of the parties, you may consider the fact that the attention of persons who visit public stores ordinarily is attracted by the display of wares offered for sale and may be more or less absorbed by the transactions which they have in mind. You may consider whether the defendant anticipated that fact with ordinary care in the exercise of the duty which I have defined; also, whether the plaintiff did or did not share that ordinary experience of store visitors, and, if so, what effect that fact had on her conduct in relation to the cause of the accident."

Although it is true, as defendant states, that plaintiff herself did not testify that her attention was attracted by anything, it is not true that there is no evidence to support the instruction. The defendant's traffic manager testified that Mrs. Laird had told him that just before she fell she was "looking at the merchandise out in the open in front of the stairwell." In view of the evidence and the instructions considered as a whole, the giving of such instruction cannot be deemed reversible error.

The judgment and order appealed from are affirmed.

WHITE, P. J., and FOURT, J., concur.

159 Cal.App.2d 395

Peggy Joyce JOHNSON, Candace Louise Johnson, a minor, and Ernest Carlisle Johnson, a minor, by Peggy Joyce Johnson, their Guardian ad litem, and Peggy Joyce Johnson, Administratrix of the Estate of Ernest Carlisle Johnson, Deceased, Plaintiffs and Appellants,

v.

H. B. NICHOLSON, James L. Ferry and N. P. Van Valkenburgh, individually and doing business as Hal B. Hayes Construction Company; Hal B. Hayes Construction Company; Hal B. Hayes Construction Company, a corporation; Kettler-Knolls, Inc., a corporation; P. I. Wilsey, Jr., J. E. Kettler; D. W. Elliott; Alan J. Mickle and Kettler-Knolls, Inc., a corporation, individually and doing business as Kettler-Knolls Supply Company; Kettler-Knolls Supply Company; Virgil Collier, individually and doing business as Universal Floor Company; Universal Floor Company; Loren Conklin, Walter Mayer, Clarence E. St. George; Muroc Housing Corporation, a corporation, and Doe I to Doe X, inclusive, Defendants,

Kettler-Knolls, Inc., a corporation, Hal B. Hayes Construction Company, a joint venture, Clarence E. St. George, Virgil Collier, individually and doing business as Universal Floor Company, and Loren Conklin, Respondents.

Llewellyn PHILLIPS, Jr., Plaintiff and Appellant,

v.

KETTLER – KNOLLS CONSTRUCTION COMPANY, a corporation, Muroc Housing Corporation, a corporation, Hal B. Hayes Construction Company, a corporation, Universal Floor Company, a corporation, Clarence E. St. George, Hal B. Hayes, Loren Conklin, Walter Mayer, and Does One to Fifteen, Inclusive, Defendants,

Kettler-Knolls, Inc., a corporation, Hal B. Hayes Construction Co., a joint venture, and Clarence E. St. George, Respondents.

Civ. 22444.

District Court of Appeal, Second District, Division 3, California.

April 16, 1958.

Hearing Denied June 11, 1958.

Actions for damages for personal injuries and for death of employees of a cleaning service who were engaged in

cleaning operations of a building under construction when gasoline they were using was ignited by a blow torch being used in adjoining rooms by an employee of a subcontractor. From judgments of nonsuits in both actions in the Superior Court of Los Angeles County, Charles T. Smith, J., the plaintiff appealed The District Court of Appeal, Vallée, J., held that the questions of negligence, contributory negligence and assumption of risk should have been submitted to the jury.

Judgments reversed.

1. Appeal and Error ⇐927(3)

On review of a judgment of nonsuit, the appellate court states the evidence and reasonable inferences deducible therefrom in the light most favorable to the appellant.

2. Trial ⇐142

If inferences can be deduced reasonably and fairly from the evidence which sustain the allegations of the complaint, it is error to grant a motion for judgment of nonsuit.

3. Negligence ⇐134(2)

Negligence may be established by "circumstantial evidence," which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstantial Evidence".

4. Evidence ⇐587

A plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly deriving from the evidence.

5. Negligence ⇐136(9)

When different inferences as to negligence may be drawn from the evidence, the court must on motion for judgment of nonsuit, submit the question to the jury.

6. Negligence ⇐52, 55

Generally, a general contractor on a construction job in control of the premises has duty to use ordinary care to provide a safe place for employees of a subcontractor to work, including duty to warn employees of a danger either known to general contractor or discoverable by ordinary care or otherwise protect employees from injury, and to avoid exposing him to injury on account of dangerous conditions.

7. Negligence ⇐55

Employee of a subcontractor had duty to exercise ordinary care for the safety of employees of other subcontractors in a building under construction and it was the duty of such employee to conduct his operations in such a manner as not to injure others, and to use reasonable care, and such, included reasonable foresight as to the harmful consequences of his acts and omissions.

8. Negligence ⇐22, 24

Liability for careless handling of dangerous instrumentalities arises from failure to use due care, and arises when the circumstances show that the actor had reason to know that his act was likely to produce injury to any person in the lawful pursuit of his own business and exercising reasonable care.

9. Explosives ⇐10

In actions for death and injuries of employees of a cleaning service, when gasoline used in cleaning operations was ignited by use of a blow torch in an adjoining room by an employee of a subcontractor, it was not necessary that negligence of employee of general contractor in complete charge of the work and of subcontractors and employee of a subcontractor be the sole cause of a death and injuries, but it was sufficient that either be one of the contributing causes.

10. Negligence ⇐136(9, 14)

Whether a particular act or omission constitutes negligence is ordinarily a jury question, and it is only when reasonable minds cannot differ with respect to whether proved facts and reasonable inferences therefrom spell negligence or nonnegligence, that such issues may properly be taken from the jury.

11. Negligence ⇐136(9, 10)

Where there is uncertainty as to the existence of negligence question is not one of law but of fact to be settled by the jury; and this is so whether the uncertainty arises from a conflict in the evidence or because fair-minded men will honestly draw different conclusions from undisputed facts.

12. Explosives ⇐10

In actions for injuries and death of employees of a cleaning concern engaged in using gasoline in cleaning operations in an apartment building which was ignited by use of a blow torch of an employee of a subcontractor in an adjoining room, evidence of negligence of the employee of the general contractor who had complete charge of the work and of the subcontractors and of the employee of the subcontractor should have been submitted to the jury. West's Ann.Civ.Code, §§ 1714, 3281.

13. Death ⇐58(1)

Presumption obtained that a deceased employee exercised due care and ordinary prudence unless it could be said that such presumption was dispelled from the case. West's Ann.Code Civ.Proc. § 1963, subd. 4.

14. Negligence ⇐138(2)

Where alleged negligent acts and conduct of a decedent are at issue before the court and testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, an instruction that deceased is presumed to have exercised ordinary care is proper, except if the fact proved by uncontradicted testimony produced by party seeking to invoke the presumption, is wholly irreconcilable with the presumption. West's Ann.Code Civ. Proc. § 1963, subd. 4.

15. Negligence ⇐136(9)

Contributory negligence is not established as a matter of law by the injured party unless the only reasonable hypothesis is that such negligence exists, and before it can be held as a matter of law, the evidence must point unerringly to that conclusion.

16. Negligence ⇐136(9)

Even where facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.

17. Negligence ⇐66(1)

Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence.

18. Negligence ⇐66(1)

Doing an act with appreciation of the amount of danger, as well as of danger itself, is necessary to render a person negligent as a matter of law.

19. Negligence ⇐65

Where a person must work in a place of possible danger the amount of care he must exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case.

20. Explosives ⇐10

In actions for injuries and death of employees of a cleaning service engaged in using gasoline in cleaning up operations of a building being constructed when gasoline was ignited by a blow torch used by an employee of a subcontractor working in an adjoining room, contributory negligence of the plaintiff and deceased should be submitted to the jury. West's Ann.Code Civ. Proc. § 1963, subd. 4.

21. Negligence ⇐105

The essential elements of the doctrine of assumption of risk are voluntary exposure to danger, and actual, and not merely constructive, knowledge and appreciation of the risk assumed.

22. Negligence ⇐105

It is not assuming a risk to assume that one is not exposed to danger which results only from a violation of duty by some other person.

23. Explosives ⇐10

In actions for injuries and death of employees of a cleaning service engaged in cleaning operations of a building being constructed when gasoline they were using

was ignited by a blow torch used by an employee of a subcontractor in an adjoining room, record did not establish that the plaintiff and decedent assumed the risk as a matter of law.

24. Evidence ⇐314(1)

When a person's belief or state of mind is a fact in issue, word-utterances which betray the belief or state of mind of the speaker are admissible in evidence and are not obnoxious to the hearsay rule.

25. Evidence ⇐314(1)

In action for injuries, testimony of plaintiff as to what coemployee had told him a third person had said in conversation between the third person and the witness, the morning of the accident, was admissible not for the purpose of proving the truth of the statement, but for the purpose of showing the belief of the coemployee.

26. Evidence ⇐471(9)

Question to plaintiff, if the idea of using gasoline to clean floors originated with him was not improper as calling for the conclusion of a witness, since the question called for a fact, of which the witness knew of his own knowledge. West's Ann.Code Civ. Proc. § 1845.

27. Depositions ⇐88

Denying right to read in evidence part of a deposition was proper, where the answer was not responsive to the question at the time the deposition was taken, and all objections except to the form of questions were reserved to the time of trial.

Clifton A. Hix and Elizabeth Hix, San Pedro, for appellant Phillips.

Demler & Eckert and Charles E. Samuel, Long Beach, for appellants Johnson.

Ball, Hunt & Hart and Clarence S. Hunt, Long Beach, for respondents Kettler-Knolls, Inc., Hal B. Hayes Const. Co., and Clarence E. St. George.

Hunter & Liljestrom and Gerald V. Barron, Los Angeles, for respondents Virgil Collier, individually and doing business as Universal Floor Co., and Loren Conklin.

VALLÉE, Justice.

Appeals from judgments of nonsuit in two actions consolidated for decision. The first action is for damages for personal injuries by Llewellyn Phillips, Jr., against defendants Kettler-Knolls, Inc., Hal B. Hayes Construction Company, Clarence E. St. George, and Loren Conklin. The second action is for wrongful death by the surviving widow and two minor children of Ernest Johnson against the same defendants and Virgil Collier. The actions arose out of the same accident; they were consolidated for trial and tried before a jury. At the conclusion of plaintiffs' cases, on motion of defendants a nonsuit was granted in each case. Judgments for defendants followed. Plaintiff Phillips appeals from the judgment in favor of Kettler-Knolls, Inc., Hal B. Hayes Construction Company, and Clarence E. St. George. Plaintiffs Johnson appeal from the judgment in favor of the same defendants and in favor of defendants Virgil Collier and Loren Conklin.[1]

Kettler-Knolls, Inc., and Hal B. Hayes Construction Company were the general contracters in the construction of a housing project in Muroc, California. St. George was their employee and field superintendent of the project. The buildings under construction were duplex and quad structures.

Professional Cleaning Service was a subcontractor performing cleanup operations. The deceased, Ernest Johnson, a man 23 years of age, was its employee and in charge of employees of that service. Plaintiff Phillips was one of its employees. One of the duties of Johnson and Phillips with respect to the floors in the buildings under construction consisted in scraping and cleaning the cement slab so that it would be clean and smooth for the tile layers to lay tile thereon. Defendant Virgil Collier was the tile-laying subcontractor. Defendant

1. Plaintiff Phillips did not appeal from the judgment in favor of Virgil Collier and Loren Conklin.

Loren Conklin was an employee of Collier engaged in laying the tile. He had been employed in laying tile about 22 years.

[1] We shall, in accordance with the rule on review of a judgment of nonsuit, state the evidence and the reasonable inferences deducible therefrom in the light most favorable to plaintiffs. The accident happened in a quad, i. e., a 4-unit apartment building known as No. 10. Johnson and Phillips first worked in No. 10 on January 7, 1953. They found that apartment 4—the one where the accident occurred—was difficult to clean; they could not get the bumps and spots off the concrete floors and get them smooth.

Phillips testified: On January 8, the day before the accident and after the floors in apartment 4 had been cleaned for the first time, St. George told him to have Johnson reclean the floors in apartment 4 because they were not clean enough for the tile layers, and to tell him to use something other than water. He relayed the message to Johnson that evening. The next morning Johnson and Phillips were together and saw St. George. Johnson went over to talk to him. He was gone about 5 minutes. After sweeping out some houses, Johnson and Phillips went to the general contractor's warehouse and storage yard to get 5 gallons of gasoline to clean the floors in apartment 4. Johnson went over to where St. George was, got the key to the gasoline tank from him, came back, unlocked the tank, and pumped 5 gallons of gasoline.

Phillips testified he had a conversation with Johnson as to what directions were given him (Johnson) by St. George. He was then asked, "What did Mr. Johnson tell you that Mr. St. George said?" Defendants' objection was sustained.

After pumping the gasoline Phillips "put the lid on it and carried it to the back of the car and Mr. St. George drove up at that time." When Johnson finished pumping the gasoline he had the key in his hand; he walked over to St. George, stuck his hand in the window of St. George's car, and gave the key to the gasoline tank to St. George.

The duties of St. George were to coordinate the work between the subcontractors, tell them what he wanted done and when to do it. St. George testified that the day before the accident he told Johnson to reclean apartment 4 in No. 10; on the morning of the accident Johnson told him he was going to reclean the apartment and asked him if he could have some gasoline; he told him (Johnson) he could have it.

Johnson and Phillips went to No. 10; set the gasoline down outside; went into apartment 4; checked the gas outlets and the burners on the heaters and turned the pilot light off in a wall heater. The other outlets and pilot lights were all shut off. Phillips then started to spread the 5 gallons of gasoline and as he did so Johnson went behind him with a broom, sweeping it over the surface of the floors in apartment 4. They saw they did not have enough gasoline to cover all the floors. Phillips went to the warehouse and got another 5 gallons. The warehouseman asked him whom to charge it to; Phillips told him, the general contractor.

Phillips returned to apartment 4 with the gasoline, set it down on the front stoop, walked about 50 feet from the front door to where Johnson was sitting, and smoked a cigarette with him. Johnson had locked the back door and closed the windows of apartment 4; the front door was left "Nearly open all the way." The windows were closed to keep anyone from "walking over or looking in them with a cigarette," and the back door was locked so that no one would walk in with a cigarette. After finishing smoking Johnson and Phillips stomped out the cigarettes with their feet. They then got hand scrapers out of the car and stepped inside apartment 4 to see how it would clean off; "it" had dissolved somewhat and scraped much easier. They began to scrape the floor in the living room. They had been scraping about three minutes when an explosion was heard in the bedroom area. When Phillips heard the

explosion he looked towards the hall door and flames were coming from the general direction of the wall separating the adjoining apartment. The second can of gasoline remained on the front stoop until the time of the accident.

When Johnson and Phillips first went to apartment 4 on the morning of the accident, Phillips did not see any workmen around the building; the only cars in the area were at the end of another separate building. From the time he first went into the building until the explosion, Phillips had no knowledge anyone besides Johnson and him was working in the building. He testified he knew the tile layers "were down in the other building because of seeing this car." Phillips had not used gasoline before in cleaning floors, and it had never occurred to him to use it prior to the conversation Johnson had with St. George because there had not been need for it.

On the day before the accident St. George went to No. 10, found that the floors in apartment 3, the one next to where Johnson and Phillips worked, and in apartments 1 and 2 were ready for the tile; it was his job to tell the tile layers when to go in and lay the tile. Kennedy, foreman of the tile crew, had asked him to have the floors in apartment 4 recleaned. At the time and prior to the accident Kennedy was working in apartment 3. St. George knew of the danger of open flame and of open flame contacting gasoline. At no time did he say anything to Johnson or Phillips about the tile men working in apartment 1, 2, or 3 nor did he say anything to the tile men about Johnson and Phillips working in the adjacent apartment.

On the day of the accident Conklin was laying tile in apartment 3, the one adjoining the one in which Johnson and Phillips were working. Conklin was working in a bedroom closet about 2½ by 4 feet, the wall of which formed the bedroom wall of the apartment in which Johnson and Phillips were working. The baseboard was not installed until after the tile was laid and it had not been installed at the time, a fact known to Conklin.

Conklin was inside the closet with a lighted blowtorch in the closet doorway. He was using the blowtorch to cut tile in the closet. While he was working in the closet Mayer was in the bedroom working with him. Conklin testified: "I believe I did make a comment to Mr. Mayer. 'Some gas smells very potent.' I think I said how strong that gas was. * * * Q. When you smelled that gasoline, your blowtorch was lit? A. Yes. Q. Did you turn it off? A. No. Q. You realized, did you not, that there was a danger if gasoline came in contact with an open flame? * * * The Witness: There is always a danger, yes. There is a danger. Q. You knew that at the time of this accident, did you not, sir? A. Certainly." He was cutting the tile; he "let the torch sit on the floor." Conklin did not go into the apartment where Johnson and Phillips were working that morning because the foreman had told him it had to be recleaned. Conklin also testified: "Q. From your experience in this work, do they just use gasoline to clean those floors? A. It has been a habit of the trade to use gas, and I have quit three jobs rather than clean floors, because I had a flash fire like that three years ago. * * * I have known them to use gasoline to remove paint from the floor and I will not do it."

Within a minute or two after he smelled gasoline Conklin saw a fire around the edges of the wall; it was all around him. He testified: it was "Around the edges of the wall on the floor level, maybe two, three inches high. It was not up any degree of height." He ran out of the building.

Johnson died as a result of burns received in the fire; Phillips was severely injured.

[2–5] The primary question is whether there was any substantial evidence from which the jury could have inferred that St. George or Conklin or both were negligent. It is hardly necessary to say that if

inferences can be deduced reasonably and fairly from the evidence which sustain the allegations of the complaint, it is error to grant a motion for a judgment of nonsuit. Negligence may be established by circumstantial evidence, which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts. A plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly deriving from the evidence. Jones v. Hotchkiss, 147 Cal.App. 2d 197, 201–202, 305 P.2d 129. When different inferences as to negligence may be drawn from the evidence it is the duty of the court, on motion for a judgment of nonsuit, to submit the question to the jury.

Everyone is responsible for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. Civ.Code, § 1714. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault. Civ. Code, § 3281. "All persons are required to use ordinary care to prevent others being injured as the result of their acts; ordinary care has been defined as that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances of a given case. In other words, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated [citations]. The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence." Warner v. Santa Catalina Island Co., 444 Cal.2d 310, 317, 282 P.2d 12, 16.

[6] St. George was an employee of the general contractor; he was in complete charge of the work and of the subcontractors. "The contractor * * * has supervision over the entire building and its construction, including the work performed by a subcontractor, and where he negligently creates a condition, either by himself or through a subcontractor, he is primarily responsible for that condition and the consequences that may follow from it. He is in full control of the construction and knows or should know what is being placed in the building. Indeed, what is placed there is peculiarly within his knowledge." Dow v. Holly Manufacturing Co., 49 Cal. 2d 720, 321 P.2d 736, 739. "The ground upon which this liability is based is the implied duty which the law casts upon the independent contractor, as the person in charge and control of the work, to see that the rights of other persons, rightfully on the premises, are not injuriously affected by the performance of the work." Hall v. Barber Door Co., 218 Cal. 412, 419, 23 P. 2d 279, 281.

"The general rule is that a general contractor on a construction job who is in control of the premises is burdened with the duty to use ordinary care to provide a safe place for employees of a subcontractor to work, including the duty to warn such employees of a danger, either known to the general contractor, or discoverable by the exercise of ordinary care, or otherwise to protect the employees from injury, and to avoid exposing them to injury on account of dangerous conditions. He is bound to take reasonable measures to protect the employees of a subcontractor from injuries likely to arise from places of danger about the building. If he neglects this duty by failing to give adequate notice or warning of the existence of a place of danger, he may be found liable to an employee of a subcontractor for resulting injury." Revels v. Southern California Edison Co., 113 Cal.App.2d 673, 678, 248 P.2d 986; Raich v. Aldon Construction Co., 129 Cal.App.2d 278, 284, 276 P.2d 822, 827.

St. George knew Johnson and Phillips were going to use gasoline to clean the floors in apartment 4 on the day of the accident. It could be inferred he instructed them to do so and that he furnished the

gasoline. He knew, or should have known, the baseboard was not installed between apartment 4 and the adjoining apartment. It could be inferred he knew that gasoline might flow from apartment 4 into apartment 3. He knew the floors in the adjacent apartments were ready for the tile layers. It could be inferred he knew the tile layers would be working in the next apartment on the day of the accident. It was his job to tell the tile layers where and when to work. It could be inferred that is what he did. He knew the tile layers would use a blowtorch with an open flame. He did not warn either group of the presence of the other or take any precautions to prevent an accident. If St. George had reasonable grounds to apprehend that danger might follow the use of gasoline in the room adjoining that where Conklin was working with a blowtorch, reasonable care required that Johnson and Phillips be warned or that Conklin be told not to use the blowtorch while they were cleaning the floors. Young v. Bates Valve Bag Corp., 52 Cal. App.2d 86, 94, 125 P.2d 840. From the evidence and reasonable inferences the jury could have found that St. George and thus his employers were negligent.

[7] Conklin was an employee of a subcontractor. It is the duty of an employee of a subcontractor to exercise ordinary care for the safety of the employees of other subcontractors in a building under construction. Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 388–389, 26 P.2d 485; Pease v. San Diego Unified School Dist., 54 Cal.App.2d 20, 23, 128 P.2d 621. It was the duty of Conklin to conduct his operations in such a manner as not to injure others. It was his duty to exercise reasonable care; and that includes reasonable foresight as to harmful consequences of his acts and omissions. Darnold v. Voges, 143 Cal.App.2d 230, 248, 300 P.2d 255.

Conklin knew the floors in apartment 4 had to be recleaned. The morning of the accident he was in and out of apartments 1, 2, and 3 twice. He did not enter apartment 4. Johnson's car was parked in front of apartment 4. It could be inferred that Conklin knew, or should have known, that Johnson and Phillips were working in the adjoining apartment cleaning the floors on the day of the accident and that he knew gasoline was used sometimes to clean floors in preparation for laying tile. Conklin was using a blowtorch with an open flame. He smelled gasoline. It was "very potent." He knew the baseboard between the closet where he was working and the adjoining apartment had not been installed. Instead of immediately shutting off his blowtorch he continued to work in the closet with the lighted torch. He did nothing to determine the source of the gasoline odor. It could be inferred that the fire and resulting explosion were caused by the flame from the torch igniting the gasoline. From this evidence and reasonable inferences the jury could have found that Conklin and thus his employer were negligent.

[8] "Liability for carelessly handling dangerous instrumentalities arises from failure to use due care, and such failure arises when the circumstances show that the actor had reason to know that his act was likely to produce injury to any person in the lawful pursuit of his own business and exercising reasonable care. [Citation.] When human life is at stake the rule of due care and diligence requires that without regard to difficulties or expense every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others. [Citations.] One who causes the use of a dangerous instrument in a negligent manner, or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not at fault. [Citation.] That which a man foresees, is, as to him at least, natural and probable. [Citation.] No less a degree of care than that which is commensurate with the apparent danger is reasonable." Been v. Lummus Co., 76 Cal. App.2d 288, 292, 173 P.2d 34, 36.

[9–12] It is not necessary that St. George's negligence or Conklin's negligence be the sole cause of Johnson's death and Phillips' injuries; it is sufficient that either be one of the contributing causes. Westover v. City of Los Angeles, 20 Cal. 2d 635, 639, 128 P.2d 350; Reid & Sibell, Inc., v. Gilmore & Edwards Co., 134 Cal. App.2d 60, 65, 285 P.2d 364. Whether a particular act or omission constitutes negligence is ordinarily a jury question; it is only when reasonable minds cannot differ with respect to whether proved facts and reasonable inferences therefrom spell negligence of nonnegligence that such issues may properly be taken from the jury. Where there is uncertainty as to the existence of negligence the question is not one of law but of fact to be settled by the jury; and this is so whether the uncertainty arises from a conflict in the evidence or because fair-minded men will honestly draw different conclusions from undisputed facts. Biondini v. Amship Corp., 81 Cal.App.2d 751, 766, 185 P.2d 94.

[13–14] Defendants Collier and Conklin contend that Johnson was contributively negligent as a matter of law. Defendant St. George and his employers contend that both Johnson and Phillips were contributively negligent as a matter of law. As to the deceased Johnson, it is presumed he exercised due care and ordinary prudence (Code Civ.Proc. § 1963(4)) unless it can be said the presumption was dispelled from the case. "As expressed in Scott v. Burke, 1952, 39 Cal.2d 388, 394, 247 P.2d 313, it is settled law that where alleged negligent acts and conduct of a decedent are at issue before the court and the 'testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, * * * an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is * * * proper' except that if the fact proved by uncontradicted testimony produced by the party seeking to invoke the presumption, 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption * * the latter is dispelled and disappears from the case.' Although there is no room for the presumption where the driver or other person who claimed negligence is at issue himself testifies to his actions at the time involved [citation], the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked.'" Gigliotti v. Nunes, 45 Cal.2d 85, 92, 286 P.2d 809, 813; Leonard v. Watsonville Community Hosp., 47 Cal.2d 509, 517, 305 P.2d 36. Plaintiffs' evidence in the present case was not irreconcilable with the presumption.

[15, 16] As to Phillips, contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists, and before it can be held as a matter of law that contributory negligence exists the evidence must point unerringly to that conclusion. Slovick v. James I. Barnes Construction Co., 142 Cal.App.2d 618, 627, 298 P.2d 923. It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence the question is one of fact for the jury. Bady v. Detwiler, 127 Cal.App.2d 321, 339, 273 P.2d 941.

[17–20] It is argued that Phillips knew the danger of using gasoline. Knowledge that danger exists is not knowledge of the

amount of danger necessary to charge a person with negligence. Doing an act with appreciation of the amount of danger, as well as of danger itself, is necessary to render a person negligent as a matter of law. Andre v. Allynn, 84 Cal.App.2d 347, 352, 190 P.2d 949. Where a person must work in a place of possible danger the amount of care he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 239, 282 P.2d 69. Cases in which it can be said that negligence of the plaintiff contributes proximately to the accident as a matter of law are rare. Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826. Johnson and Phillips were entitled to assume, until a reasonable man in their place would be apprised of the contrary, that a safe place to work had been provided. Slovick v. James I. Barnes Construction Co., 142 Cal.App.2d 618, 628, 298 P.2d 923. We cannot say, as a matter of law, that either Johnson or Phillips was contributively negligent.

[21–23] St. George and his employers also contend Johnson and Phillips assumed the risk as a matter of law. The two essential elements of the doctrine of assumption of risk are voluntary exposure to danger, and actual, not merely constructive, knowledge and appreciation of the risk assumed. Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 235, 282 P.2d 69; 35 Cal.Jur.2d 814, § 266. The jury could have found that the danger which caused the fire was the lighted blowtorch. It cannot be said as a matter of law that either Johnson or Phillips knew or should have known that Conklin was working in apartment 3 with a lighted blowtorch. Nor can it be said as a matter of law that by the use of gasoline on the floors of apartment 4 Johnson and Phillips assumed the risk of negligence on the part of Conklin. It is not assuming a risk to assume that one is not exposed to danger which results only from a violation of duty by some other person. Leo v. Dunham, 41 Cal.2d 712, 715, 264 P.2d 1.

[24, 25] As stated earlier, the court refused to permit Phillips to testify to what Johnson had told him St. George said in the conversation between St. George and Johnson the morning of the accident. Plaintiffs assert error. The point is made only as against St. George and his employers. When a person's belief or state of mind is a fact in issue, word-utterances which betray the belief or state of mind of the speaker are admissible in evidence. Such evidence is not obnoxious to the hearsay rule. (2 Wigmore on Evidence, 3d ed., § 266; 6 Wigmore on Evidence, 3d ed., §§ 1789, 1790.)

Smith v. Whittier, 95 Cal. 279, 30 P. 529, was an action to recover damages for personal injuries caused by the falling of an elevator. At the trial a defendant was called as a witness on behalf of the plaintiff, and was asked whether he had received any direction from those who put the elevator in the building as to how it should be handled or used, and whether anything was said as to what the effect would be if he did not carry out those instructions. The questions were objected to and the objections overruled. On review it was contended the rulings were erroneous. Holding the rulings were correct, the court stated (95 Cal. at page 293, 30 P. at page 532):

> "If the fact sought to be established is that certain words were spoken, without reference to the truth or falsity of the words,—as, for instance, that a certain statement was made by a party to the action as an admission of a fact, or was made to him as a notice, or under such circumstances as to require action or reply from him,—the testimony of any person who heard the statement is original evidence, and not hearsay. Wharton on Ev. § 254; Greenl. Ev. § 100; People v. McCrea, 32 Cal. 98; People v. Estrado, 49 Cal. 171. Such evidence is admitted for the purpose of establishing merely the ut-

terances of the words, and not their truth; but the admission in evidence of the words spoken is not to be used in determining the issue of their truth. Necessarily the words so spoken are brought before the jury, but the jury can readily be instructed by the court that they are not to regard them as proof of the facts that are stated. People v. Estrado, 49 Cal. 173."

Also see People v. One 1948 Chevrolet Convertible Coupe, 45 Cal.2d 613, 620, 290 P.2d 538, 55 A.L.R.2d 1272; Dunn v. Shamoon, 37 Cal.App.2d 486, 491, 99 P.2d 1113; Head v. Wilson, 36 Cal.App.2d 244, 251, 97 P.2d 509; 31 C.J.S. Evidence § 257, p. 1009. The evidence is likewise admissible when the converse of the factual situation which existed in Smith v. Whittier, supra, 95 Cal. 279, 30 P. 529, is present, as it is in the case at bar. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 443–444, 159 P.2d 958; Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892. Cf. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 782, 117 P.2d 850. The evidence was admissible not for the purpose of proving the truth of what Johnson told Phillips but to show that Johnson believed he had been instructed to use gasoline to clean the floors.

[26] Phillips was asked by counsel for plaintiff if the idea of using gasoline to clean the floors originated with him. Counsel for defendant objected on the ground the question called for the conclusion of the witness. The objection was sustained. The ruling was clearly error. The question called for a fact, not a conclusion. It was a fact which Phillips knew of his own knowledge. Code Civ.Proc. § 1845. Phillips knew as a fact, not as a conclusion, whether the idea originated with him.

[27] Counsel for plaintiffs attempted, as against St. George and his employers, to read in evidence the following part of the deposition of Phillips: "'Q [asked by defendants other than Conklin and Collier]. Had you been instructed by any one of your superiors to charge it [the gasoline] to the general contractor? A. After Johnson's first conversation with St. George about cleaning the house, when he came back he told me St. George had told him to use gasoline on it, he would furnish the gas and we would do the work. Other than being told that, I don't know.'" Objections by counsel for defendants on the grounds of hearsay and nonresponsiveness were sustained. Error is asserted. The court did not err. At the time the deposition was taken all objections except as to the form of questions were reserved to the time of trial. The answer obviously was not responsive to the question.

The question of negligence, contributory negligence, and assumption of risk were for the jury. The court erred in granting the motions for judgments of nonsuit.

The judgments appealed from are reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; McCOMB, J., dissenting.



159 Cal.App.2d 635

In the Matter of the ESTATE of Morris BUCKHANTZ, Deceased.

Frieda DAVIDSON, Leon Davidson and Louis Davidson, Contestants and Appellants,

v.

UNION BANK & TRUST CO. OF LOS ANGELES, Petitioner and Respondent,

Jeannette Buckhantz, Legatee and Respondent.

Civ. 22655.

District Court of Appeal, Second District, Division 3, California.

April 23, 1958.

Proceeding in the matter of an estate. From an order of the Superior Court, Los Angeles County, Clyde C. Triplett, J., con-

testants appealed. The District Court of Appeal, Vallée, J., held, inter alia, that where executor had paid all estate and inheritance taxes, and decree of distribution directed trustee to apportion property into three parts, two parts for benefit of testator's widow and one part for benefit of testator's sister, and trustee did as directed, a subsequent order which in effect increased the estate held for benefit of widow and decreased the estate held for benefit of sister was erroneous notwithstanding decree was erroneous in failing to provide for reducing the one third part by the amount of taxes paid by executor attributable to that part, and in making no provision for reimbursement to executor by sister personally of taxes which executor had paid with respect to property bequeathed and devised directly to her, since decree of distribution was final though erroneous.

Reversed.

1. Executors and Administrators ⇐315(6)

A decree of distribution, when it becomes final, is conclusive as to rights of heirs, devisees and legatees, and is conclusive even if erroneous and though the record itself shows that it is erroneous. West's Ann.Prob.Code, § 1021.

2. Executors and Administrators ⇐315(6)

A decree of distribution is a final and conclusive determination of rights of all parties under a testamentary trust, including beneficiaries of the trust, and a testamentary trustee as a devisee and legatee is bound by decree with respect to existence, validity of, and rights under testamentary trust and incidental matters which necessarily are involved in determination on those subjects. West's Ann.Prob.Code, § 1021.

3. Executors and Administrators ⇐315(5)

The decree of distribution fixes several interests of distributees by designating the persons entitled and the proportions or parts to which each is entitled. West's Ann.Prob.Code, §§ 1020, 1021.

4. Executors and Administrators ⇐314(11)

It was duty of probate court to determine at time of decree of distribution the existence of any trust created by will and extent of any interest that could pass to trustee under the will. West's Ann.Prob. Code, §§ 1020, 1021.

5. Executors and Administrators ⇐315(6)

Where executor had paid all estate and inheritance taxes, and decree of distribution directed trustee to apportion property into three parts, two parts for benefit of testator's widow and one part for benefit of testator's sister, and trustee did as directed by decree, a subsequent order which in effect increased the estate held for benefit of widow and decreased the estate held for benefit of sister was erroneous notwithstanding decree was erroneous in failing to provide for reducing the one-third part by the amount of taxes paid by executor attributable to that part, and in making no provision for reimbursement to executor by sister personally of taxes which executor had paid with respect to property bequeathed and devised directly to her, since decree of distribution was final though erroneous.

6. Executors and Administrators ⇐315(6)

The fact that a final determination of estate tax had not been made on date when decree of distribution was made did not detract from finality and conclusiveness of decree where executor paid all the estate tax before the decree was made.

7. Executors and Administrators ⇐315(3)

Where decree of distribution directed trustee to apportion property into three parts, two parts for benefit of testator's widow and one part for benefit of testator's sister, a subsequent order which in effect increased the estate held for benefit of widow and decreased the estate held for benefit of sister could not be justified on ground of conclusion of law made by court preceding decree with regard to prorating of the federal estate tax among beneficiaries, in view of fact that such conclusion was not carried into decree.

8. Judgment ⇐527

A conclusion of law which is not carried into the judgment cannot be deemed a part thereof, since the judgment is the only real conclusion of law and displaces all former statements in findings on the subject.

9. Executors and Administrators ⇐315(3)

An order which in effect increased the trust estate held for benefit of testator's widow beyond an amount equal to two-thirds of property distributed to trustee by decree of distribution, and decreased trust estate held for benefit of testator's sister to less than one-third thereof contrary to decree, could not be justified on ground of conclusion of law preceding decree relating to prorating of federal estate tax among beneficiaries even if conclusion could be considered an instruction where such instruction was directed to executor and not to trustee with respect to proration of estate tax and decree itself specially approved the proration of that tax made by the executor.

10. Executors and Administrators ⇐315(3)

Where executor had paid all estate and inheritance taxes, and decree of distribution directed trustee to apportion property into three parts, two parts for benefit of testator's widow and one part for benefit of testator's sister, a subsequent order which in effect increased the estate held for benefit of widow and decreased the estate held for benefit of sister could not be justified on basis of provision in decree which applied to taxes "which said Trustee shall be required to pay" and which provided that "estate and inheritance taxes so paid by the Trustee shall be charged to the" beneficiary, there being nothing in decree authorizing trustee to prorate taxes, and decree could not be construed as authorizing trustee, after decree of distribution had become final, to charge the taxes paid by executor prior to distribution to a beneficiary.

Zagon, Aaron & Sandler, Beverly Hills, and Nelson Rosen, Hollywood, for appellants.

Alvin R. Isenberg, Beverly Hills, for respondent Union Bank & Trust Co. of Los Angeles.

VALLÉE, Justice.

Appeal from an order granting the petition of a testamentary trustee to transfer funds from one trust to another.

Morris Buckhantz died testate on March 18, 1950. Appellant Frieda Davidson is his surviving sister. Appellants Leon and Louis Davidson are sons of Frieda Davidson. Respondent Jeannette Buckhantz is his surviving widow. Respondent bank was the executor of his will.

During administration of the estate the executor paid federal estate tax in the amount of $12,052.63 and inheritance taxes in the amount of $4,602.09.

On November 26, 1952 an order and decree was made in which the executor was ordered to exclude the community interest of the widow in the estate from its computation when prorating the federal estate tax apportioned to each beneficiary, and decreed that described real and personal property of the estate and all other property except $11,414.19 "be and the same is hereby distributed to" respondent bank in trust. The decree provided: "The Trustee shall apportion the trust estate into three equal parts without being required to make physical segregation"; that the net income from two of the three parts be distributed to Jeannette Buckhantz, and that the two parts be charged with two-thirds of the expenses of administering "this trust"; and that the net income available from the remaining one part be distributed to Frieda Davidson, and that the one part be charged with one-third of the expenses of administering "this trust." It also provided:

> *"The respective portions of the Trust Estate shall continue until and shall cease and terminate upon the death of the beneficiary of the respective portions of the Trust Estate as is set out hereinabove.* Upon such termination, the *respective portion* of the Trust Estate (principal and any undis-

tributed income therefrom) shall, after payment of any expenses of last illness and burial for Jeannette Buckhantz and Frieda Davidson, be distributed to the persons for whom the *portion* of said estate is then held in trust under the provisions and *in the proportions herein provided,* and if there be no such persons surviving, then to the heirs of Morris Buckhantz, as such heirs shall be determined according to the laws of succession of the State of California then in full force and effect." (Emphasis added.)

The decree gave Jeannette Buckhantz the power to appoint her share of the trust estate, and provided that on the death of Frieda Davidson her share should be distributed to her sons, Leon and Louis. It specifically approved the executor's proration of the federal estate tax. An appeal was taken only from that part of the decree of November 26, 1952 which ordered the executor to exclude the community interest of the widow in prorating the federal estate tax. The part appealed from was affirmed. Estate of Buckhantz, 120 Cal.App.2d 92, 260 P.2d 794. The decree became final in its entirety.

On December 18, 1952 pursuant to the decree of November 26 respondent bank, as trustee, acknowledged that it had received from the executor on behalf of the Jeannette Buckhantz fund, designated as "Trust E–477–1," a two-thirds interest in the property distributed to it amounting in the aggregate to $100,092.06, and that it had received from the executor on behalf of the Frieda Davidson fund, designated as "Trust E–477–2," one-third of the property distributed to it amounting in the aggregate to $50,046.04.

On January 25, 1955 respondent bank, as executor, filed a petition for approval of its final account and report of administration. The petition stated: after paying commissions and fees it had $1,951.03 on hand; it was still holding $2,500 which had theretofore been distributed to the trustee; it was necessary for it to distribute $6,820.17 to the trust estate for the benefit of Jeannette Buckhantz; by distributing the $2,500 to the Jeannette Buckhantz trust estate, the balance of the probate estate which will be left in the hands of the executor after the payment of the balance of commissions and fees will be $1,951.03, or a total of $4,451.03, and it would then be necessary for Frieda Davidson to pay the executor $2,369.13 for distribution to the Jeannette Buckhantz trust estate. The petition prayed that an order be made authorizing the executor to pay to the trustee "for the use and benefit of that portion of the Trust Estate in favor of Jeannette Buckhantz, the entire balance in the hands of petitioner in the sum of $1,951.03, and [a]uthorizing and ordering petitioner [the executor] to transfer and pay over to the Trustee aforesaid, for the use and benefit of the portion of the Trust Estate in favor of Jeannette Buckhantz, the above described fund in the sum of $2500.00, and [i]nstructing and directing Frieda Davidson to pay to said Trustee for the use and benefit of the Jeannette Buckhantz portion of the trust estate, the sum of $2,369.13."

Frieda Davidson filed objections to the petition. She prayed that the petition be denied except that the balance of $1,951.03 be ordered distributed to the trustee with instructions to apportion two-thirds to trust E–477–1 and one–third to trust E–477–2.

On May 16, 1955 an order was made sustaining the objections except it was decreed that the $1,951.03 be distributed to the trustee for the benefit of trust E–477–1 only. The objections apparently were sustained on the ground the decree of November 26, 1952 was final and conclusive with respect to the matters as to which the executor sought instructions and directions except as to the $1,951.03 item. This order became final.

From December 1952 to December 1955 respondent trustee carried two-thirds of the assets distributed to it as trust E–477–1 with Jeannette Buckhantz as beneficiary and one-third thereof as trust E–477–2 with Frieda Davidson as the beneficiary, and orders were made settling accounts of the trustee on this basis.

On February 26, 1957—more than four years following the decree of distribution of November 26, 1952—respondent trustee filed a petition for authority to transfer funds and for instructions. It alleged that in accordance with the decree of distribution it had divided the trust estate into two parts, one designated E–477–1, for the benefit of Jeannette Buckhantz, and the other, E–477–2, for the benefit of Frieda Davidson and her sons; in so dividing the trust estate the trustee originally made the distribution and division without the final proration and allocation of the federal inheritance tax, the distribution and division having been made before the final determination and computation of that tax. The petition quoted a provision of the will to the effect that all bequests shall be taxable to each beneficiary; that all taxes shall be first paid by such beneficiary before distribution of the bequest; that any sums so paid shall be charged to the beneficiary and deducted from the interest of such beneficiary; and that any estate and inheritance taxes *"paid by the trustee"* shall be deducted "by the Trustee" from the gift distributable to such beneficiary.

The petition further alleged: the trustee received $99.715.96 by way of distribution into trust E–477–1 and $48,884.48 into trust E–477–2, and that in addition to those amounts payments were made for inheritance and state taxes on both E–477–1 and E–477–2 and on benefits received directly by Frieda Davidson, bringing the grand total necessary to provide the basis for distribution between the two trusts to $159,477.34; the inheritance and estate taxes so paid consisted of the following:

(a) Inheritance tax on E-477-1	$ 369.17
(b) Inheritance tax on E-477-2	2,796.91
(c) Estate tax on E-477-1	1,286.43
(d) Estate tax on E-477-2	3,784.07
(e) Inheritance Tax on Frieda Davidson personal legacy	755.44
(f) Estate Tax on Frieda Davidson personal legacy	1,884.88
Total	$10,876.90;

on the basis of $159,477.34 trust E–477–1 *"should have received"* $106,318.23 and trust E–477–2 *"should have received"* $53,159.11; from the $106,318.23 trust E–477–1, having paid inheritance taxes of $369.17 and estate tax of $1,286.43, a total of $1,655.60, *"should have had"* the net amount due to it of $104,662.63, whereas in fact it received $99,715.96, resulting in a deficit to E–477–1 of $4,946.67; from the $53,159.11 trust E–477–2, having paid inheritance tax of $2,796.91 and estate tax of $3,784.07, a total of $6,580.98, *"should have had"* the net amount due to it of $46,578.13, whereas it received $48,884.48, resulting in an overpayment to E–477–2 of $2,306.35; the overpayment of $2,306.35 received by E–477–2 should be transferred by the trustee from E–477–2 to E–477–1; Frieda Davidson received the benefit of inheritance tax paid on her personal legacy in the amount of $755.44 and estate tax on her personal legacy of $1,884.88, a total of $2,640.32; the $4,946.67 consists of the overpayment of $2,306.35 and the personal overpayment of $2,640.32; in order to make the proper division and distribution of the trust estate and the two separate funds based on a proper charge and allocation of inheritance and estate tax payments, it is necessary for the trustee to transfer from E–477–2 to E–477–1 the $2,306.35 and to receive or to withhold $2,640.32 from Frieda Davidson.

The petition prayed for an order authorizing the trustee to take $2,306.35 from trust E–477–2 and transfer it to trust E–477–1 and to withhold from Frieda Davidson from current payments next payable to her $2,640.32 from trust E–477–2.

Frieda, Leon, and Louis Davidson filed objections to the petition. They alleged the decree of distribution distributing the trust estate had become final and conclusive; quoted the provision of the decree directing the trustee with respect to division of the trust estate into three parts; denied that the trustee had paid any estate or inheritance taxes since the distribution of the property to it; alleged that such taxes, attributable to any property distributed to the trustee and to any legacy made directly to Frieda Davidson, were paid by the ex-

ecutor of the estate out of the funds in his possession prior to the orders of distribution and prior to distribution to the trustee; and the petition constitutes an attempt to vary the provisions of the decree of distribution.

At the hearing the only evidence received was that by the decree of distribution the corpus of the trust for Frieda Davidson received an overpayment of $2,306.35; that since the decree of distribution of November 26, 1952 the trustee had not paid any inheritance or estate taxes of any kind or character; the executor paid the inheritance and estate taxes; the estate tax was paid on June 15, 1951 and the final payment of inheritance taxes was made January 16, 1952; pursuant to the decree of November 26, 1952 the trustee allocated $100,092.06 to trust E–477–1 for the benefit of Jeannette Buckhantz and $50,046.04 to trust E–477–2 for the benefit of Frieda Davidson.

The court instructed the trustee to take $2,306.35 from trust E–477–2 and transfer it to trust E–477–1, and to withhold $2,640.32 from Frieda Davidson for current payments payable from trust E–477–2 and to transfer it to trust E–477–1. Frieda, Leon, and Louis Davidson appeal from this order.

Appellants contend the order is erroneous because it varies and modifies the rights and obligations of the beneficiaries of the trust as stated in the decree of distribution.

[1, 2] It is hornbook law that the decree of distribution, when it becomes final, is conclusive as to the rights of heirs, devisees, and legatees. Prob.Code, § 1021. It is conclusive even if erroneous and though the record itself shows that it is erroneous. Estate of Loring, 29 Cal.2d 423, 432, 175 P.2d 524; Miller v. Pitman, 180 Cal. 540, 543, 182 P. 50; O'Brien v. Nelson, 164 Cal. 573, 575–576, 129 P. 985. It is a final and conclusive determination of the rights of all parties under a testamentary trust including beneficiaries of the trust. Estate of Loring, supra, 29 Cal.2d 423, 427, 175 P.2d 524; Estate of Van Deusen, 30 Cal.2d 285, 289–290, 182 P.2d 565. And a testamentary trustee as a devisee and legatee is bound by the decree with respect to the existence, validity of, and rights under a testamentary trust and the incidental matters which necessarily are involved in a determination on those subjects. Wells Fargo & Union Trust Co. v. Superior Court, 32 Cal.2d 1, 9, 193 P.2d 721.

[3, 4] At the time of the decree of distribution the court must distribute the estate to "the persons entitled thereto" (Prob. Code, § 1020), and in the decree it "must name the persons and the proportions or parts to which each is entitled * * *" (Prob.Code, § 1021). The decree fixes the several interests of the distributees by designating the persons entitled and the proportions or parts to which each is entitled. Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322. It was the duty of the probate court to determine at the time of the decree of distribution the existence of any trust created by will and the extent of any interest that could pass to the trustee under the will. Cook v. Cook, supra, 17 Cal.2d 639, 652, 111 P.2d 322; Estate of Easter, 24 Cal.2d 191, 194, 148 P.2d 601.

The decree of distribution in Goad v. Montgomery, 119 Cal. 552, 51 P. 681, distributed part of the estate to trustees in trust. Later it was urged the will gave the trustees powers not specified in the decree. The court answered (119 Cal. at page 557, 51 P. at page 682):

> "The decree of distribution is the instrument by virtue of which the plaintiffs have received the property in trust for the children, and their powers and duties in regard to that property are to be measured by the terms of this decree. * * * Section 1665, of the Code Civ.Proc., requires the court, in making distribution of the estate, to distribute the residue of the estate in the hands of the executor 'among the persons who by law are entitled thereto'; and the provision in section 1666 that the court must name in the decree 'the persons and the proportions or

parts to which each shall be entitled' requires the court in making such decree to give a construction to the terms of the will. The further provision in the same section that 'such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal,' precludes all right to impeach the decree except upon an appeal, and causes the decree to supersede the will, and to prevail over any provision therein which may be thought inconsistent with the decree. The decree is conclusive, not only as to the persons who have any rights in the estate, but also as to the extent and limitation of their rights. Whether the distribution is to individuals in their own right, or to hold for others under specified trusts, the rights of all parties interested in the estate are determined by the decree. * * *"

O'Brien v. Nelson, 164 Cal. 573, at page 575, 129 P. 985, says:

"The appellant claims that the former administration was void or ineffectual, because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and C. O. Nelson, her surviving husband, and distributed it all to Annie Reardon, to whom Nelson had conveyed all his title and interest therein. This does not make the proceedings or decree void. At the most it was a mere error, a mistake injurious to the persons who would have inherited the property from Annie Nelson, if it had been her separate estate, and which they could correct only by moving for a new trial, or by taking an appeal from said decree. In the absence of such proceedings for a review of that decree, it became final and conclusive upon all heirs, legatees, and devisees."

In Estate of Loring, supra, 29 Cal.2d 423, 175 P.2d 524, the decree of distribution distributed assets valued at more than $150,000 to trustees with directions to pay within five years of the death of the testator $75,000 to a town in Iowa, $10,000 to Braille Institute, and various sums to sundry individuals. Less than three years thereafter and before any payment had been made by the trustees, the trust had shrunk to about $55,000. On a petition by the trustees for instructions as to the distribution of that amount the probate court held that the provisions of section 41 of the Probate Code restricting gifts to charities to one-third of the testator's estate were applicable to the bequests to the town and Braille Institute, and instructed the trustees to distribute to them one-third of the aggregate of the amount then available for distribution. On review it was held: the probate court erred; the decree of distribution was final and conclusive on the rights of the beneficiaries of the trust not only as to the rights which were necessarily in issue in the distribution proceeding but all rights determined by the decree; and the town and Braille Institute were entitled to their pro rata share of the amount in the trust in proportion to the specific sums provided in the decree of distribution. The court said it might well have been that in rendering the decree of distribution the probate court "failed to consider the provisions of the Probate Code restricting charitable bequests to one-third of the estate and erroneously held all the provisions of the trust to be valid. It is settled, however, that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error" (29 Cal.2d at page 432, 175 P.2d at page 529). Also see Estate of Van Deusen, supra, 30 Cal.2d 285, 182 P.2d 565; Federal Farm Mortgage Corp. v. Sandberg, 35 Cal.2d 1, 215 P.2d 721; McLellan v. McLellan, 17 Cal.2d 552, 110 P.2d 1034; Carr v. Bank of America, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282; Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120; Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 146 P.2d 962; Estate of Lingg, 71 Cal. App.2d 403, 162 P.2d 707; Howe v. Brock,

86 Cal.App.2d 271, 194 P.2d 762; Estate of Cecala, 104 Cal.App.2d 526, 232 P.2d 48; Estate of Tynan, 129 Cal.App.2d 364, 276 P.2d 809; Estate of Bodger, 130 Cal.App.2d 416, 279 P.2d 61; Estate of Weinreich, 131 Cal.App.2d 303, 280 P.2d 499; Estate of Nash, 132 Cal.App.2d 233, 282 P.2d 184.

"'By giving the notice prescribed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive upon him, "'subject only to be(ing) reversed, set aside, or modified on appeal.'" The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court.'" Estate of Radovich, 48 Cal.2d 116, 121, 308 P.2d 14, 18.

[5] Applying the foregoing principles of law it is manifest that the order appealed from changes, contradicts, and deviates from the decree of distribution. The facts, while they appear to be somewhat complicated, are relatively simple. During administration of the estate the executor paid all estate and inheritance taxes. The decree of distribution distributed property valued at $150,138.10 to the trustee. The decree directed the trustee to apportion that $150,138.10 of property into three parts without physical segregation, two parts for the benefit of Jeannette Buckhantz and one part for the benefit of Frieda Davidson. The trustee did so and allocated property of the value of $100,092.06 to trust E–477–1 for the benefit of Jeannette Buckhantz and $50,046.04 to trust E–477–2 for the benefit of Frieda Davidson. The decree was clearly erroneous. It made no provision for reducing the one-third part distributed to the trustee for the benefit of Frieda Davidson by the amount of estate and inheritance taxes previously paid by the executor attributable to that part, and it made no provision for reimbursement to the executor by Frieda Davidson personally of estate and inheritance taxes which the executor had paid with respect to property bequeathed and devised directly to her. However, as seen from the authorities cited, an erroneous decree of distribution is as final and conclusive as a decree that contains no error. The effect of the order appealed from is to increase the trust estate held for the benefit of Jeannette Buckhantz beyond an amount equal to two-thirds of the property distributed to the trustee by the decree of distribution, and to decrease the trust estate held for the benefit of Frieda Davidson and her sons to less than one-third thereof contrary to the decree of distribution. To uphold the order "would be flying in the very teeth of the mandate" to divide the property distributed into three equal parts and pay the net income from two parts to Jeannette Buckhantz during her lifetime and to pay the net income from one part to Frieda Davidson during her lifetime. Estate of Tynan, 129 Cal.App.2d 364, 366, 276 P.2d 809.

It is also to be observed that the order appealed from contradicts the order of May 16, 1955 which sustained Frieda Davidson's objections to the petition of respondent bank as executor in which it sought an order authorizing it to transfer $2,500 which had been distributed to it as trustee to trust E–477–1 for the use and benefit of Jeannette Buckhantz and directing Frieda Davidson to pay $2,369.13 to the trustee for the use and benefit of the Jeannette Buckhantz trust, which order became final.

[6] The fact that a final determination of the estate tax had not been made on November 26, 1952 when the decree of distribution was made is of no consequence. That fact does not in any way detract from the finality and conclusiveness of the decree. The decree became final irrespective of whether a final determination of the estate tax had been made. The executor paid all the estate tax before the decree; the trustee paid none.

[7, 8] In its conclusions of law preceding the decree of distribution of November 26, 1952, the court made the conclusion quoted in the margin.[1] Respondents rely on this conclusion as authorizing the order under review. The point is without merit. This conclusion of law was not carried into the decree of distribution. The decree unequivocally ordered and adjudged that the specific properties distributed to the trustee be apportioned into three equal parts. A conclusion of law which is not carried into the judgment cannot be deemed a part thereof. Neilsen v. Neilsen, 216 Cal. 150, 152, 13 P.2d 715. The judgment is the only real conclusion of law and displaces all former statements in the findings on the subject. Mason v. Del Valle, 213 Cal. 30, 32, 1 P.2d 419; Liuzza v. Brinkerhoff, 29 Cal.App.2d 1, 5, 83 P.2d 976; Valentin v. Valentin, 93 Cal.App.2d 588, 592, 209 P.2d 654. "It is well settled that the findings and conclusions of the court do not have the force and effect of an adjudication where the subject matter is not disposed of by the judgment. The force of an adjudication rests in the judgment itself, and findings not necessary to the judgment are no wise conclusive." Guardianship of Leach, 30 Cal.2d 297, 310, 182 P.2d 529, 536.

[9] Gordon v. Vucinich, 61 Cal.App.2d 78, 142 P.2d 71, considered the effect of an order settling the final account of a guardian and for distribution. The court in the order found that Voislav Vucinich had been paid $1,306.88 in excess of his share of the estate and that that amount was owing to Desanka and Alexander, the other wards. This finding was not carried into the order for distribution which followed the finding in the same document. The probate court decreed that the estate be distributed in equal shares to the three wards. This court said (61 Cal.App.2d at page 81, 142 P.2d at page 72):

> "We need not determine on this appeal whether or not the probate court, in the guardianship proceeding, could have entered a judgment that Desanka recover of Voislav the sum of $756.29, or that Voislav should pay that sum to Desanka. It suffices for our purposes to note that the probate court made no such judgment. It did not even order that the share of the estate to be distributed to Desanka should be increased beyond a third, the increase to be taken from Voislav's third, in order to equalize the unequal distribution theretofore made by the guardian. Certainly the mere finding that A owes B money is not a judgment in B's favor, particularly where it is followed by a formal judgment which takes no account of the debt."

Furthermore, the conclusion of law, if it may be considered an instruction, was directed to the executor, not to the trustee, with respect to proration of the estate tax, and the decree itself specially approved the proration of that tax made by the executor.

[10] Respondents' reliance on a paragraph of the decree which is quoted in the margin is misplaced.[2] This paragraph ap-

1. "That the Federal Estate Tax shall be prorated among and paid by the beneficiaries under the decedent's Will, as follows: Each beneficiary shall pay such portion of the Federal Estate Tax as the amount received by, or for the use and benefit of such beneficiary, bears to the total property subject to the Federal Estate Tax. Jeannette Buckhantz, the decedent's widow, is liable for that pro rata share of the federal estate tax which the value of the assets received by her, or for her use and benefit, is in excess of the value of her community property interest; that portion of the estate received by her, or for her use and benefit, representing her community interests created no federal estate tax, and therefore, should not be considered in prorating the federal estate tax."

2. "If the whole or any part of the Trust Estate, or the proceeds or avails thereof, shall become liable for the payment of any tax, charge or assessment which said Trustee shall be required to pay, said Trustee shall have the full power and authority, without previous notice to or demand upon any person, to pay such tax, charge or assessment. All gifts and bequests to each of the beneficiaries as herein set out shall be tax-

plies only to taxes "which said Trustee shall be required to pay" and provides that "estate and inheritance taxes so paid by the Trustee shall be charged to the" beneficiary. There is nothing in the decree authorizing the trustee to prorate taxes. It does not and cannot be construed as authorizing the trustee, after the decree of distribution has become final, to charge estate and inheritance taxes paid by the executor prior to distribution to a beneficiary. As said in Goad v. Montgomery, 119 Cal. 552, at page 561, 51 P. 681, at page 684: "Although the persons named in the will as its executors are the same as those to whom the testator directed the property to be distributed in trust for his children, yet the power of sale conferred upon the executors was not given by him to them as trustees, but terminated with their discharge as executors. The fact that the two offices are held successively by the same individuals does not give to them in the exercise of one office the power that had been conferred for the exercise of the other. Their rights and duties as executors were quite distinct from the duties imposed upon them as trustees, and their powers and duties as trustees did not begin until, as executors, they had ceased to have any control over the property; and, as above seen, the decree of distribution is alone to be considered for the purpose of ascertaining their powers." Also see Estate of Shaw, 85 Cal.App. 518, 520–522, 260 P. 351. The duties of respondent bank as trustee under the decree of November 26, 1952 did not begin until that date. Bemmerly v. Woodard, 136 Cal. 326, 331, 68 P. 1017.

If respondents had felt that the decree of distribution was erroneous or defective in not giving enough to the widow's share of the trust property and in giving too much to Frieda Davidson's share, they could have appealed therefrom and had the decree corrected. By their failure to appeal, the decree has become conclusive on them.

Order reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

able to the donee or beneficiary, and all taxes, whether Federal, State or Municipality, shall be first paid by such donee or beneficiary before distribution to them of the said gift or bequest. Any sums so paid which are a charge against any beneficiary hereunder shall be deducted from the interest of the beneficiary so liable. Any estate and inheritance taxes so paid by the Trustee shall be charged to the donee or beneficiary and deducted by the Trustee from the gift, devise or bequest distributable to such donee or beneficiary. Other taxes shall be charged to income, provided, however, that any tax levied upon profit or gain which inures to the benefit of principal shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority. Improvement assessments shall be charged to principal and maintenance assessments shall be charged to income."



159 Cal.App.2d 839

Samuel LANDI and Rose Landi, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY of SAN MATEO; The Honorable Louis B. DeMatteis, Presiding Judge, and The Honorable Frank B. Blum, Respondents.

Civ. 18025.

District Court of Appeal, First District, Division 1, California.

April 17, 1958.

Proceeding for a writ of prohibition to restrain the Superior Court of San Mateo County from proceeding in an action of eminent domain pending therein brought by school districts to condemn for school purposes certain real property in the town owned by the petitioners. The District Court of Appeal, Bray, J., held that zoning ordinances of a town that did not control the right of a school district to acquire land

to enlarge the district's school premises within the corporate limits of the town.

Alternative writ discharged and petition for peremptory writ denied.

Municipal Corporations ⇐601(19)

Zoning ordinances of a town did not control the right of a school district to acquire land to enlarge the district's school premises within the corporate limits of the town.

Christin & Davis, San Francisco, for petitioners.

Keith C. Sorenson, Dist. Atty., Howard E. Gawthrop, Deputy Dist. Atty., Redwood City, for respondents.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., amici curiæ in support of contentions of respondent.

BRAY, Justice.

Petitioners seek a writ of prohibition to restrain the Superior Court of San Mateo County from proceeding in an action in eminent domain now pending in that court, brought by Las Lomitas School District, an elementary school district in San Mateo County, against petitioners, to condemn for school purposes certain real property in the Town of Atherton owned by petitioners.

Question Presented.

Do the zoning ordinances of the Town of Atherton control the right of a school district to acquire land to enlarge the district's school premises within the corporate limits of the town?

Facts.

The facts in this case are similar to those in Town of Atherton v. Superior Court, Cal.App., 324 P.2d 328.[1] The principal difference is that the Las Lomitas School District, real party in interest here, already owns and maintains a public school in the Town of Atherton. The school district includes a portion of the Town of Atherton. Desirous of enlarging that school, it instituted an action to condemn one acre of land in the Town of Atherton belonging to petitioners. Prior to the date upon which the district commenced the proceedings leading up to the filing of the condemnation action the Town of Atherton adopted ordinance No. 146 as amended for the zoning of public buildings including schools. The district, pursuant to that ordinance applied for a use permit on the one acre above mentioned. This was denied. The district then filed its action in eminent domain. Thereafter, pursuant to section 65806, Government Code, Atherton adopted as an emergency measure ordinance No. 225, a temporary interim zoning ordinance, which prohibited during the interim in which Atherton intended to take the necessary measures to adopt a master zoning plan, any use which conflicted with the provisions of the ordinance. If valid, ordinances Nos. 225 and 146 would prohibit the enlargement of the grounds of the school now operated by said district in Atherton.

Opinion.

As all of the issues raised herein were raised and are identical with those raised in the Town of Atherton case, supra, we deem it unnecessary to discuss them further here.

Upon the authority of that case, the alternative writ is discharged and the petition for a peremptory writ is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

1. Argued and submitted with this proceeding and this day decided. See that opinion for more detail of the ordinances involved.

159 Cal.App.2d 417

TOWN OF ATHERTON, a municipal corporation, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR COUNTY of SAN MATEO, and Menlo Park School District, an Elementary School District in the County of San Mateo, State of California, Respondents.

Civ. 18064.

District Court of Appeal, First District, Division 1, California.
April 17, 1958.

Rehearing Denied May 16, 1958.

Proceeding for a writ of prohibition to restrain the Superior Court from proceeding in an action of eminent domain pending in that court brought by school district in which the district seeks to condemn certain lands in the town for school purposes. The District Court of Appeal, Bray, J., held that zoning ordinances of the municipality did not control the right of the school district in which the municipality was included to designate the location of its schools and that the school district is a state agency and that the state had occupied the field of location of schools.

Alternative writ discharged and petition for peremptory writ denied.

1. Schools and School Districts ⇐21

A school district is a state agency.

2. Municipal Corporations ⇐592(1)

The state has occupied the field in matter of location of school sites. West's Ann.Education Code, §§ 18402–18404; West's Ann.Gov.Code, §§ 65090 et seq., 65540 et seq., 65551–65554.

3. Municipal Corporations ⇐601(19)

Assuming that a city council has power to zone schools, such zoning is merely advisory or recommendatory and is not binding on the school district. West's Ann.Gov. Code, § 65554; West's Ann.Const. art. 11, § 11.

4. Municipal Corporations ⇐601(18)

A zoning ordinance falls within the classification of police measures.

5. Municipal Corporations ⇐601(19)
Statutes ⇐223.2(21)

Word "education" in the statute with respect to what the master or general zoning plan shall consist does not conflict with the power of a school district to locate schools and statute must be construed with statutes dealing with zoning and the rights of the state. West's Ann.Gov.Code, §§ 65462, 65470, 65806.

6. Schools and School Districts ⇐68

Where the department of education is required under the statute to consider the master plan of a city in improving a school site, the school district need not conform to the department's recommendations. West's Ann.Education Code, §§ 5021, 5022, 5041, 18102(a), 18151–18153, 18404.

7. Schools and School Districts ⇐68

The construction and maintenance of a school building being a sovereign activity of the state, the location and acquisition of a school site is equally such an activity. West's Ann.Education Code, §§ 5021, 5022, 5041, 18102(a), 18151–18153, 18404.

8. Statutes ⇐233

In the interpretation of a statute, generally the state and its agencies are not bound by general words limiting the rights and interest of its citizens unless such public authority be included within the limitation expressly or by necessary implication.

9. Municipal Corporations ⇐592(1)

A school system of the state is a matter of general concern and not a municipal affair. West's Ann.Const. art. 4, § 25, subd. 27; art. 9, § 5.

10. Prohibition ⇐9

Alleged fact that a zoning ordinance of a municipality was an interim ordinance intended to hold property in status quo under a period of study necessary to the ultimate determination of the city's master zoning plan did not give the city power to prevent by prohibition a school district from exercising its right of eminent domain in acquiring a school site. West's Ann.Education Code, §§ 5021, 5022, 5041, 18102(a), 18151–18153, 18404.

11. Municipal Corporations ⇐601(4)

A city had no right to zone against a school district's right of location of a school site, whether such zoning was intended to be temporary or permanent. West's Ann.Education Code, §§ 5021, 5022, 5041, 18102(a), 18151–18153, 18404.

12. Prohibition ⇐28

Contention that action of the school board in bringing the eminent domain action and in choosing a school site thereby sought to be acquired was arbitrary and constituted an abuse of discretion could not be determined in prohibition, though possibly constituting a matter of defense in the condemnation action.

Winston Churchill Black, San Francisco, for petitioner.

Keith C. Sorenson, Dist. Atty., Howard E. Gawthrop, Deputy Dist. Atty., Redwood City, for respondents.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., amici curiæ in support of contentions of respondents.

BRAY, Justice.

Petitioner seeks a writ of prohibition to restrain the Superior Court of San Mateo County from proceeding in an action in eminent domain now pending in that court, numbered 76501, brought by respondent Menlo Park School District[1] against certain parties, in which said respondent seeks to condemn certain lands in said Town of Atherton for school purposes.[2]

Questions Presented.

Do the zoning ordinances of a municipality control the right of a school district in which the municipality is included, to designate the location of its schools? Corollary to this are the questions (a) Is a school district a state agency? (b) If so, has the state occupied the field of location of schools?

Facts.

There is no conflict as to the facts. Included in Menlo Park School District are the incorporated cities of Atherton and Menlo Park as well as unincorporated territory. The district desires to acquire land in Atherton for public school purposes. Petitioner is a municipal corporation of the sixth class. June 24, 1957, the city council adopted ordinance No. 225, entitled "An Interim Zoning Ordinance Relating to Public Buildings and the Location Thereof Declaring its Urgency and Providing that it Shall Take Effect Immediately." In substance it prevents any property in the Town of Atherton which is zoned for residential purposes from being used for any other purposes, specifically providing that no lands presently zoned residential may be used for the purpose of public buildings, including but not limited to schools. The ordinance was adopted pursuant to section 65806, Government Code, which provides that if the planning commission in good faith is conducting studies or holding hearings for the purpose of the adoption of any zoning ordinance or amendment thereto, the legislative body may adopt a temporary interim zoning ordinance prohibiting any purposes which might conflict with such ordinance.

The same day the city council adopted a resolution proposing amendments to the town's zoning ordinance No. 146 as amended for the zoning of public buildings, including schools, and directing the planning commission to hold public hearings on the proposed amendments to determine whether or not zoning districts should be established in which public buildings, including schools, may be located. The planning commission has employed a planning consultant for expert advice on land uses in the town, is now making pertinent studies, and has held public hearings. If valid, the ordinances would prohibit the school district from locating its school as proposed.

July 3, 1957, respondent commenced its eminent domain action, in which it seeks

1. Hereinafter referred to as respondent.

2. Argued and submitted with this proceeding is Landi v. Superior Court. See Cal.App., 324 P.2d 326.

to condemn approximately nine acres within respondent's corporate limits for school purposes, which property is zoned for residential uses only under petitioner's comprehensive zoning plan (ordinance No. 146 as amended). The condemnation is in direct violation of ordinance No. 225. The superior court in said action refused to grant petitioner's request for an order staying proceedings in said action. The petition alleges that the planning commission is proceeding "in good faith" as required by section 65806, Government Code; that Atherton was incorporated in 1923 for the express purpose of assuring a continuance of its area as, and its area still is, a low density, estate type, residential community consisting of 3035 acres. It has no industrial or manufacturing plants or districts and no business district or business enterprises excepting two real estate offices and one gasoline service station existing as non-conforming uses. Atherton is primarily dependent for revenue to operate the municipality on real property taxes. Three different elementary school districts including respondent extend into the boundaries of Atherton and the portion of each in Atherton is much smaller than the outside portions. Approximately 7000 persons live in Atherton. Registered as in attendance in schools within the town limits are 6046 persons of whom 2696 are in elementary grades. Only 1640 of these persons reside in Atherton; 1206 of these are in the elementary grades. Approximately 33 elementary students resident in Atherton cannot attend any public school in the town and are attending one in unincorporated territory. 74.61 per cent of the land in Atherton is used for one family residences, 15 per cent for streets, 5.86 per cent for schools, 3.61 per cent for public utilities, fire protection and city hall, police and other municipal uses; .92 per cent for other uses. The major portion of respondent district lies within the city of Menlo Park. Menlo Park uses for school purposes only 1.5 per cent of its land as compared to the 5.86 per cent used in Atherton. A study by the American Institute for Planners, published jointly with the Federal Reserve Bank of Boston, for a city of the same size, type and kind as Atherton, shows that reasonable and proper zoning would require for school purposes only 1.31 per cent of the total town area, or 39.76 acres as compared to Atherton's present 5.86 per cent or 177.77 acres. In addition to the nine acres sought to be condemned, petitioner is informed that respondent intends to acquire additional acreage in Atherton. Listing the present public and private schools, petitioner contends that Atherton has more schools per capita and more students in proportion to residents, than any other city in the United States. In the past five years there have been attempts to build four additional schools in Atherton. One elementary district whose boundary does not include any of the territory of Atherton, attempted to acquire property in Atherton for a school which no Atherton resident would have been permitted to attend. Attending school in Atherton with its population of only 7000 are approximately 6000 students while no community on either side of Atherton has students therein exceeding one for every five residents. Because of needed traffic control, public safety and police protection every school in Atherton has to receive the special attention of a police officer and because of the unreasonable number of schools there is an unreasonable burden on the police department and an unreasonable expenditure for the benefit of a majority of students who contribute nothing thereto.

In its answer in the eminent domain action, petitioner has set forth that plaintiff has not acquired the conditional use permit required by ordinance No. 146. The superior court denied petitioner's motion for a judgment on the pleadings based upon the ground that respondent's complaint was barred by the provisions of said two ordinances.

Does Petitioner's Zoning Ordinance Control?

Petitioner contends that the issue in this case is whether a municipality under sec-

tion 65806, Government Code, has the power by an interim ordinance to prohibit any other than specific uses pending studies by the planning commission. It attempted to do this in ordinance No. 225. We are only concerned with the power of the municipality by such an ordinance to prohibit a school district from acquiring public school sites, and not to the application of the ordinance in general.

Petitioner concedes that the power of eminent domain is inherent in the State of California and may be exercised by the state, or any of its agencies to which the power is delegated, but contends that the delegation of the power to schools is limited by the powers which it contends the municipalities have by virtue of section 11, article XI, Constitution, and section 65800, Government Code.

In order to determine these questions we must consider the question of whether a municipality has the power to zone school sites, whether by an interim ordinance or otherwise. Therefore, we must determine if a school district is a state agency, and if so, whether the state has occupied the field in the matter of location of school sites.

(a) *Is a School District a State Agency?*

[1] This question has been flatly answered in the affirmative in Hall v. City of Taft, 47 Cal.2d 177, 302 P.2d 574: "The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relaton thereto. * * * School districts are agencies of the state for the local operation of the state school system. [Citations.] The beneficial ownership of property of the public schools is in the state." 47 Cal.2d at pages 179, 181, 302 P. 2d at page 576.

(b) *State has Occupied the Field.*

[2] "The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. [Citations.]" Hall v. City of Taft, supra, 47 Cal.2d at page 181, 302 P.2d at page 577.

Has the state occupied the field of school site location or has it expressly granted the power of school zoning to the municipalities? The answer is that the state has occupied the field. Evidence of this is the following statutes:

Section 18402, Education Code: "The State Department of Education shall establish standards for school sites." How can this be accomplished if a municipality may by zoning determine the location of such sites?

Section 18403, Education Code, provides that the governing board of a school district before acquiring property for a new school site or addition to a present school site shall "give the planning commission having jurisdiction notice in writing of the proposed acquisition." The planning commission in 30 days is required to submit to the school board "a written report of the investigation and its recommendations concerning acquisition of the site." "The governing board shall not acquire title to the property until the report of the planning commission has been received. *If the report does not favor the acquisition of the property for a school site, or for an addition to a present school site, the governing board of the school district shall not acquire title to the property until 30 days after the commission's report is received.*" (Emphasis added.) This shows that while the local planning commission may recommend concerning the location of a school site the ultimate determination of the site is in the school board.

Section 18404 provides that a school district board and a city school board, if the latter desires to locate a school within two miles of an airport, must notify the State Department of Education of the proposed acquisition of a school site, and if the state department does not report favorably, the school board must wait 30 days before acquiring title to the property. This power of recommendation in the state department is inconsistent with the right of a local

planning commission to designate by zoning the area where a public school may be located.

Sections 65090 et seq., Government Code, deal with the appointment and powers of a city planning commission. In chapter 3, article 9, dealing with "Administration of Master or General Plan" appears section 65551, which provides that after the legislative body has adopted a master or general plan for the city no "public ground or open space" shall be acquired and "no public building or structure shall be constructed or authorized in the area" until its location, purpose and extent have been submitted to and reported upon by the planning commission. Section 65552 provides that if the power to acquire such "public ground or open space" public building or structure is vested in "some governmental body, commission, or board" other than the city council, then such body, commission or board shall submit to the planning commission its location, purpose and extent.

Section 65553 provides that the planning commission shall report its findings as to whether the proposed public improvement conforms to the adopted master or general plan.

Section 65554 provides: "If the planning commission disapproves the proposed public improvement, *its disapproval may be overruled by such other governmental body, board, or agency.*" (Emphasis added.) Such a power in the other government body is completely incompatible with a power in the municipality of zoning public schools.

[3] Petitioner points out that a planning commission has no legislative function, but may only study, administer and recommend, whereas the city council has the sole power to zone. Therefore, says petitioner, section 65554 deals only with the planning commission and is not binding on the city council. This contention overlooks the fact that the section is dealing with a master plan which has already been adopted by the city council and in which the council has zoned an area for a public ground or building. While the council may zone it, these sections provide that if the power to acquire such ground or building is in some other governmental body that body after reporting to the planning commission may entirely disregard the disapproval of the commission. There is no requirement that it then must go to the city council before it may acquire the property. "[P]ublic ground or open space," and "public building or structure," necessarily include public school grounds and buildings. Assuming that the city council under the statutes relied upon by petitioner, and hereafter discussed, in the first instance has the power to zone schools, it is clear that such zoning is merely advisory or recommendatory and that under section 65554 such zoning is not binding on the school district.

[4] Petitioner contends that Atherton's power to zone comes from section 11, article XI, Constitution (the police power section): "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." "A zoning ordinance falls within the classification of police measures." Hurst v. City of Burlingame, 207 Cal. 134, 138, 277 P. 308, 310. Petitioner concedes that under the qualification in the section, the Legislature has the power to grant to the school districts if they are state agencies the exclusive power of zoning school sites. Petitioner contends that the Legislature has not done so but on the other hand has done just the contrary and designated the municipalities as the body having the power to effect such zoning. Supporting its contention it cites the hereafter mentioned statutes which it contends control those above mentioned. Section 65800, Government Code: "Pursuant to the provisions of this chapter, the legislative body of any county or city by ordinance may: (a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence *and other purposes.* * * * (d) Create civic districts around civic centers, public parks, and public buildings and

grounds for the purpose of enabling a planning commission to review all plans for buildings or structures within the district prior to the issuance of a building permit in order to assure an orderly development in the vicinity of such public sites and buildings." (Emphasis added.) Section 65801: "For such purposes the legislative body may divide a city, a county, or portions thereof into zones of the number, shape, and area it deems best suited to carry out the purpose of this chapter." Section 65806 gives the city council authority to adopt as an emergency measure a temporary interim zoning ordinance to protect the public safety, health and welfare, which ordinance may prohibit *"such and any other uses* which may be in conflict with such zoning ordinance." (Emphasis added.) Section 65462 provides of what the master or general plan shall consist, including "(a) A *land use* element which designates the proposed general distribution and general location and *extent of the uses* of the land for housing, business, industry, recreation, *education,* public buildings and grounds, and other categories of public and private uses of land." (Emphasis added.) Section 65470: "A master or general plan may include a public buildings element of the plan, showing *locations* and arrangements of civic and community centers, *public schools,* libraries, police and fire stations, and all other public buildings, including their architecture and the landscape treatment of their grounds." (Emphasis added.)

[5] We see nothing in any of the above statutes which in any way conflicts with the statutes hereinbefore mentioned which we hold evidence the occupancy of the field by the state. The sections referred to by petitioner necessarily include broad general language in order to cover all the situations, purposes and property with which zoning must be concerned. The word "education" in section 65462 does not conflict with the power of a school district to locate its schools. It must be construed with statutes dealing with zoning and the rights of the state. It must be remembered that in all municipalities there are private schools, the location of which is purely a municipal matter. Hence the reason for the words "education" and the words "other uses" and "other purposes" appearing in the above statutes. As to the word "public schools" in section 65470, no master plan would be complete without showing on it the location of public schools already in existence. It may also show areas which the city recommends for future schools. The quoted words in nowise show that the Legislature intended by the use of these words to repeal the evident power given school districts expressly as state agencies to locate their schools. The statutes relied upon by petitioner include "public buildings." Petitioner concedes that the inclusion of those words in the statutes does not in any manner interfere with the right of the state to locate a state building, or of a county to locate a county building, in any portion of a municipality it desires, regardless of any attempt of the municipality to zone the location of such buildings. Yet if its contention is correct that by the inclusion of the words "education" and "public schools" in the above statutes the Legislature was relinquishing the field of school site location to the municipalities, it necessarily would be equally true that by the inclusion of "public buildings" the Legislature was also relinquishing the field of state and county building site locations.

Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, deals with the power of the city of Los Angeles to zone to exclude stores from certain areas. Petitioner contends that the language (195 Cal. at pages 502–503, 234 P. at page 391) to the effect that a municipal zoning ordinance which regulates, restricts and segregates the location of "industries, the several classes of business * * * and the several classes of public and semipublic buildings" is a valid exercise of the police power, is a holding that Atherton has the power it claims here. Obviously, the court did not have in mind nor was it passing

upon the question involved in our case. It was dealing solely with the power to zone business areas.

In Hall v. City of Taft, supra, 47 Cal.2d 177, 302 P.2d 574, the question was "whether a municipal corporation's building regulations are applicable to the construction of a public school building by a school district in the municipality." 47 Cal.2d at page 179, 302 P.2d at page 576. Taft, like Atherton, is a city of the sixth class. Taft, as does petitioner here, relied on article XI, section 11 of the Constitution and contended that under the police power therein granted, it was given the power to adopt building regulations which would apply to school buildings within its boundaries, as the state had not occupied the field. After holding, as we have hereinbefore shown, that a school district is a state agency, the court went on to hold that the state had completely occupied the field and that the city's regulations concerning "the activity involved" (47 Cal.2d at page 184, 302 P.2d at page 579) conflicted with general laws. "A city may not enact ordinances which conflict with general laws on statewide matters [citations]."

[6] The Education Code sets out a complete system for providing necessary and adequate schools. In addition to the statutes hereinbefore discussed there are the following: Section 5021: "The Legislature hereby declares that it is in the interest of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the education of the children of the State is an obligation and function of the State." This language obviously includes the location of schools. Section 5041: "The Legislature hereby declares that it is in the interest of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the education of the children of the State is an obligation and function of the State * * *" Section 5022 appropriates a sum of $30,000,000 to be apportioned to school districts for "(1) The purchase and improvement of school building sites." Section 18102(a) requires the board of education to "Advise with the governing board of each school district on the acquisition of new school sites, and after a review of available plots give the governing board of the district in writing a list of the approved locations in the order of their merit considering especially the matters of educational merit, reduction of traffic hazards, and conformity to the organized regional plans as presented in the master plan of the planning commission having jurisdiction." While the department of education is thereby required to consider the master plan of a city, in approving a school site, the school district is not required to conform to the department's recommendations. Section 18404 hereinbefore discussed gives the local school board the power to disregard the department's recommendations as it only requires the board to delay for 30 days the acquiring of title to the property the board desires, if the department's recommendation is unfavorable. These sections, as was said in Hall v. City of Taft, supra, 47 Cal.2d 177, 188, 302 P.2d 574, 582, concerning the building construction sections, "tend more to indicate that the school districts could follow such regulations [of the municipalities] as well as those of the state but are not bound to do so."

"The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse." Ed.Code, § 18151. Section 18153 gives the school board the power to establish additional schools in the district. Section 18152 gives the school board, where any school is overcrowded, the power to locate the school in temporary quarters, without restriction as to its location.

The comprehensive system of school control and operation by the school districts

as shown in the statutes herein discussed is completely inconsistent with any power of a municipality to control the location of school sites.

Hall v. City of Taft, supra, 47 Cal.2d 177, 302 P.2d 574, placed its decision that the construction of school buildings by school districts is not subject to building regulations of a municipality upon another ground than that the state has completely occupied the field by general laws and that such regulations interfere with those laws.[3] "* * * When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of article XI of the state Constitution, supra, should not be considered as conferring such powers on local government agencies. Nor should the Government Code sections which confer on a city the power to regulate the construction of buildings within its limits, see Government Code, §§ 38601, 38660, be so considered. * * *" 47 Cal.2d at page 183, 302 P.2d at page 578. As stated in the Hall case (47 Cal.2d at page 181, 302 P.2d at page 577): "The beneficial ownership of property of the public schools is in the state."

[7] If, as the Hall case holds, the construction and maintenance of a school building is a sovereign activity of the state, it is obvious that the location and acquisition of a school site is necessarily and equally such an activity. Obviously, too, neither the Constitution nor the Legislature has consented to a municipal regulation of school sites. As said in Kentucky Institution for Education of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402, 8 L.R.A., N.S., 553, as quoted in the Hall case (47 Cal.2d at page 183, 302 P.2d at page 579): "'"The principle is that the state, when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. * * * How can the city ever have a superior authority to the state over the latter's own property or in its control and management? From the nature of things it cannot have."'"

[8] As said in C. J. Kubach Co. v. McGuire, 199 Cal. 215, 217, 248 P. 676, 677: "In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication."

Under the statutes, the state has in no wise ceded to the municipalities its sovereign right to locate school sites. On the contrary, the state has expressly granted the power of location to its agencies, the school districts.

[9] Article IX, section 5, and article IV, section 25, subdivision 27, of the Constitution vest the Legislature with the absolute power to establish the state school system. "It is well settled that the school system of the state is a matter of general concern and not a municipal affair * * *" Becker v. Council of City of Albany, 47 Cal.App.2d 702, 705, 118 P.2d 924, 926.

[10, 11] The fact that ordinance No. 225 is an interim ordinance intended to hold property in status quo under the period of study necessary to an ultimate determination of the city's master plan, does not give the city the power to prevent the district from exercising its right of eminent domain in acquiring a school site. As we have shown, the city has no right to zone against the district's right of location whether such zoning be intended to be temporary or permanent.

3. The brief of the Attorney General on behalf of Honorable Roy E. Simpson, Superintendent of Public Instruction and ex-officio Director of Education, as amicus curiae, stresses this ground.

[12] Petitioner contends that the action of the school board in bringing the eminent domain action and particularly in choosing the school site thereby sought to be acquired is arbitrary and constitutes an abuse of the discretion vested in the board. This question cannot be determined in prohibition. It is possibly a matter of defense to be determined in the condemnation action.

The alternative writ is discharged and the petition for a peremptory writ is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.



159 Cal.App.2d 714

Frank G. CAVALLI and Mary J. Cavalli, Plaintiffs and Respondents,

v.

Lee MACAIRE and Bess Macaire, Defendants and Appellants.

No. 17878.

District Court of Appeal, First District, Division 2, California.

April 28, 1958.

Action by lessors against lessees for declaratory judgment as to right to liquor licenses. The Superior Court of San Mateo County, Edmund Scott, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Brazil, J. pro tem., held that lessee's agreement to retransfer liquor license to lessors upon termination of lease was not illegal.

Affirmed.

1. Limitation of Actions ⇐43

Lessors' cause of action against lessees for declaratory relief concerning rights under lease was not barred by limitations where no dispute or controversy existed until well within the four-year period, though lease had been executed earlier. West's Ann.Code Civ.Proc. § 337.

2. Limitation of Actions ⇐43

The statute of limitations in a declaratory action does not begin to run until an actual controversy has accrued or occurred. West's Ann.Code Civ.Proc. § 337.

3. Intoxicating Liquors ⇐45

The statute prohibiting transfer of liquor license as security is not retroactive, even as to rights that have accrued but have not yet been adjudicated. West's Ann. Bus. & Prof.Code, § 24076.

4. Intoxicating Liquors ⇐103

Lessee's agreement to retransfer liquor license to lessors upon termination of lease was not illegal. West's Ann.Bus. & Prof. Code, §§ 23300, 23355, 24040, 24076.

5. Intoxicating Liquors ⇐103

Landlord and Tenant ⇐88(3)

Evidence authorized finding that so-called "lease" was in fact an extension and not a renewal of original 1945 lease, and hence was not invalid under statute, enacted after execution of original lease, prohibiting transfer of liquor license as security. West's Ann.Bus. & Prof.Code § 24076; West's Ann.Civ.Code, § 1643.

Robert J. Dell'Ergo, Redwood City, for appellants.

Dennis L. Woodman, Redwood City, for respondents.

BRAZIL, Justice pro tem.

The appellants and the respondents, who had been friends for 30 years, have come to court by an action for declaratory relief to decide which is entitled to certain on-sale and off-sale liquor licenses. These licenses were originally issued to the Cavallis for use at a little place at La Honda, called "Cavalli's Inn." In the latter part of 1945, on proper application for transfer to the Alcoholic Beverage Control Board, these licenses were then issued to the Macaires for use at the same place as before. They have been renewed annually since

then; and they still remain in the name of the appellants.

In compliance with a written agreement of November 23, 1945, so to do, the respondents sold to the appellants all the furniture, furnishings and liquor inventory of Cavalli's Inn for $3,000; and then on December 1, 1945, executed a five year lease of the premises in favor of the appellant purchasers. That lease among other things contained this provision:

"If the lessees hold possession of the premises after the expiration of the term of this lease, such lessees shall become tenants from month to month at the rental and upon the terms herein specified, and shall continue to be such tenants until the tenancy shall be terminated by the lessors, or, until the lessees shall have given to the lessors a written notice of at least one month of intention to terminate the tenancy; * * *". Notices provided by the foregoing section were not given by either party to the lease; and possession has all this time remained undisturbed with the appellants.

A second provision of the lease which is the same as paragraph 13 of the November agreement of sale is as follows:

"It is understood that lessees will have transferred to them by Frank G. Cavalli, a certain on-sale beer and wine license, an on-sale distilled spirits license and a Retail Package Off-Sale General license, to be used in connection with the operation of the business on said premises; it is agreed by the lessees that, as a further consideration for this lease, that they will not, nor will either of them at any time commit any act which will cause the suspension or revocation of said licenses or any of them, and that they nor either of them will at any time transfer or assign or attempt to transfer or assign said licenses, or any of them, or any renewals thereof, to any person, firm or corporation for use in connection with any business conducted or to be conducted and operated on any premises other than the premises herein described and hereby leased; and lessees further agree that they nor either of them will at any time remove said licenses or any of them for use in connection with any business at any location other than on the premises hereby leased; and lessees further agree that, upon the expiration or sooner termination of this lease, they will transfer and assign said licenses to the lessors, their successors, nominees or representatives, upon the payment to said lessees of the pro rata cost of said licenses as of the date of the transfer * * *"

There was no option provision for renewal or extension of the term in the 1945 lease. Five years later, the same parties signed another instrument called a two year lease which included an option to *further extend* the term for three more years. This second lease is practically the same as the first with a few minor changes such as increase in rent by $25 a month plus additional taxes, some variance in obligations respecting outside walls and foundations and the addition of the option already mentioned. Paragraph 13 of the first lease was copied into the second one without any change except that the past tense instead of future perfect is used in referring to transfer of license. The business continued to be operated as usual, the rent was paid regularly and there were no disputes until early in 1955, when a controversy arose between the parties over the ownership of the licenses. The respondent filed an action in declaratory relief with a supplementary cause of action for injunctive relief, to determine the rights of the parties in and to the liquor licenses.

The trial court entered judgment in favor of the plaintiffs, decreeing that the defendants were bound by the terms and conditions of paragraph 13 of the November, 1950 lease, and enjoined them from transferring the licenses to anyone other than plaintiffs. The court retained jurisdiction to make further orders to carry out the provisions of the judgment. The appeal is taken from the entire judgment.

[1, 2] Appellants' first contention that respondents' cause of action is barred by Code of Civil Procedure, section 337, is

without merit for there was no dispute or controversy existing between these parties until well within the four year period. "The statute of limitations in a declaratory action does not begin to run against a right to maintain the same, until an actual controversy has accrued or occurred. * * *" Salada Beach Public Utility Dist. v. Anderson, 50 Cal.App.2d 306, at page 308, 123 P.2d 86, at page 87.

Appellants' main contention is that paragraph 13, relating to retransfer of liquor licenses is illegal and void as contrary to public policy. The claim of illegality is based on the assumption that the agreement to retransfer is given as security for the fulfillment of an agreement in violation of the provisions of Section 24076 of the Business and Professions Code which reads as follows:

"No licensee shall enter into any agreement wherein he pledges the transfer of his license as security for a loan or as security for the fulfillment of any agreement. Each application for the transfer of a license shall be accompanied by or contain a statement verified by both the transferor and transferee specifically stating that the transfer application or proposed transfer is not made to satisfy the payment of a loan or to fulfill an agreement entered into more than ninety (90) days preceding the day on which the transfer application is filed with the department or to gain or establish a preference to or for any creditor of the transferor * * * This statement shall become part of the transfer application, and any misrepresentation contained in the statement shall be considered the misrepresentation of a material fact."

[3] The foregoing section became effective October 1, 1949. This section is not only not retroactive as to rights that have accrued and have been adjudicated before the effective date of the section, but is also not retroactive as to rights that have accrued but have not yet been adjudicated. Tognoli v. Taroli, 127 Cal.App.2d 426, 273 P.2d 914.

Appellant also calls attention to three other sections of the same code, claiming that what was done here was in violation of those sections. They are:

23300. "No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division."

23355. "* * * the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued."

24040. "Each license shall be issued to a specific person * * *."

[4] These three sections have no application to the facts of this case for the respondent did not in any way exercise any privilege, perform any act or receive any profit from the licenses as issued. "Defendant's contentions that plaintiff is estopped to assert any claim to the license in question [an agreement to retransfer case] and has not come into a court of equity with clean hands are apparently based on the theory that plaintiff wilfully concealed her interest in the license and affirmatively claimed she retained no interest in it when the transfer was made to defendant. There is no evidence in the record of such claimed wilful concealment, and while plaintiff made application 'to surrender all her interest in the license', she had no interest in the operation of the business under lease and received no profits from the license. Under these circumstances the contentions of defendant cannot be sustained." Etchart v. Pyles, 106 Cal.App.2d 549, at pages 553, 554, 235 P.2d 427, at page 430.

Unless the said section 24076 makes this agreement for retransfer illegal, there is nothing else in the Alcoholic Beverage Control Act which would make the arrangement illegal or void as against public policy. "As the agreement to retransfer as between the parties is not prohibited by the

act, [Sec. 24076 is not involved] and as such agreements must be viewed in the light of the act which makes the transfer of all licenses subject to the discretion of the board, there is nothing illegal in such an agreement, nor is it in any way contrary to public policy." Saso v. Furtado, 104 Cal. App.2d 759, at page 769, 232 P.2d 583, at page 589.

There is nothing in the record to support appellants' contention that all legal and beneficial interest in the licenses passed to them by the original transfer with only a restriction on the place where they could be used. It is clear that no consideration was paid for the licenses and that the parties did not intend to make a complete and final transfer of all interest therein, thereby making the appellants owners of a valuable property right they had not paid for. There is no provision in any of the agreements giving appellants the absolute right to sell the licenses so long as they remained at Cavalli's Inn. The evidence shows only that Mr. Cavalli had no objection to the sale of the business and in such an event he would consent to a transfer of the licenses after working out a lease agreement with the prospective purchasers.

We assume, without deciding, that the arrangement entered into by these parties for retransfer would be illegal if made after the effective date of section 24076 of the Business and Professions Code. It then becomes important to determine whether the 1950 lease was a renewal or an extension of the 1945 lease. Respondent claims and the court found it to be an extension; and the appellant maintains it can only be a renewal.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Civ.Code, § 1643.

[5] The record supports the following observations contained in the memorandum opinion of the trial judge: "It was specifically agreed that no consideration was to be paid for the transfer of said licenses. * * * Thereafter, on November 28, 1950, a new lease was made, substantially in the form of the prior lease extending the tenancy to November 30, 1952. This second lease also contained a paragraph 13 with the same provisions as paragraph 13 in the original lease. * * * It is beyond dispute that the licenses involved now are the same licenses as were originally transferred. In our opinion, it is also beyond dispute that, at the time of the execution of each of the three documents above referred to, it was the intention of all parties that defendants would merely have the right to use said licenses until the premises were restored. * * * Defendants have shown no equities, and, in our opinion, it would be unjust enrichment to hold that they were entitled to retain the licenses."

The appellants claim that the 1950 agreement cannot be an extension of the 1945 lease for the rent was increased, a provision was made for an option to extend the term, and there were some differences in relation to liability in regard to foundations and exterior walls. The 1950 lease was substantially a recopying of the 1945 lease; the conduct of the parties and the use of the expression "further extend" in the option clause, justified the trial court in determining that the new lease was in fact only an extension or continuation of the old lease. Otherwise, the major portion of the consideration, embodied in paragraph 13 dealing with a retransfer of the licenses, would be an unlawful consideration and the entire contract would in all probability be void. If such were the case the appellants would then be holding under the original lease as a tenant from month to month as is provided in section 10 of that instrument, hereinbefore set out at length, and would, under the original paragraph 13, be required to make the retransfer.

The use of the words "further extend" the term in the option clause of the 1950 lease indicate that the option created a right to a second extension, the November 1950 lease being itself the first extension.

Under the circumstances presented in this case, the trial court was not incorrect in finding, despite the fact that a written instrument called a lease was actually signed by the parties, that there was in fact an extension and not a renewal of the original 1945 lease. As the rights and obligations of the parties are determined by this earlier lease, the provisions of Business and Professions Code, section 24076, having no retroactive effect, are not applicable.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



159 Cal.App.2d 760

James J. LOCKHART, Plaintiff and Appellant,

v.

Joe MARTIN et al., Defendants, Denton O. Hyder, Respondent.

Civ. 22965.

District Court of Appeal, Second District, Division 2, California.

April 29, 1958.

Rehearing Denied May 22, 1958.

Hearing Denied June 25, 1958.

Action for injuries sustained by passenger on a fishing boat. Judgment of nonsuit in the Superior Court of Los Angeles County, Arnold Praeger, J., and the passenger appeals. The District Court of Appeal, Fox, P. J., held that the doctrine of res ipsa loquitur was not applicable; and that evidence of negligence of the defendant with respect to fall of the passenger on an anchovy lying on the deck was insufficient for the jury.

Judgment affirmed.

1. Negligence ⇐121(2)

Generally, "res ipsa loquitur" applies where accident is of such a nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and that defendant is probably the person who is responsible.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

2. Evidence ⇐8

It is common knowledge that movements of fishing boats are constantly affected by the waves and thereby made unsteady, without regard to the care exercised in their operation.

3. Shipping ⇐166(4)

In action for injuries sustained by a passenger on fishing boat due to sudden movement of the boat which caused him to lose his balance, where it was at least equally probable that the sudden movement throwing the plaintiff off balance was caused by a wave hitting the boat as that it resulted from any negligent act in the operation thereof, case was not a proper one for the application of the res ipsa loquitur doctrine.

4. Shipping ⇐166(5)

In action for injuries sustained by passenger on a fishing boat, when he allegedly slipped on an anchovy on deck, where there was no evidence that defendant placed the anchovy on deck or that it had actual notice or constructive notice of its presence there by reason of the length of time it had been on deck, evidence of defendant's negligence was insufficient for the jury.

James A. Starritt, Los Angeles, for appellant.

Robert Sikes, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal from a judgment of nonsuit.

Plaintiff was a passenger for hire on defendant's fishing boat Sport Fisher. Plaintiff was an experienced fisherman and had fished many times on this boat. It was the practice of the operators of the boat to an-

chor it in a particular spot for a period of time for fishing and then move to another location. There were anchovies and other bait on board in a tank where each fisherman would get his bait as he needed it. Plaintiff had gone to the bait tank for live bait many times on the day in question prior to his fall. At various times plaintiff had observed anchovies and other bait on the deck of sport fishing boats; he had himself upon occasion dropped live bait on the decks of such boats and had seen other fishermen do likewise. It was the custom on the Sport Fisher for the fishermen to change from one fishing post to another from time to time. Plaintiff had been fishing on the right side of the boat when the fishermen were notified to change positions. He thereupon went to a new location on the left side. When plaintiff made his move to the left side there was no bait on the deck in the area of his new location. Plaintiff was at this location two or three minutes before he fell. He was by himself; no one had joined him there.

The captain of the boat announced that he was going to move the boat. Plaintiff proceeded to reel in his line preparatory to placing his fishing pole in a rack when he fell. He described the incident in this fashion: "There was a sudden jerking of the boat and I stepped forward and as I did so I stepped on an anchovy and my feet went up in the air and I came down on one knee * * *." The movement "wasn't a natural roll of the boat. It was sort of a jerk" and threw him off balance. Plaintiff thought that the sudden movement of the boat might have been caused by the raising of the anchor preparatory to changing the boat's location, or by a wave striking the side of the boat.

Plaintiff's right knee was injured in the fall. He brought this action to recover damages for the injury.

The cause of plaintiff's fall was the sudden movement of the boat which caused him to lose his balance. There is no evidence that the sudden movement of the boat was due to any negligence on the part of defendant or his employees. Plaintiff contends, however, that the doctrine of res ipsa loquitur is applicable and that he thus established a prima facie showing of negligence; hence it was improper to grant a nonsuit. Defendant, on the other hand, argues that the doctrine of res ipsa loquitur is not here applicable.

[1] On this question we stated in Redfoot v. J. T. Jenkins Co., 138 Cal.App.2d 108, at pages 116–117, 291 P.2d 134, 138; "The most recent decisions of the Supreme Court prescribe as the ultimate test of applicability of res ipsa loquitur an answer to the question of 'whether it can be said, in the light of common experience, that the accident was more likely than not the result of their [defendants'] negligence. [Citing cases.] "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply."' [Citation.] The rule is thus phrased in Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 446, 247 P.2d 344, 349: 'In summary, it appears from the foregoing that, as a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' [Citations.] The search for the existence of such a probability of negligence on defendant's part presents a question of law in the case at bar, for the inference when it arises is a compulsory one [citation], and the question of whether or when it arises does not present a question for the jury's determination."

[2, 3] Applying these principles to the instant factual picture, it is clear that the trial judge reached the correct conclusion in holding that res ipsa loquitur was not here applicable. It is a matter of common knowledge that the movements of fishing boats and other small water craft are constantly affected by the waves and thereby made unsteady, and that this is true without regard to the care exercised in their operation. The bigger the waves the more vigorous is the impact on the boat and the more severe

and sudden the lurch or jerk caused thereby. Anyone who has ever been on such a boat or who has observed their movements from the shore, particularly when the tide was coming in, has observed how the waves upon occasion cause these boats to pitch and churn. Such vigorous and unpredictable movements may readily cause a person to lose his balance and fall as did the plaintiff here. This is simply one of the natural hazards of this type of venture. In the circumstances of this case it was at least equally probable that the sudden movement of the boat that threw plaintiff off balance, resulting in his fall, was caused by a wave hitting the boat as that it resulted from any negligent act or omission in operation of the boat. Accordingly, it cannot be said that it was more likely than not that the accident was caused by the negligence of defendant, and hence the case was not a proper one for the application of the doctrine of res ipsa loquitur. LaPorte v. Houston, 33 Cal.2d 167, 199 P.2d 665; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 446, 247 P.2d 344; Redfoot v. J. T. Jenkins Co., supra.

Plaintiff's authorities are distinguishable from the instant situation in that they all grew out of the movement of transportation facilities on land; hence they were under the complete control of the operators and were not subject to the unpredictable lashing of the waves.

[4] There is no merit in the suggestion that plaintiff's fall was caused by his stepping on an anchovy. That was merely an incident in the fall. It was the movement of the boat that caused him to lose his balance and fall. But, in any event, plaintiff failed to show that defendant's negligence was responsible for the anchovy's being on the deck in the area of his fishing station. Plaintiff testified "there was no fish on the deck" at his new fishing position on the left of the boat; that he was alone there and that no one joined him, and that he was there only about three minutes before he fell. There is no evidence that either the defendant or any of his employees placed the anchovy on the deck or that defendant had actual notice or constructive notice of its presence there by reason of the length of time it had been on the deck in plaintiff's fishing area. See Oldenburg v. Sears, Roebuck Co., 152 Cal.App.2d 733, on pages 746–748, 314 P.2d 33, and cases summarized. In analyzing this aspect of the case the learned trial judge concluded that "the only fair inference to be drawn is that he himself must have dropped the anchovy on the deck."

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



159 Cal.App.2d 608

Amelie WEINFELD, Plaintiff and Appellant,

v.

Frederik WEINFELD, Defendant and Respondent.

Civ. 22717.

District Court of Appeal, Second District, Division 1, California.

April 22, 1958.

Rehearing Denied May 13, 1958.

Hearing Denied June 17, 1958.

Divorce action. From that part of an order of the Superior Court, Los Angeles County, Elmer D. Doyle, J., which in effect reduced the amount for support of minor child and from an order denying the divorced wife's motion for reconsideration and reversal of the court's modification order, the divorced wife appealed. The District Court of Appeal, Fourt, J., held that where within five days from receipt of copy of order of court commissioner requiring divorced husband to pay $200 per month for support of minor child husband filed objections, court order reducing to $150 per month the amount required to be paid for support of child and denying divorced wife's motion to reconsider the modification under statute author- abuse of discretion under statute author-

izing court to modify an order made by court commissioner, as against contention that it was duty of husband to provide court with copy of reporter's transcript of proceedings before commissioner and that without such transcript court could not properly act.

Affirmed.

Divorce ⇐307

Where within five days from receipt of copy of order of court commissioner requiring divorced husband to pay $200 per month for support of minor child husband filed objections, court order reducing to $150 per month the amount required to be paid for support of child and denying divorced wife's motion to reconsider the modification order was not an abuse of discretion under statute authorizing court to modify an order made by court commissioner, as against contention that it was duty of husband to provide court with copy of reporter's transcript of proceedings before commissioner and that without such transcript court could not properly act. West's Ann.Code Civ.Proc. § 259a.

Aaronson & Shapero, Beverly Hills, for appellant.

No appearance for respondent.

FOURT, Justice.

This is an appeal from that part of an order which, in effect reduced "The support of the minor child * * * to $150. per month," and from an order denying the appellant's motion for a reconsideration and reversal of the court's modification order.

The parties hereto were married, had one child as the issue of the marriage and then divorced. The court, after a trial, made an interlocutory decree of divorce wherein, among other things, it was ordered, apparently pursuant to a stipulation between the husband and wife, that the wife should have the custody of the minor child and that the husband pay to the wife for the support and maintenance of the child the sum of $175 per month, and that the husband pay to the wife as alimony the sum of $150 per month. Judgment was entered March 19, 1954.

August 23, 1954, the husband moved to modify the interlocutory judgment and a hearing was had thereon in November, 1954. It was ordered that the child support payments be reduced to $125 per month, and the alimony to the wife was reduced to $75 per month.

October 3, 1956, the husband filed an order to show cause wherein he sought to eliminate the alimony payments, and to reduce the child support payments to $75 per month. The wife, on October 30, 1956, filed a petition to have the child support payments increased to $225 per month.

On November 5, 1956, the matter was referred by the judge to a commissioner for findings and recommendation. Testimony was taken before the commissioner and on November 8, 1956, "Findings of Fact by Court Commissioner" were filed. The findings contain the the following statement: "There is some question as to whether or not the defendant's earning capacity will be diminished in the future in comparison with what it was in 1955. It is stipulated that the matter be continued until after the close of the calendar year when the defendant will have an accurate statement as to his earnings of 1956 and is further stipulated that any modification granted either to the plaintiff or defendant shall be retroactive to November 1, 1956. The plaintiff's attorney has expended the sum of $20 in court costs. Attorney's fees, if any, to the plaintiff's attorney to be fixed and determined at the time of continuance."

The cause was then continued to February 4, 1957, and later continued to February 25, 1957, at which time it was referred to a commissioner for findings and recommendation. A hearing was held on February 25, 1957, and the commissioner in due time filed his "Findings of Fact by Court Commissioner," wherein it was found that "* * * the child's necessary expenses

are not in excess of $200," and "that the defendant's earnings are considerably greater than they were in 1954 * * *."

A court reporter was present at both hearings before the commissioners at the wife's request.

On February 28, 1957, the recommendations of the commissioner were presented to the court, and read in part as follows:

> "This matter having been heretofore submitted on February 25, 1957, the following order is now made: The order of November 5, 1954 is modified in the following respects only: The defendant is ordered to continue to pay $75 per month alimony to the plaintiff and the defendant is ordered to pay $200 per month for the support of the minor child, a total of $275, payable on the 1st day of each month retroactive to November 1, 1956 (as per the stipulation of the parties made on November 5, 1956). The defendant is further ordered to pay to plaintiff's attorney for this proceeding the sum of $150 attorney's fees and $42.67 court costs on account, payable at the rate of $25 per month, commencing March 15, 1957."

The court, on the same day, signed at the bottom of the page containing the recommendations the following: "It is so ordered."

Within five days from a receipt of a copy of the order, the husband filed objections to the commissioner's findings upon the ground "that the findings are contrary to law and evidence and are not supported by the evidence * * *." A memorandum in support of the objections to the findings was filed, wherein the husband set forth an analysis of the profit and loss statement of the husband and a résumé of the testimony pertaining to his expenses and other matters having to do with the cause.

On March 28, 1957, the husband's motion came on to be heard and was argued and submitted. Later, on that same date the court made an order that, "The support of the minor child is reduced to $150 a month * * *."

The wife, thereafter, filed a "Notice of Motion to Reconsider Modification of order * * *." That motion came on to be heard on April 16, 1957, was argued and denied. This appeal followed.

Appellant contends that the court abused its discretion in sustaining the defendant's objections to the commissioner's findings, and in effect asserts that it was the duty of the husband to provide the court with a copy of the reporter's transcript of the proceedings before the commissioners, and that without such transcript the court could not properly act.

The appellant in this cause has cited several cases as authority for her contention. In at least four instances counsel for the appellant in her brief either deliberately or with the grossest carelessness has misquoted the authorities cited to this court. Such conduct is inexcusable upon the part of any lawyer, and places additional burdens upon this court. (See, Canon 22 on the Canons of Professional Ethics of the American Bar Association.)

The husband has not seen fit to file a brief, nor did he see fit to make any appearance, nor in any manner to assist this court in the cause, which course of conduct we do not commend. As a consequence, it has been necessary for this court to make its own independent research in the matter.

Section 259a, Code of Civil Procedure, which is pertinent in this case, provides in part as follows:

> "Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall, in addition to the powers and duties contained in Section 259 of this code, have power:
>
> * * * * * *
>
> "2. To take proof and make and report his findings thereon as to any matter of fact upon which information is required by the court; but any party

to any contested proceeding may except to such report and the subsequent order of the court made thereon within five days after written notice of the court's action, a copy of said exceptions to be filed and served upon opposing party or his counsel within said five days; and may argue his exceptions before the court on giving notice of motion for that purpose within ten days from entry thereof. *After a hearing before the court on such exceptions, the court may sustain, or set aside, or modify its order theretofore made;*

* * * * * *

"5. When ordered by the court appointing him so to do, to hear, and report his findings and conclusions to the court for approval, rejection or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary alimony, costs and attorneys' fees, and issues of fact in contempt proceedings in divorce, maintenance and annulment of marriage cases; * * *." (Emphasis added.)

In Ellsworth v. Ellsworth, 42 Cal.2d 719, at pages 722–724, 269 P.2d 3, at page 5, the court said among other things:

"The provisions of the Code of Civil Procedure relating to proceedings before referees and commissioners preserve the traditional distinctions between a general reference, that is, a trial before a referee upon all the issues of fact or of law, and a special reference, in which he considers only part of the issues. A general reference may be had only with the consent of the parties. Code Civ.Proc., § 638, subd. 1, In re Estate of Hart, 11 Cal.2d 89, 91, 77 P.2d 1082. 'The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court.' Code Civ. Proc., § 644. In such a case, the decision of the referee must be attacked in the same manner as one made by the court, and an order vacating the decision and directing a rehearing is properly appealable as an order granting a new trial. (Citing cases.)

"A special reference, however, does not determine the whole issue, and the report of the referee does not become the decision of the court without further action by the trial judge. (Citing cases.) Without the adoption of the report and the filing of the findings of fact and conclusions of law of the trial court, the report may be set aside without the necessity of granting a new trial. (Citing cases.) An order vacating such a report is interlocutory only. (Citing cases.)

"The proceeding authorized by section 259a of the Code of Civil Procedure does not contemplate a hearing upon the whole issue within the meaning of the provisions relating to reference. By subsection 2, the commissioner is authorized to make and report finding 'as to any matter of fact upon which information is required by the court'. Under this provision, as the hearing is not had upon the stipulation of the parties, the commissioner's findings are advisory only.

* * * * * *

"* * * it appears that the Legislature intended that the order remain interlocutory throughout the period for filing and hearing exceptions to the commissioner's report. At that time, instead of making an order for the first time, the trial court may 'sustain, or set aside, or modify its order theretofore made.' Such a construction of the section preserves the immediate effectiveness of the order without unnecessary delay occasioned by an appeal."

We view it that the trial judge simply did what he was entitled to do under the provisions of the Code section, namely, in the first instance pursuant to the husband's objections to the commissioner's finding,

modify "its order theretofore made," and in the second instance deny the wife's motion to reconsider the modification order above referred to.

There was no abuse of the court's discretion.

The orders are, and each is, affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



159 Cal.App.2d 389

In the Matter of the ESTATE of Rose PLUMER, Deceased.

Georgia E. WARE, Petitioner, Contestant and Appellant,

v.

Forrest JOHNSON, Executor of the Estate of Mitchell Lewis, Deceased, and Doreen Turner Garwick, Rose McVey, Flora Turner, Ruth Lambert, Tom Lambert, Florence Drader, Roy Turner and Tobis Dulien, Legatees and Respondents,

Mary Edwards, Legatee and Respondent.

Civ. 22821.

District Court of Appeal, Second District, Division 1, California.

April 16, 1958.

Hearing Denied June 11, 1958.

Proceeding to determine heirship. The Superior Court of Los Angeles County, Burdette J. Daniels, J., entered a decree from which petitioner, a first cousin of testatrix, appealed. The District Court of Appeal, Fourt, J., held that where testatrix declared that she had no living blood relatives and will provided that, in event any persons claimed such relationship and proved that they were, they were to be given one dollar to quit their claim, and that testatrix wanted her friends to be "remembered" and provided that remainder in a particular envelope was to be divided among named friends, and amount of estate was $53,265.93 and amount in envelope was $5,240, residue of estate would be distributed to persons named in will and not to first cousins of deceased who were not named.

Affirmed.

1. Wills ⇐423

Where an heir at law contested will, superior court denied contest and admitted all three pages of document as last will of testatrix and that order was appealed from and affirmed by appellate court, appellate court's decision and issues therein determined were law of case.

2. Wills ⇐706

Where trial judge construed will without aid of any evidence, it was duty of appellate court to construe will.

3. Wills ⇐467

The words "I want my friends remembered" express the testatrix' desire and intention that the friends who were listed and named be rewarded and the words are a command and dispositive.

4. Wills ⇐478

Dispositive or operative words are not necessary to create a testamentary disposition of property.

5. Wills ⇐587(1)

No particular mode of expression is necessary to constitute a residuary legatee.

6. Wills ⇐587(1)

District Court of Appeal is bound to give residuary clause a broad and liberal interpretation to the end that intestacy may be prevented. West's Ann.Prob.Code, §§ 101, 102.

7. Wills ⇐448, 452

Rule to effect that blood of testatrix is preferred does not apply where in order to prefer those of blood of testatrix it is necessary to ignore presumption against intestacy and in favor of upholding intent of testatrix as expressed in will. West's Ann.Prob.Code, § 101.

8. Wills ⇐706

Where trial court's interpretation of will appears to be reasonable and consistent with intent of testatrix, trial court should be affirmed even though a different interpretation might seem equally tenable. West's Ann.Prob.Code, § 101.

9. Wills ⇐587(1)

Where testatrix declared that she had no living blood relatives and will provided that in event any persons claimed such relationship and proved it, that they were to be given $1 to quit their claim, and that testatrix wanted her friends to be "remembered" and further provided that remainder in a particular envelope was to be divided among named friends, and amount of estate was $53,265.93 and amount in envelope was $5,240, residue of estate would be distributed to persons named in will and not to first cousins of deceased who were not named.

Mantalica, Barclay & Teegarden, Los Angeles, for appellant.

Henshey & Beeman, Los Angeles, for respondents Johnson and others.

Edmond Gattone, Los Angeles, for respondent Edwards.

FOURT, Justice.

This is an appeal by the petitioner from that portion of an order and decree determining heirship and interest in estate which decrees that the residue of the estate should be distributed to the persons named in the will, and not to the petitioner and Andrew E. Perkins, first cousins of the deceased, who are not named in the will.

[1] The decedent died on March 3, 1955, in Los Angeles county, leaving surviving her as her only heirs at law, two first cousins, namely the petitioner and Andrew E. Perkins. The decedent left a holographic will consisting of three pages, one of which pages was titled "Memorandum for Executors," (In re Estate of Plumer, 147 Cal.App.2d 760, 306 P.2d 110, 111), and which was admitted to probate. Andrew E. Perkins contested the will; however the Superior Court denied the contest and admitted all three pages of the document in question as the last will of the decedent. That order was appealed from, and was affirmed by this court (In re Estate of Plumer, supra, 147 Cal.App.2d 760, 306 P.2d 110). That decision and the issues therein determined are the law of the case. Allen v. California Mutual Bldg. & Loan Ass'n, 22 Cal.2d 474, 139 P.2d 321.

The testatrix, in her will, first set forth that the document was her last will, that she was in her "right mind" and "not influenced unduly by anyone;" that she had no debts and "no living blood relatives" and that "anyone claiming a debt or relationship and proving it shall be given, one Dollar $1.00 to quit their claim." She then appointed the executors, and thereafter described her assets in detail. On the last page of her will she set forth:

"Memorandum for Executors
"Nov. 15th 1948
"I want my friends to be remembered
Mitchell Lewis
Doreen Turner Garwick
Rose McVey
Flora and Roy Turner
Mary Edwards
Ruth and Tom Lambeth
~~Edna Kelley Allen~~ out R. P.

"The cash in envelope marked 'Mitchell Lewis, Personal' is to be used to pay funeral expenses & remainder to be, after Executors fees & expenses, divided with the above named friends * * *."

She then set forth certain specific bequests to various friends consisting of certain items of furniture, jewelry and wearing apparel.

The estate of the decedent was appraised at $53,265.93. The amount of money in the envelope above mentioned was $5,240.

Appellant contends that by using the word "remainder" in the sentence which

relates to the cash in the envelope marked "Mitchell Lewis, Personal," she meant that her friends were to get what was left from the amount in the envelope after paying the funeral expenses, executors' fees and expenses, and that the balance of the estate should go to the first cousins. In other words, appellant asserts that the words "I want my friends to be remembered" are indicative of a wish to give those friends a small remembrance and nothing else.

[2] The judge determined the construction of the will without the aid of any evidence. Accordingly, it is the duty of this court to construe it. In re Estate of Moody, 118 Cal.App.2d 300, 305, 257 P.2d 709; In re Estate of Luckel, 151 Cal.App. 2d 481, 312 P.2d 24.

[3] Webster's New International Dictionary, 2d ed. (Unabridged), defines the transitive verb, "remember" in part as follows: "remember. Transition—3(b). To keep in mind as deserving a reward, hence to reward; as, he was *remembered* in the will."

The words "I want my friends remembered" are directed to the executors and express the testatrix' desire and intention that the friends who are listed and named, be rewarded. The words are a command and dispositive. See, In re Estate of Lawrence, 17 Cal.2d 1, 7, 108 P.2d 893; In re Estate of Tooley, 170 Cal. 164, 149 P. 574; In re Estate of Shirley, 180 Cal. 400, 181 P. 777.

[4] However, dispositive or operative words are not necessary to create a testamentary disposition of property. In re Estate of Weber, 76 Cal.App. 723, 725, 245 P. 776.

> "A will is to be construed according to the intention of the testator." Probate Code, § 101.

In re Estate of Lawrence, supra, 17 Cal. 2d at page 6, 108 P.2d at page 896, contains the following language:

> "In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible. (Citing cases.)
>
> "Of course, as stated in the case of In re Estate of Wilson, supra, 184 Cal. [63], at page 68, 193 P. [581] at page 583: 'Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills.' "

In this case the testatrix declared that she had no living blood relatives, and that in the event any persons claimed such relationship and proved it they were to be given $1 to quit their claim. She clearly set forth that she intended to disinherit her heirs, if any, and where the will specifically excludes the relatives from sharing the estate, she manifested an intention to avoid intestacy. In re Estate of Soulie, 72 Cal. App.2d 332, 164 P.2d 565. "* * * constructions which lead to intestacy, total or partial, are not favored; and that such interpretation should, if possible, be placed upon the provisions of the will as will prevent intestacy, especially where the will evinces an intention on the part of the testator to dispose of his whole estate. (Citing cases.) It is clear also in the instant case that the testator intended to and did dispose of his entire estate entirely without provision for his heirs." In re Estate of Lawrence, supra, 17 Cal.2d at page 7, 108 P.2d at page 896.

It was appropriately said in Re Estate of Hart, 151 Cal.App.2d 271, at pages 282–283, 311 P.2d 605, at page 612: "The fact that a testator makes a will raises a presumption that he intended to dispose of all of his property (citing cases) and wherever a testamentary provision may be given either of two meanings, that meaning should be given to it which will prevent intestacy,

either entire or partial. (Citing cases.)" See also, In re Estate of O'Brien, 74 Cal.App.2d 405, 408, 168 P.2d 432; In re Estate of Rowley, 126 Cal.App.2d 571, 575–576, 272 P.2d 911.

[5] Appellant asserts, in effect, that the expression as used by the testatrix is not usual if she intended to dispose of her estate to her friends. However, no particular mode of expression is necessary to constitute a residuary legatee. In re Estate of Upham, 127 Cal. 90, 98, 59 P. 315; In re Estate of Keller, 134 Cal.App.2d 232, 240, 286 P.2d 889; In re Estate of Weber, supra, 76 Cal.App. 723, 725, 245 P. 776.

The fact that the residuary clause in this particular will is followed by some specific bequests of jewelry and furniture is of no moment for "[a]lthough the residuary clause usually appears as the last of the disposing provisions of a will, it is not necessary that it be so placed, and its presence elsewhere does not lessen its force and effect or affect the validity of the instrument since the clause is, in legal contemplation, the last in the will regardless of its actual position. It has been held that, where the clause is not the last of the disposing provisions, a particular bequest following it may reasonably be read as an exception out of the property comprising it. The position of the clause at any place other than the end will bear on the question of whether or not it was intended to be a residuary clause." 96 C.J.S. Wills § 796, pp. 217–218.

[6] We are bound to interpret the will so as to give the residuary clause a broad and liberal interpretation to the end that intestacy may be prevented. In re Estate of O'Brien, supra, 74 Cal.App.2d 405, 409–410, 168 P.2d 432; In re Estate of Olson, 144 Cal.App.2d 694, 696, 301 P.2d 501; In re Estate of Boyd, 148 Cal.App.2d 821, 307 P.2d 754; Prob.Code, § 102.

[7] The rule to the effect that the blood of the testator is preferred has its limitations, as was pointed out in Re Estate of Lawrence, supra, 17 Cal.2d 1, at page 12, 108 P.2d 893, at page 899, wherein the court said:

> "Although it has been held that where a will is capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood is preferred (citing cases), nevertheless, the said rule does not apply where in order to prefer those of the blood of the testator, it is necessary to ignore the presumption against intestacy and in favor of upholding the intent of the testator as expressed in his will."

[8] Furthermore, the rule is well established to the effect that if the interpretation by the trial court appears to be reasonable and consistent with the intent of the testatrix, the trial court should be affirmed even though a different interpretation might seem equally tenable. See, In re Estate of Schuster, 137 Cal.App.2d 125, 289 P.2d 847; In re Estate of Lewis, 91 Cal.App.2d 322, 204 P.2d 898.

[9] In our opinion, the most that can be said for the appellant's contention as to what the testatrix meant by the use of the word "remember" is that it was ambiguous as used in this case.

Judgment affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

159 Cal.App.2d 369

R. G. WILSON, Plaintiff and Respondent,

v.

Al SCANNAVINO, doing business as Scannavino Trucking Co., Defendant and Appellant.

Civ. 9381.

District Court of Appeal, Third District, California.

April 15, 1958.

Hearing Denied June 11, 1958.

Action against defendant upon an open book account under a contract for services in hauling. Defendant moved to change the place of trial to San Joaquin County and from an order denying the defendant's motion for change of venue the Superior Court, Butte County, Dudley G. McGregor, J., the defendant appeals. The District Court of Appeal, Warne, J. pro tem., held that where Butte County was place of acceptance of defendant's telephonic offer of a contract, contract was entered into in Butte County and was a proper place for trial of the action.

Order affirmed.

1. Contracts ⇐145

When an acceptance is to be given by telephone, the place of contracting is where the acceptor speaks his acceptance.

2. Venue ⇐7

In action in County of Butte against defendant upon an open book account for services performed under contract which was accepted by telephone in Butte County, Butte County was proper county for trial of the action and defendant was not entitled to a change of venue to the county of his residence. West's Ann.Code Civ.Proc. § 395.

Forrest E. Macomber and Gordon J. Aulik, Stockton, for appellant.

Millington & Millington, Gridley, for respondent.

WARNE, Justice pro tem.

From an order denying his motion for a change of venue defendant appeals.

Plaintiff commenced an action in the county of Butte against the defendant upon an open book account. The complaint alleges: "That within four years last past, plaintiff rendered, upon an open book account, work, labor, and services at defendant's special instance and request; That the value of such work, labor and services performed by the plaintiff is the sum of One Thousand Seven Hundred Forty Eight and 45/100 Dollars ($1,748.45); * * * that the whole thereof is due and owing this plaintiff"; and "That said open book account was entered into in the Gridley Township and is payable therein." Gridley Township is in Butte County.

Defendant moved to change the place of trial to San Joaquin County, basing his motion on the ground that at the commencement of this action he was, and still is, a resident of the county of San Joaquin.

In his affidavit in support of the motion defendant alleges: "that he was at the commencement of this action, and now is, a resident of the County of San Joaquin," and "That the obligation sued upon was incurred, if at all, for the sub-hauling performed by the Plaintiff for this Defendant; that the Plaintiff did said sub-hauling pursuant to a telephone request from Defendant, and that pursuant to said request the Plaintiff hauled loads from Fort Klamath, California; Brown Station, Nevada; Fallon, Nevada; and Corvalis, Oregon; and that none of the hauls had as its destination any point in Butte County, California; that the open book account sued upon is based solely upon the hauls made as herein set forth." Plaintiff, in his affidavit in opposition to said motion, admitted the truth of the allegations contained in defendant's affidavit but alleged in addition thereto that the contract was made by telephone and that the County of Butte is a proper county for the maintenance of the action because plaintiff there received and accepted defendant's telephone request to do the sub-hauling.

Section 395 of the Code of Civil Procedure provides, in part:

"When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant * * * resides * * * shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[1] In Ward Manufacturing Co. v. Miley, 131 Cal.App.2d 603, 610, 281 P.2d 343, 348, the court said:

"The law is that a contract made by telephone is entered into at the place where the recipient of the call is at the time he accepts the offer. Restatement of Conflict of Laws, section 326, comment c, page 405: '*Acceptance by telephone.* When an acceptance is to be given by telephone, the place of contracting is where the acceptor speaks his acceptance.' Cf. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 315, 74 P. 855, 65 L.R.A. 90; Trinity Universal Ins. Co. v. Mills, 293 Ky. 463, 169 S.W. 2d 311, 314; Traders Oil Mill Co. v. Arnold Bros. Gin Co., Tex.Civ.App., 225 S.W.2d 1011, 1013; Pearson v. Electric Service Co. of Pensacola, 166 Kan. 300, 201 P.2d 643, 645; Cousins v. Harrison, 33 Ala. 199, 30 So.2d 393, 394; United States v. Bushwick Mills, 2 Cir., 165 F.2d 198, 202; 17 C.J.S. Contracts § 356, p. 814; 1 Williston on Contracts, Rev.Ed., § 82, p. 237; § 97, p. 312."

This fixes Butte County as the place of contract, and section 395 of the Code of Civil Procedure in effect says that all actions arising on contract shall be tried in the county in which the defendant resides, or *in which the contract was made,* unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action. Armstrong v. Smith, 49 Cal.App.2d 528, 532, 122 P.2d 115; DeCampos v. State Comp. Ins. Fund, 75 Cal. App.2d 13, 20–21, 170 P.2d 60; Dawson v. Goff, 43 Cal.2d 310, 273 P.2d 1.

[2] In the instant case, Butte County being the place of acceptance of defendant's telephonic offer, the contract was there entered into and under the provisions of section 395 of the Code of Civil Procedure Butte County is a proper county for the trial of this action. Defendant attempts to void this conclusion by asserting that the contract was unilateral. It suffices to say that the record does not support such assertion.

The order denying defendant's motion for change of venue is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



159 Cal.App.2d 629

John E. BROOKS, Plaintiff and Respondent,

v.

John E. DUSKIN, Jr., et al., Defendants.

San Jose Abstract and Title Co., etc., Defendant and Appellant.

No. 17606.

District Court of Appeal, First District, Division 1, California.

April 23, 1958.

Action to enforce Mechanic's and materialman's lien. The Superior Court of Santa Clara County, Gregory P. Maushart, J., awarded the relief sought, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that one who had essentially an option to purchase land for price to be paid in part in his own labor, but was entitled to be paid for his labor if he

did not pay the purchase price, was within statute exempting from requirement of contractor's license an employee compensated solely by wages.

Judgment for plaintiff affirmed, and appeal dismissed in part.

1. Mechanics' Liens ⇐281(4)

In action to enforce mechanic's lien, plaintiff's testimony whereby value of his services, discounting for his lack of skill, was estimated by comparing labor costs on adjacent identical houses, was sufficient to support finding as to value of labor and materials which was lower than the lowest hourly wage for day labor.

2. Mechanics' Liens ⇐79

Under plaintiff's agreement with subdivision developer, contemplating plaintiff's purchase of house in subdivision by working labor out himself, though plaintiff was inexperienced in construction work, and providing that plaintiff's work would reduce purchase price or, if plaintiff were unable to pay purchase price, the property would be transferred to developer upon developer's paying plaintiff for labor, plaintiff had essentially an option to become owner, which was never exercised when developer became bankrupt and subsequently died without plaintiff's having paid him any money; and hence plaintiff was not precluded from asserting mechanic's lien for his labor.

3. Vendor and Purchaser ⇐57

An option to purchase does not effect a transfer until exercised.

4. Licenses ⇐19(3)

One who had essentially an option to purchase land for price to be paid in part in his own labor, but was entitled to be paid for his labor if he did not pay the purchase price, was within statute exempting from requirement of contractor's license an employee compensated solely by wages. West's Ann.Bus. & Prof.Code, §§ 7044, 7053.

5. Licenses ⇐19(3)

One performing labor in construction of house under agreement whereby he would either become owner with credit on purchase price for value of his labor, or would be paid for his labor, and hence would eventually be entitled to either the exemption of owners from contractor's license requirement or the exemption of employees, should not be denied both exemptions merely because his status had not become fixed. West's Ann.Bus. & Prof.Code, §§ 7044, 7053.

6. Mechanics' Liens ⇐149(1)

Mechanic's lien claim specifying merely the furnishing of "general building materials", without itemizing particular materials, was not so deficient as to invalidate the lien in absence of suggestion of intent to defraud or failure to put landowner upon inquiry in any manner. West's Ann.Bus. & Prof.Code, §§ 7044, 7053.

7. Appeal and Error ⇐792, 805

Where notice of appeal, though taken "from the whole" of judgment, was directed only to clerk of court and plaintiff's attorney, and copies of appellant's brief were mailed only to plaintiff's attorney and trial judge, and no brief was filed or appearance made by any party other than plaintiff and appellant, appellant abandoned its appeal as to other defendants and appeal would be dismissed upon reviewing court's own motion as to portions of judgment in favor of such other defendants.

Royal E. Handlos, San Francisco, for appellant.

Timothy A. O'Connor, San Jose, for respondent.

FRED B. WOOD, Justice.

Defendant San Jose Abstract and Title Company, trustee for Fred and Lena Radach, has appealed from a judgment awarding plaintiff a mechanic's and materialman's lien of $2,368.04 against certain real property, prior to said defendant's deed of trust. The judgment also declares that the similar liens of other defendants, when perfected, are prior to said deed of trust.

The trial court found: Between August 27, 1953, and November 10, 1954, plaintiff furnished labor and materials used in the construction of a dwelling house on a certain parcel of real property. He did so pursuant to a written agreement between plaintiff and John E. Duskin, Jr., Duskin agreeing to pay plaintiff the reasonable value thereof, which was $2,368.04. Thereafter and on December 1, 1954, plaintiff duly filed in the County Recorder's office his claim of lien therefor. The claim was duly verified, contained a general statement of the kind of material and labor furnished by plaintiff, the person to whom he furnished labor and materials, the names of the owners or reputed owners, a description of the property sought to be charged with a lien sufficient for identification, and a statement of plaintiff's demand after deducting all just credits and off-sets. Plaintiff's lien and the liens of certain other defendants are all prior to the defendant Title Company's deed of trust which was dated October 9 and recorded October 20, 1953. Plaintiff's lien is inferior to the liens of such other defendants. All of the land described is necessary for the convenient use and occupation of the improvements thereon.

These findings support the judgment but appellant claims some of them are without support in the evidence and that some are not within the issues.

[1] (1) *The evidence is sufficient to support the finding as to the value of the labor and materials furnished.*

Plaintiff testified that he worked 2,457 hours and incurred expenses of $75.16. He said he estimated the value of his services, discounting for his lack of skill, by comparing the labor cost on adjacent identical houses. This seems quite fair and reasonable. At even the lowest hourly wage for day labor, plaintiff's earnings would have been higher than as found by the court.

[2] (2) *Was plaintiff the owner (as vendee) of the land and thus incapable of asserting such a lien as this? It does not appear so.*

Plaintiff commenced work pursuant to an oral agreement with Duskin (from whom appellant later derived title). Duskin wanted to give plaintiff an opportunity to purchase a house in a subdivision Duskin was developing, and to do so by working the labor out himself. Duskin would allow plaintiff to work on this house, doing as much toward the construction as he could. Upon completion plaintiff was to reimburse Duskin for any efforts the latter exerted in the way of labor or materials and time. Any work that plaintiff personally performed would reduce the purchase price. Duskin obtained a construction loan on the property. The forms were placed and construction started August 27, 1953. Duskin gave plaintiff instructions from time to time on how to build the house. Plaintiff had never built even a "box" before this. The property was to be owned by Duskin until such time as the buildings were completed and until such time as plaintiff could pay Duskin the money that the latter would have expended. The property was to be held by the appellant until plaintiff paid to Duskin the purchase price of the property. A separate contemporaneous agreement was entered into providing for certain divisions of profits upon the sale of the realty by plaintiff within a certain period, a first right of refusal on such sale, and the plaintiff's right to buy up Duskin's rights under the agreement. This agreement was to terminate on Duskin's death. These agreements were oral, but were memorialized in a writing prepared around February 1, 1954, and dated September 9, 1953.

The purchase price was to be paid on or before 60 days of recording notice of completion. Upon plaintiff being in a position to pay, title would be transferred to him. In the event plaintiff should be unable to pay the purchase price the property would be transferred to Duskin upon Duskin's paying plaintiff for labor performed by the latter.

In October, 1954, Duskin filed a petition in bankruptcy. (The trustee refused to take this property over.) December 1,

plaintiff filed his claim of lien for labor and materials. Duskin died January 7, 1955.

Plaintiff never paid the purchase price; never paid Duskin any money.

There is no indication that a notice of completion was ever filed. Plaintiff testified the building had not yet been completed.

[3] Under these facts it does not appear that plaintiff has acquired or ever did acquire title, legal or equitable. The agreement created, essentially, an option to become owner, an option that was never exercised. Such a right, until exercised, does not effect a transfer. 12 Cal.Jur.2d 204–206, § 15.

There seems no reason why the fact that plaintiff had the right to purchase the property at a later date should defeat his right to the lien. He would not be in the position of an owner, who owes a debt to another, avoiding that debt by recovering over against his own assets by impressing a lien on those assets. The debt that here might be defeated by the lien was not his own. It was Duskin's. Insofar as appellant is concerned, plaintiff is not in any position different from that of any other person entitled to a mechanic's lien. It would be inequitable to allow appellant to reap the benefit of the increased value of the property, to the detriment of plaintiff who created that value.

[4] (3) *Must plaintiff's action fail because he did not have a contractor's license? No.*

The parties have discussed this question with reference to the applicability or inapplicability of section 7044 of the Business and Professions Code which exempts from the licensing requirements "owners * * * building * * * for the occupancy of such owner and not intended for sale." "Owner" as here used may, conceivably, have a broader meaning than when used in discussing the relative rights of vendor and purchaser. We think, however, that the exemption declared in section 7053: "This chapter does not apply to any person who engages in the activities herein regulated, as an employee with wages as his sole compensation," is applicable. Plaintiff did the work under supervision by the owner who, if the purchase price were not paid, would pay plaintiff for his labor. These facts support an implied finding that in doing this work of construction plaintiff's relationship to it and the owner was that of an employee, not that of an independent contractor.

[5] There appear to be no similar cases, but it would seem that in this peculiar situation, where eventually plaintiff would have the benefit of one or the other of these exemptions, he should not be denied both because his status had not yet become fixed. If he might not eventually attain an exempt status, the situation would be different. Appellant implied that plaintiff would not be entitled to the employee exemption because he ordered certain work done after February or March, 1954, and ordered materials and supplies after Duskin's death. The answer is that plaintiff was claiming for labor and materials supplied prior to December 1, 1954, when the claim of lien was filed. Mr. Duskin died on January 7, 1955, after that time. The fact that he was employed in a supervisory capacity before Duskin's death does not deprive him of the benefit of the employee exemption. Dorsk v. Spivack, 107 Cal.App.2d 206, 236 P.2d 840.

[6] (4) *Was the claim of lien so defective as to invalidate the lien? No.*

Appellant contends that the claim of lien was fatally defective, in that it only specified that labor and "general building materials" were furnished, without itemizing the particular materials furnished. Code of Civil Procedure, section 1193.1(j), prescribing the form and contents of the claim of lien, requires that it contain, among other things, "a general statement of the kind of work done or materials fur-

nished by [the claimant], or both." In McClain v. Hutton, 131 Cal. 132, 136, 61 P. 273, 63 P. 182, it was held unnecessary "to state specifically the kind of materials furnished, or the prices of the several items." In Johnson v. Smith, 97 Cal.App. 752, 276 P. 146, it was held that a claim for "materials furnished" was not fatally defective in the absence of a showing of intent to defraud, in view of Code of Civil Procedure, section 1203, now section 1196.1. In Winship v. Holden, 90 Cal.App. 71, 73, 265 P. 572, a statement that a dealer in lumber and building materials "furnished materials" actually used in the construction of certain dwellings was held sufficient. In Shafer v. Los Serranos Co., 128 Cal.App. 357, 17 P.2d 1036, the claim failed to set forth the kind of materials furnished and failed to state to whom the material was furnished. The answer pleaded that the owner had no knowledge that a building was being constructed on the premises. The court affirmed a judgment denying the lien, stating that under these circumstances, plaintiff failed to bring himself within Code of Civil Procedure, section 1203. That section, now section 1196.1, provided: "No mistake or errors in the statement of the demand, * * * shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand * * * was made with the intent to defraud, or the court shall find that an innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner." In our case there is no suggestion of intent to defraud, nor does it appear that the description was so deficient that it did not put the appellant upon inquiry in any manner.

[7] (5) *Appellant's other points have to do with portions of the judgment which are in favor of other parties than the plaintiff.* We find that appellant abandoned its appeal in respect to those parties and those portions of the judgment; wherefore it is appropriate that the appeal as to those portions of the judgment be dismissed upon this court's own motion.

Appellant's notice of appeal though taken "from the whole" of the judgment was directed only to the Clerk of the Court and to the attorney for the plaintiff, John E. Brooks. Appellant filed only an opening brief and the affidavit attached to it shows service only of two copies thereof, one mailed to plaintiff's attorney, the other to the trial judge. No brief was filed and no appearance has been made upon this appeal by any party other than the plaintiff and the appellant. These facts justify a finding that appellant has abandoned any appeal it may have taken as to defendants Arthur Knudsen and Nicholas DiSalvo, copartners doing business under the name and style of K and M Cabinet Shop, Carl E. Anderson Company, E. M. Williams and M. J. Freitas, copartners doing business as Coast Door and Plywood Company, San Jose Paint and Wallpaper Company, and any other defendants (except appellant) there may have been. Palmer v. Holcomb, 147 Cal.App.2d 94, 99–100, 305 P.2d 107.

The judgment in favor of plaintiff is affirmed. The appeal from those portions of the judgment which are in favor of other parties (parties defendant) is dismissed.

PETERS, P. J., and BRAY, J., concur.

James W. TUPPER, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF MARIN, Respondent.*

Cr. 18088.

District Court of Appeal, First District, Division 1, California.

April 14, 1958.

Hearing Granted June 11, 1958.

Petition for writ of prohibition to arrest further proceedings in Superior Court, Marin County, upon information charging petitioner with contributing to delinquency of a minor. The District Court of Appeal, Bray, J., held, inter alia, that where committing magistrate, at preliminary examination of defendant charged with contributing to delinquency of a minor by giving a minor a purported bill of sale of hub caps which defendant knew to be stolen, in refusing defendant upon proper request the right to see statements made by minors to officials, which statements might be an important part of defendant's cross-examination of the prosecution witnesses, exceeded its jurisdiction, defendant was entitled to writ of prohibition to arrest further proceedings notwithstanding availability of remedy of appeal after termination of trial.

Writ issued in accordance with opinion.

1. Criminal Law ⇐238

The evidence before a committing magistrate at a preliminary hearing need not be such as would require a conviction in order to hold accused to answer.

2. Criminal Law ⇐238

"Reasonable or probable cause" in order to hold accused to answer before a committing magistrate at a preliminary hearing means such state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of guilt of accused, and may exist although there may be some room for doubt.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

3. Criminal Law ⇐238

Evidence that defendant who was a clerk in automobile accessories store gave minor a purported bill of sale of hub caps defendant knew to be stolen, the obvious purpose of which was to enable minor in case of question to make it appear that he had obtained the hub caps legitimately showed "probable cause" and hence was sufficient to justify magistrate's commitment of defendant accused of contributing to delinquency of a minor. West's Ann.Welfare & Inst.Code, § 702.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

4. Criminal Law ⇐627½

In preliminary examination before committing magistrate against defendant who was charged with contributing to delinquency of a minor in giving minor a purported bill of sale of hub caps that defendant knew to be stolen, wherein cross-examination of two minors developed that they had given statements concerning theft of the hub caps to officials, denial to defendant of the statements made by the minors was an abuse of discretion where establishment of probable cause depended almost conclusively on testimony of such minors and only objection to their production was that they might not be impeaching in character and therefore not admissible in evidence. West's Ann.Welfare & Inst.Code, § 702.

5. Constitutional Law ⇐263

While the right of cross-examination given a defendant at preliminary examination is a statutory rather than a constitutional one, it is nevertheless a step in that due process of law to which a defendant is entitled. West's Ann.Pen.Code, §§ 865, 872.

6. Criminal Law ⇐234

The violation of a defendant's fundamental right of cross-examination causes

* Opinion vacated 331 P.2d 977.

commitment to be illegal and information to be invalid. West's Ann.Pen.Code, §§ 859, 865–872; West's Ann.Const. art. 1, §§ 8, 13.

7. Criminal Law ⇐223

Under constitutional provision that certain offenses shall be prosecuted by information, after examination and commitment by magistrate or by indictment "as may be prescribed by law," implementing statutes virtually had the dignity and sanction of constitutional mandates. West's Ann.Pen. Code, §§ 859, 865–872; West's Ann.Const. art. 1, §§ 8, 13.

8. Indictment and Information ⇐137(5)

"Legally committed" as used in statute vesting independent right to have information set aside by court in which arraigned if before filing thereof defendant has not been "legally committed" by a magistrate refers to the examination of the case, and holding of the defendant to answer and essential principles of procedure and of evidence may not be departed from by committing magistrates. West's Ann.Pen.Code, § 995; West's Ann.Const. art. 1, §§ 8, 13.

See publication Words and Phrases, for other judicial constructions and definitions of "Legally Committed".

9. Criminal Law ⇐223

The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waved aside. West's Ann.Pen.Code, §§ 859, 865–872, 995; West's Ann.Const. art. 1, §§ 8, 13.

10. Criminal Law ⇐232, 234

Not every deviation from requirements with which preliminary examination has been surrounded would tincture with illegality a commitment based upon that examination, but thwarting of a fundamental right of defendant, such as the right to benefit of counsel, right to present witnesses, and right to cross-examine prosecution's witnesses, constitute such deviation from those requirements as will infect with illegality any order of commitment based upon the examination. West's Ann.Pen. Code, §§ 859, 865–872, 995; West's Ann. Const. art. 1, §§ 8, 13.

11. Prohibition ⇐28

When inquiry is whether evidence adduced at preliminary examination supports magistrate's finding of reasonable and probable cause, a court in prohibition proceeding does not undertake to weigh the evidence nor is it concerned with mere irregularities of procedure before the magistrate, nor, in general, with correctness of his rulings on admissibility of evidence, but when the very legality of preliminary examination is in question, as affected by violation of one or more of defendant's fundamental rights, nature and scope of inquiry are radically different since if a person's fundamental rights are to be protected and enforced by the courts the validity of magistrate's significant rulings is of necessity a subject of inquiry. West's Ann.Pen.Code, §§ 859, 865–872, 995; West's Ann.Const. art. 1, §§ 8, 13; West's Ann.Code Civ.Proc. §§ 1102, 1103.

12. Criminal Law ⇐238

The committing magistrate has jurisdiction to hold accused to answer only if the legally admissible evidence showed probable cause that defendant had committed crime charged.

13. Prohibition ⇐3(4)

Where committing magistrate, at preliminary examination of defendant charged with contributing to delinquency of a minor by giving a minor a purported bill of sale of hub caps which defendant knew to be stolen, in refusing defendant upon proper request the right to see statements made by minors to officials, which statements might be an important part of defendant's cross-examination of the prosecution witnesses, exceeded its jurisdiction, defendant was entitled to writ of prohibition to arrest further proceedings notwithstanding availability of remedy of appeal after termination of trial. West's Ann.Welfare & Inst.Code, § 702; West's Ann.Pen.Code, §§ 859, 865–872, 995; West's Ann.Code Civ.Proc. §§ 1102, 1103; West's Ann.Const. art. 1, §§ 8, 13.

Carl B. Shapiro, Fairfax, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Petition for writ of prohibition to arrest further proceedings in the Marin County Superior Court upon an information charging petitioner with violation of section 702, Welfare and Institutions Code (contributing to the delinquency of a minor).

Questions Presented.

1. Sufficiency of the evidence at the preliminary examination.

2. Was petitioner entitled to written statements given the officials by prosecution witnesses?

3. Will prohibition lie?

Record.

Petitioner was charged with a violation of section 32, Penal Code (accessary to a felony) and at the preliminary hearing was held to answer. Thereafter an information was filed charging him as above stated. Thereafter petitioner moved the superior court to set aside the information on the same grounds upon which this petition is based. The motion was denied.

[1, 2] 1. Evidence at the Preliminary.

"* * * the evidence before a committing magistrate at a preliminary examination need not be such as would require a conviction. * * * 'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. 'Reasonable and probable cause' may exist although there may be some room for doubt." People v. Nagle, 25 Cal. 2d 216, 222, 153 P.2d 344, 347.

The evidence at the preliminary examination tended to show that Michael Powers, aged 16, stole three hub caps. He sold them to Edward Roche, aged 17, after telling him they were stolen. Petitioner was a clerk in an automobile accessories store. Roche told petitioner that the hub caps were stolen ones and asked petitioner to give him a bill of sale or receipt for the hub caps. Thereupon petitioner made out a store bill of sale or receipt in duplicate which indicated that Roche had purchased hub caps from the store. Petitioner dated the documents back saying "it would look better if the date was set back." On the duplicate for the store defendant wrote "For estimate only" but did not write it on the original given Roche.

Section 702, Welfare and Institutions Code, provides in part: "Any person who commits any act or omits the performance of any duty, which act or commission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 * * * or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of any of the subdivisions of Section 700, is guilty of a misdemeanor * * *"

People v. Miller, 145 Cal.App.2d 473, 477, 302 P.2d 603, 606, states:

"The main purpose of Welfare and Institutions Code, Section 702, is to remove minors from immoral and evil influences which would incline them toward a state of delinquency. The purpose is accomplished by making any act or omission which would tend to cause a minor to become delinquent, a misdemeanor. [Citations.]

"We do not deem it proper to give to the foregoing provisions of the statute the narrow and restricted construction for which appellant herein contends. The evident object and main purpose of the statute is preventive, and as said in People v. DeLeon, 35 Cal.App. 467, 470, 170 P. 173, 175: 'Its intent was to put a barrier across the threshold of those entrances to downward ways which are open before the feet of youth.' It is not required that the effect of the act complained of must have an

absolutely certain and unmistakable tendency to cause the minor to lead an idle, dissolute, lewd or immoral life, and in determining whether the act in question would reasonably so affect the minor, the jury may apply the teachings of human experience." People v. Deibert, 117 Cal.App.2d 410, 415, 256 P.2d 355.

[3] It is clear that the evidence showed probable cause. Petitioner's action in giving the minor a purported bill of sale of hub caps he knew to be stolen had a very definite tendency to encourage Roche's delinquency. The obvious purpose of the bill of sale was to enable Roche, in case of question, to make it appear that he had obtained the hub caps legitimately. It was intended to, and did, assist the juvenile in concealing his commission of the crime of receiving stolen property. It also encouraged Roche in retaining the stolen property and perhaps even to procure more stolen property.

2. Written Statements to Police.

[4] Cross-examination of the two juveniles developed that Powers had given a statement concerning the theft of the hub caps and their sale to Roche to the officials (apparently to a deputy sheriff or a deputy district attorney) partially written in his own handwriting and partially dictated and signed by him, and that Roche had given one entirely in his own handwriting concerning his purchase of the hub caps from Powers and his obtaining the bill of sale from petitioner. Defendant moved both orally and in writing that he be shown these statements for purposes of possible impeachment. The motions were denied.

The leading case, and one which reconciled earlier cases, on the right of a defendant *at a trial* to statements given peace officers by prosecution witnesses is People v. Riser, 47 Cal.2d 566, 305 P.2d 1. There the court pointed out that at common law the accused in a criminal action could not compel production of documents or other evidence in the possession of the prosecution for the reason that to compel the prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case, and that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self-incrimination would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor. The court then said, 47 Cal.2d at page 585, 305 P.2d at page 13: "Whatever the force of these arguments when directed to pretrial discovery, they have little or no application when production is sought by subpoena during trial of statements referred to on cross-examination. The question then is not whether the defendant will be allowed advance disclosure of evidence upon which the prosecution plans to base its case, but whether he will be allowed any disclosure of evidence that the prosecution does not intend to produce in court at all. See United States v. Krulewitch, 2 Cir., 145 F.2d 76, 78, 156 A.L.R. 337. Furthermore, the additional possibility that the defendant will obtain perjured testimony or fabricated evidence as a result of disclosure at this point in the proceedings is too slight to justify denying production. The decisions of this court have always impliedly recognized that on a proper showing a defendant in a criminal case can compel production when it becomes clear during the course of trial that the prosecution has in its possession relevant and material evidence." The court referred to cases where production had been denied solely because the requirements justifying production had not been met in the particular case, and also to cases to the contrary. It then referred to cases supporting its position, stating that they were the better reasoned cases. It said, 47 Cal.2d at page 586, 305 P.2d at page 13: "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can

throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts." To the contention that the statements if produced might not impeach the testimony of the particular witness who made it, the court said that that question could only be determined by an examination of the statement itself. "Obviously a defendant cannot show conclusively that a document is admissible without seeing it, and yet in order to see it he is told that he must show that it is admissible. The proper test for determining whether production must be granted is not whether the evidence has been conclusively proved admissible but whether, as stated in People v. Glaze, supra, 139 Cal. 154 at page 158, 72 P. 965, 'there is good reason to believe that the document when produced would be admissible in evidence for some purpose in the case * * *.' There must be more than a mere possibility that the statements when produced will contain contradictory matter and be in such a form that they can be used to impeach, but the chance that it may turn out eventually that they cannot be used for this purpose should not block production at the threshold." 47 Cal.2d at page 587, 305 P.2d at page 14. The court then held that as it was not claimed by the prosecution that the necessities of law enforcement required that the statements be kept confidential, the defendant was entitled to see the statements even though it might develop that there was nothing of an impeachment nature in them. See also Gordon v. United States, 344 U. S. 414, at page 418, 73 S.Ct. 369, at page 372, 97 L.Ed. 447, where the court said: "[P]roduction may sometimes be required though inspection may show that the document could properly be excluded."

In Powell v. Superior Court, 48 Cal.2d 704, 312 P.2d 698, the defendant charged in an indictment with the embezzlement of public funds, moved the trial for an order authorizing *pretrial inspection* of a signed statement and a typewritten transcript of the tape recording which he had made in the office of the chief of police on the ground that he could not recall what he had said and that such documents were necessary to refresh his recollection. In holding that the defendant was entitled to these documents the court quoted extensively from People v. Riser, supra, 47 Cal. 2d 566, 584–586, 305 P.2d 1, and then said: 48 Cal.2d at page 707, 312 P.2d at page 699, "In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however, odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike." Further, it quoted with approval from State v. Tippett, 1927, 317 Mo. 319, 296 S.W. 132, where it was held that the defendant charged with a crime similar to our "hit and run" was entitled to a copy of the statement given to the prosecution by one Tucker, a witness to the accident. "The court there stated: 'This was a document, and, provided it tended to impeach Tucker, was admissible on the part of defendant for that purpose. The general rule denying the inspection of documents in the hands of an adverse party has been greatly relaxed in modern cases. In civil cases an inspection of documents in the hands of opposing parties, such as papers, contracts, and corporation records, upon motion, have been allowed. The cases seem to hold that it is a matter of indifference whether the document to be examined may be of actual benefit to the party filing the motion to inspect. If from the motion the document may be material, the right of inspection obtains. In the instant case the request

for inspection relates to a statement given by Tucker relative to Fitzpatrick losing his life. * * * The motion then shows that the statement may be material. We are unable to perceive why the privilege should not obtain in a criminal case * * The prosecuting attorney is both an officer of the state and of the court, and his duty extends no further than an impartial, fair, and just trial of defendant. * * * That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.'" 48 Cal.2d at pages 708–709, 312 P.2d at page 700.

In Walker v. Superior Court, 155 Cal. App.2d 134, 317 P.2d 130, it was held that a defendant in a criminal prosecution has no absolute right to *pretrial* discovery of statements made to the prosecution by persons who may become witnesses at the trial but that the trial court may in the interest of justice grant such discovery for good cause shown, and has a broad discretion to grant or refuse such discovery. In holding that the defendant had failed to show sufficient reasons to justify the trial court in ordering *pretrial* discovery of such a statement the court said, 155 Cal.App.2d at page 140, 317 P.2d at page 134: "It may be, as was held in People v. Riser, 47 Cal.2d 566, 305 P.2d 1, that at the trial conditions may arise giving petitioner a right to compel production and inspection of such statements."

The denial to defendant of the statements made by the juveniles was an abuse of discretion. The establishment of probable cause depended almost exclusively on the testimony of the juveniles Powers and Roche. The statements were made by them. The demand was for these specific statements and was not one for a broad fishing expedition, nor for statements not made by witnesses. The prosecution did not assert any privilege for the documents on grounds of public security, confidential character, public interest or otherwise. The only objection to their production was that they might not be impeaching in character and therefore not admissible in evidence. This could only be determined by an examination of them, and an examination could only be had if they were produced.

In Jencks v. United States, 353 U.S. 657, 672, 77 S.Ct. 1007, 1015, 1 L.Ed. 1103, the court said: "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, Roviaro v. United States, 353 U.S. 53, 60–61, 77 S.Ct. 623, 627–628, 1 L.Ed.2d 639. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

In Jencks v. United States, supra, 353 U. S. 657, 77 S.Ct. 1007, 1 L.Ed. 1103, many cases theretofore decided are mentioned, clarified, distinguished or in part disapproved. There the petitioner was convicted in a federal district court of violating 18 U.S.C. § 1001 by filing, under section 9(h) of the National Labor Relations Act, 29 U.S.C.A. § 159(h), as president of a labor union, an affidavit stating falsely that he was not a member of the Communist Party or affiliated with such party. Crucial testimony against him was given by two paid undercover agents for the F.B.I., who stated on cross-examination that they had made regular oral or written reports to the F.B.I. on the matters about which they had testified. The petitioner moved for the production of these reports in court for inspection by the judge with a view to their possible use by the petitioner in im-

peaching such testimony. His motions were denied. The Supreme Court concluded that a denial of the motions was erroneous, and the conviction was reversed.

See also People v. Carter, 48 Cal.2d 737, 312 P.2d 665, where in upholding the defendant's right to see the entire statement made by the defendant's wife to the sheriff when the prosecution used a portion of it to refresh the wife's memory at the trial, the court quoted with approval from People v. Riser, supra, 47 Cal.2d at page 586, 305 P.2d at page 13, " 'the state has no interest in denying the accused access to all evidence that can throw light on issues in the case * * *.' " 48 Cal.2d at page 752, 312 P.2d at page 674.

3. Prohibition.

[5, 6] Section 865, Penal Code, gives the defendant at a preliminary examination the right of cross-examination. The refusal to require the production there of the type of statements under consideration here in effect deprives the defendant of the right of cross-examination. While this right is a statutory rather than a constitutional one, it is nevertheless a step in that due process of law to which a defendant is entitled. It is somewhat analogous to the situation in In re Williams, 52 Cal.App. 566, 199 P. 347. There the preliminary examination was started before one magistrate and testimony introduced. The hearing was continued twice. On the date last set the magistrate was unable to be present, and a judge of another department of the same court proceeded to hear and determine the matter. Over the objection of the defendant, the transcript of the testimony taken before the first judge was used instead of calling the prior witnesses. On habeas corpus, after the defendant was held to answer, it was decided that the committing magistrate can only act upon testimony heard by him in the usual way in which such testimony is presented, and that to act upon evidence, the admissibility of which he has not passed upon, and upon testimony, the weight and value of which he has not measured by the appearance, the narration and the manner of testifying of the witnesses present in person before him, was not merely an error but was an essential violation of the defendant's rights. That the violation of defendant's fundamental right of cross-examination causes the commitment to be illegal and the information to be invalid is shown by an analysis of the constitutional and statutory mandates which govern the prosecution of crime *by information.* These accord a defendant all of the *fundamental elements* of a "fair trial" on the question of whether "it appears * * * that a public offense has been committed" and whether there is "sufficient cause to believe the defendant guilty * * *" (Pen.Code, § 872.)

[7] By sections 859, 865 through 871, the Legislature, in the exercise of the power expressly conferred upon it by the Constitution [1] surrounded the preliminary "examination * * * by the magistrate" with the safeguards and minimum requirements which the Constitution itself prescribes in "criminal prosecutions, in any court whatever" (art. I, § 13).[2] Accordingly, it is not necessary in the present inquiry to determine whether the preliminary "examination" sanctioned by section 8 is a "criminal prosecution" within the meaning of the latter term as used in section 13 of article I. The Legislature has with complete com-

1. Section 8 of article I of the Constitution says that certain offenses "shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, *as may be prescribed by law.*" (Emphasis added.) *In view of this empowerment, the implementing statutes virtually have the dignity and sanction of constitutional mandates.*

2. The first sentence of section 13, article I, declares: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel."

petence "prescribed by law" the same fundamental safeguards for the conduct of the preliminary "examination" as the Constitution by direct mandate has prescribed for "criminal prosecutions, in any court whatever."

To assure the observance of these fundamental requirements, it would seem, the Legislature, at its very first session after the adoption of the Constitution which provided for prosecution by information, amended section 995 of the Penal Code to vest in the defendant the right to have the information "set aside by the court" in which arraigned if "before the filing thereof the defendant had not been legally committed by a magistrate." (Amendments to the Codes, 1880, Pen.Code, ch. 118, p. 43.) That ground of dismissal has continued without change all these years.

[8, 9] "Legally committed" as used in section 995 "refers to the examination of the case, and the holding of the defendant to answer as prescribed by title 3, c. 7, of the Pen.Code." Ex parte Baker, 88 Cal. 84, 85, 25 P. 966, 967. The "essential principles of procedure and of evidence may not be departed from by committing magistrates." In re Schuber, 68 Cal.App.2d 424, 425–426, 156 P.2d 944, 945. "The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waved aside." People v. Brooks, 72 Cal.App.2d 657, 661, 165 P.2d 51, 53.

[10] Of course, not every deviation from the requirements with which the preliminary "examination" has been surrounded would tincture with illegality a commitment based upon that examination. *The thwarting of a fundamental right of the defendant,* such as the right to the benefit of counsel, the right to present witnesses, and the right to cross-examine the prosecution's witnesses, *would seem to be such a deviation from those requirements as would infect with illegality any order of commitment based upon the examination.*

It is already well established the deprivation of a defendant's right to the aid of counsel taints a magistrate's commitment with illegality. People v. Napthaly, 1895, 105 Cal. 641, 644 [39 P. 29], reversing judgment of conviction and an order which denied a motion to set the information aside; People v. Salas, 1926, 80 Cal.App. 318 [250 P. 526], affirming trial court's order setting the information aside because of magistrate's failure to inform the defendant of his right to aid of counsel, citing sections 8 and 13 of article I, Constitution, and sections 858 and 859, Penal Code; People v. Miller, 1932, 123 Cal.App. 499 [11 P.2d 884], same action as in the Salas case, for the same reason; People v. Williams, 1954, 124 Cal.App.2d 32 [268 P.2d 156], same action as in the Salas case, for the same reason. Significantly, the Supreme Court in People v. Napthaly, supra, 105 Cal. 641, 644, 39 P. 29, 30, said: "An examination which denied to defendant the right guarantied him alike by the constitution and statute, of being defended by counsel, was in no sense a legal examination.

"It was a plain and palpable violation of a fundamental right of the defendant, which rendered the commitment illegal."

These cases are persuasive of the view that violation of the equally fundamental right of cross-examination upon what might be a crucial issue infects the ensuing commitment with illegality. These cases, it is true, were decided upon appeal. Does the availability of the remedy of appeal after termination of a trial render the writ of prohibition inappropriate and unavailable? It would seem not, no more so than when a defendant is committed after an examination that produces no evidence of reasonable or probable cause.

There are a few cases in which statements appear that might seem to cast a doubt upon this view. Careful scrutiny dispels any such doubt, as we read those cases.

In Murphy v. Superior Court, 58 Cal. 520, the petitioner represented that the magis-

trate who conducted the preliminary examination "'did not examine on oath or otherwise * * * any witness * * *'" The writ was denied. That seems wholly inconsistent with the rationale of Greenberg v. Superior Court, 19 Cal.2d 319 [121 P.2d 713]. Perhaps it is explainable upon the ground that the defendant did not make a motion for dismissal in the trial court (see Pen.Code, § 996), the printed decision being silent in respect thereto.

In Western Meat Co. v. Superior Court, 9 Cal.App. 538 [99 P. 976], the defendant-petitioner sought the writ upon the ground that he had been illegally committed, claiming that petitioner had not had a hearing at all before a magistrate. But it also appeared that the petitioner had not moved for dismissal in the trial court as required by sections 995 and 996. That was the reason for the denial of the writ. What the court said as to the adequacy of the remedy by way of appeal was pure dictum.

[11] It is true that when the inquiry is whether or not the evidence adduced at the preliminary examination supports the magistrate's finding of reasonable and probable cause, a court in a prohibition proceeding does not undertake to weigh the evidence (if there be some supporting evidence), nor is it concerned with mere irregularities of procedure before the magistrate, nor, in general, with the correctness of his rulings on the admissibility of evidence. See Rogers v. Superior Court, 46 Cal.2d 3, 7–8, 291 P.2d 929; Badillo v. Superior Court, 46 Cal.2d 269, 271–272, 294 P.2d 23.

But when the very legality of a preliminary examination is in question, as affected by the violation of one or more of the defendant's fundamental rights, the nature and scope of the inquiry is radically different. If a person's fundamental rights are to be protected and enforced by the courts the validity of the magistrate's significant rulings is of necessity a subject of inquiry.

[12, 13] The purpose of a writ of prohibition is to arrest proceedings in a court when such proceedings are without or in excess of its jurisdiction (Code Civ.Proc. § 1102) and when there does not exist a plain, speedy or adequate remedy in the ordinary course of law. Code Civ.Proc. § 1103. Here the court, in refusing petitioner upon proper request the right to see the statements which might be an important part of defendant's cross-examination of the prosecution witnesses, exceeded its jurisdiction. The court has jurisdiction to hold the accused to answer only if the legally admissible evidence showed probable cause that defendant had committed the crime charged. It the statements proved to be impeaching it very well could be that the magistrate would not have found probable cause and would not have held the defendant to answer. It is not enough to say that these statements could be produced on examination of the witnesses at the trial, first, because, as we have shown, a fundamental right of the defendant was violated and hence the court violated its jurisdiction, and secondly, because, if, for any reason, either of the witnesses were not then available, a very difficult situation would arise. If his testimony at the preliminary could be read, as is usually the case, the defendant would not be able to use his statement in cross-examination for the reason that the witness would not be present. On the other hand, if it should be held that that very fact would preclude the use by the prosecution of his prior testimony, the prosecution would be greatly injured.

Let the peremptory writ of prohibition issue as prayed.

PETERS, P. J., and FRED B. WOOD, J., concur.

50 Cal.2d 240

Elsie E. COWEE, Ruth Evans and Pearl L. McNulty, Plaintiffs and Respondents,

v.

Matthew MARSH, Defendant and Appellant.

Sac. 6889.

Supreme Court of California,
In Bank.
April 24, 1958.

The Superior Court, Butte County, Arthur Coats, J., rendered judgment for plaintiffs who did not serve written notice of entry of judgment but notice was given by clerk of court to parties and 30 days after receipt thereof defendant filed notice of intention to move for new trial and served notice on plaintiffs. Defendant's motion for a new trial was denied and defendant filed notice of appeal 84 days after entry of judgment and 27 days after denial of motion for new trial. Plaintiff moved to dismiss appeal. The Supreme Court held that notice of entry of judgment must be given by prevailing party and notice of entry of judgment prepared and served by clerk of court did not start running of 10-day period for filing of notice of intention to move for new trial.

Motion to dismiss appeal denied.

Opinion, Cal.App., 317 P.2d 125, vacated.

1. Appeal and Error ⇐348(1)
New Trial ⇐155

Valid service of notice of entry of judgment is necessary to start time running within which trial court may pass upon motion for new trial, but it is not necessary to start the time running within which an appeal may be taken. West's Ann.Code Civ.Proc. §§ 659, 660.

2. Appeal and Error ⇐345(1)

Time limit within which an appeal may be taken may be extended if new trial proceedings are validly begun. West's Ann. Code Civ.Proc. §§ 659, 660.

3. Judgment ⇐217

Any party desiring to achieve finality of judgment may do so by giving written notice of entry of judgment. West's Ann. Code Civ.Proc. § 659.

4. Judgment ⇐276

Clerk of court has no authority to give written notice of entry of judgment. West's Ann.Code Civ.Proc. § 659.

5. New Trial ⇐138

Mere possession of knowledge of entry of judgment is immaterial in so far as it could fix any limitation upon the time within which notice of intention to move for new trial might be given by party desiring to do so. West's Ann.Code Civ.Proc. §§ 659, 660.

6. New Trial ⇐138

Notice of entry of judgment prepared and served upon interested parties by clerk of court does not start running of 10-day period for filing of notice of intention to move for new trial. West's Ann.Code Civ. Proc. §§ 659, 660.

7. New Trial ⇐138

Where plaintiffs, prevailing parties, had not served written notice of entry of judgment, but notice had been given by clerk of court to parties and 32 days after receipt thereof defendant had filed notice of intention to move for new trial and had served notice on plaintiffs but defendant's motion for new trial was denied and notice of appeal was filed 84 days after entry of judgment and 27 days after denial of motion, notice of intention to move for new trial had been filed and served timely. West's Ann.Code Civ.Proc. § 659.

8. Judgment ⇐276

It is essential to valid notice of entry of judgment that notice be given by a party to the action, but notice of entry of judgment may be waived. West's Ann.Code Civ.Proc. § 659.

Coyle E. Bybee and Peters & Peters, Chico, for appellant.

J. Adrian Palmquist, Oakland, Manwell & Manwell, Marysville, James G. Changaris, Yuba City, and Francis T. Cornish, Berkeley, for respondents.

PER CURIAM.

A hearing was granted in this case because at the time the order of transfer was made there was pending in this court, and undetermined, the case of Goetz v. Superior Court, L.A. 24768 which involved a similar problem. The appeal in that case has since been determined and the judgment therein has become final. 49 Cal.2d 784, 322 P.2d 217. The decision of the District Court of Appeal of the Third Appellate District is in conformity with the opinion and decision of this court in the Goetz case. The opinion of the District Court of Appeal, authored by Warne, Justice pro tempore, and concurred in by Presiding Justice Van Dyke and Justice Schottky is adopted as the opinion of this court. It is as follows [317 P. 2d 126]:

"This is a motion to dismiss an appeal from the judgment. The sole question is whether the receipt of a notice of entry of judgment prepared and filed by the clerk of the court started the running of the 10-day period of time for the filing and serving of intention to move for a new trial allowed by the provisions of Section 659 of the Code of Civil Procedure.

"Judgment was entered on May 2, 1957. No notice of entry of judgment was served by the prevailing party. However, the record shows that notice in writing of entry of judgment was given on the 9th day of May, 1957, by the Clerk of the Superior Court of Butte County, by depositing copies of said written notice in the United States mail addressed to counsel for the respective parties at their respective addresses. Counsel for appellant have their offices in Chico, Butte County, California, approximately 25 miles from the county seat of Butte County. Notice of entry of judgment was received by them on May 10, 1957.

"On June 11, 1957, thirty-two days after receipt by counsel for appellant of the clerk's notice of entry of judgment, appellant filed notice of intention to move for a new trial. Notice of the motion was served on counsel for respondents the following day.

"Appellant's motion for a new trial was heard over the objections of respondents and was denied on June 28, 1957. Notice of appeal was filed on July 25, 1957, the eighty-fourth day after the entry of judgment and the twenty-seventh day after denial of appellant's motion for a new trial.

"It is appellant's position that, in order to have any legal effect, the notice of entry of judgment must be given by the attorney for the prevailing party, and that a notice of entry of judgment prepared and served upon all interested parties by the clerk of the superior court does not start the running of the ten-day period for the filing of the notice of intention to move for a new trial as provided for in Section 659 of the Code of Civil Procedure.

[1] "Valid service of notice of entry of judgment is necessary to start the time running within which a trial court may pass upon a motion for a new trial (Gross v. Hazeltine, 206 Cal. 130, 273 P. 550; Code Civ.Proc., sec. 660), but it is not necessary to start the time running within which an appeal may be taken. Lawson v. Guild, 215 Cal. 378, 10 P.2d 459.

[2–5] "The rules on appeal automatically limit the time within which an appeal may be taken, although this limitation may be extended if new trial proceedings be validly begun, but the legislature has placed no absolute limit upon the time within which the new trial proceedings may be started, except it has provided the time within which a new trial proceeding may be begun can be limited by the giving of a written notice that judgment has been entered. If that notice be not given, then the new trial proceedings may be initiated long after the right of appeal from the judgment may have expired. The statute has not said expressly who may give the notice that fixes a limitation upon the time within which new trial proceedings may be begun. Any party desiring to achieve finality of the judgment may do so by giving the statutory notice. In this case neither party has given such notice but it is claimed that

the clerk of the court has effectively placed a limitation upon the time within which the parties may exercise their right to begin new trial proceedings by himself giving a notice of the entry of judgment. The statute does not make this his duty and hence it follows that, as a ministerial officer, he has no authority to give the notice. His act in giving the notice which he gave in this case, was purely voluntary and ought to be given no more significance than if the same information had been conveyed by any disinterested person not a party to the action. It ought not to be held that the time within which a motion for a new trial could be made has been shortened by the action of the clerk. While the notice did convey information the result of that ought not to be declared to be any more than to bring home to both parties the knowledge that judgment had been entered of record. Mere possession of knowledge of the entry of judgment is immaterial in so far as it could fix any limitation upon the time within which a notice of intention to move for a new trial might be given by any party desiring to do so.

"McCordic v. Crawford, 23 Cal.2d 1, 5, 142 P.2d 7, 9, impliedly at least places the burden of serving notice of entry of judgment on the prevailing party. The court stated:

"'It is thus left to the prevailing party to take the initiative in insuring the finality of the judgment by serving upon the opposing party written notice of entry of judgment. When he does so, the time within which a motion for new trial may be made (Labarthe v. McRae, 35 Cal.App.2d 734, 97 P.2d 251) and granted (Gross v. Hazeltine, 206 Cal. 130, 273 P. 550) begins to run. A notice of intention to move for new trial must be filed "within ten (10) days after receiving written notice of the entry of judgment." Code Civ.Proc., section 659. Until the date of service there is no restriction on the right to move for a new trial. Thus the date of service of notice of entry of the judgment marks the starting point in this regard as well as for the sixty-day period in which the court retains power to grant a motion for new trial.'

"It has long been the custom and practice of California attorneys representing prevailing clients to serve the statutory notice of entry of judgment on the opposing counsel. This custom and practice was recognized in the case of Jansson v. National Steamship Co., 34 Cal.App. 483, 168 P. 151, 152. There the court held that where the prevailing plaintiff assigned a portion of the judgment to his attorney and served the defendant with notice of such assignment, signed by plaintiffs and not by his attorney, such notice was not sufficient notice of entry of judgment as required by Section 659 of the Code of Civil Procedure to start the time running in which a motion for a new trial must be made. While it was held that such document was only intended to give notice of the assignment of judgment and, therefore, did not constitute a notice of entry of judgment, the court went on to quote without disapproval a statement made by the trial judge: 'Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone.'

"Again, in the case of Harris v. Minnesota Investment Co., 89 Cal.App. 396, 400, 265 P. 306, 309:

"'* * * Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone. * * *' (Citing Jansson v. National Steamship Co., supra.)

[6–8] "We conclude that under the statutory and case law it is essential to a valid notice of entry of judgment that the notice be given by a party to the action. Of course notice may be waived, as has been held. Knowledge of entry of judgment in and of itself is not sufficient. To hold contrary to the long-accepted practice would unjustly deny appellant his right of appeal."

The motion to dismiss the appeal is denied

50 Cal.2d 245

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lowell LYONS, Defendant and Appellant.

Cr. 6147.

Supreme Court of California, In Bank.

April 29, 1958.

Rehearing Denied May 27, 1958.

Defendant was convicted of receiving stolen goods. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment, and defendant appealed. The Supreme Court, Schauer, J., held that where defendant received stolen watch and stolen fur coat on a single occasion, there was but one offense of receiving stolen property even though the goods were stolen from different sources, and defendant should not have been given two sentences even though they were ordered to run concurrently.

Affirmed in part and reversed in part.

Carter, J., dissented.

Opinion, 312 P.2d 766, vacated.

1. Criminal Law ⇐511(2)

The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.

2. Receiving Stolen Goods ⇐8(4)

Possession of stolen property, accompanied by no explanation or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen.

3. Criminal Law ⇐511(7)

In prosecution for receiving stolen watch, defendant's statement to the police officer, shortly after his arrest, that the watch "was his, that he had had it for some time" was a consciously evasive and misleading explanation and was sufficient to show a consciousness of guilt and justify an inference that defendant received the watch with knowledge that it was stolen, and consequently such evidence tended to connect the defendant with the commission of the offense and satisfied requirements of the statute that testimony of accomplice must be corroborated. West's Ann.Pen.Code, § 1111.

4. Criminal Law ⇐511(7)

In prosecution for receiving stolen goods, denial of possesson of the goods, if such denial is shown to be false, is a persuasive circumstance tending to show guilty knowledge and is sufficient to corroborate testimony of accomplice. West's Ann.Pen.Code, § 1111.

5. Criminal Law ⇐1159(2, 4)

When it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed; questions of the weight of the evidence and the credibility of the witnesses are for the trial court. West's Ann.Pen.Code, § 1111.

6. Criminal Law ⇐1159(4)

Where there was an order for exclusion of witnesses from courtroom when they were not testifying, and officer testified during people's case in chief, and on rebuttal such officer corrected his testimony, and on cross-examination on rebuttal the officer testified that on the night before his rebuttal testimony another officer called his attention "to the mistake that was in the transcript", the appraisal of the effect of the change in testimony on the officer's credibility was for the trier of fact.

7. Criminal Law ⇐878(3)

Defendant could be convicted of substantive offense of receiving stolen goods

even though he was acquitted on conspiracy charge.

8. Criminal Law ⇐1036(2)

Where question does not show on its face whether or not it is material, the questioner, in order to claim error in sustaining an objection thereto, must reframe it or make offer of proof to show its materiality.

9. Criminal Law ⇐670

In prosecution for receiving stolen goods, sustaining objection to cross-examination question, put to police officer testifying for the people, as to how many times the officer had talked to accomplice who testified for the people, was not error, where defendant did not make an offer of proof in the trial court that he was attempting to show an unusual number or type of meetings between police officer and accomplice.

10. Criminal Law ⇐1171(1)

In prosecution for receiving stolen goods, record disclosed that there was no prejudicial misconduct in respect to prosecutor's argument on any theory that the argument imputed to the jury that prosecutor had extrajudicial knowledge of defendant's guilt.

11. Criminal Law ⇐730(1), 919(5), 1037(1)

Where no objection is made by defendant to misconduct of district attorney claimed to be prejudicial or court sustains objection and properly admonishes jury, such misconduct is insufficient to justify granting of new trial or reversal of judgment.

12. Criminal Law ⇐1186(4)

Where case is closely balanced and there is grave doubt of defendant's guilt, and acts of misconduct of district attorney are such as to contribute materially to verdict a miscarriage of justice results requiring a reversal. West's Ann.Cal.Const. art. 6, § 4½.

13. Criminal Law ⇐730(1)

Where misconduct of district attorney is such that harmful results cannot be cured by any redirection of counsel or instruction of court, such misconduct requires reversal of judgment notwithstanding giving of proper admonition by court. West's Ann.Cal.Const. art. 6, § 4½.

14. Criminal Law ⇐1171(1)

Whether a prosecutor has been guilty of prejudicial misconduct in his argument must be determined in the light of the particular factual situation involved.

15. Criminal Law ⇐726

In prosecution for receiving stolen goods, prosecutor's argument that certain jewelry and fur coats were not in evidence because defendant could not be connected with them was a legitimate explanation why such items had not been introduced, a matter which had been called to the jury's attention by defense counsel, and was not erroneous as implying that prosecutor had personal knowledge of defendant's guilt.

16. Criminal Law ⇐726

In prosecution for receiving stolen goods, prosecutor's argument that if anyone would have been given consideration by the police department it would have been the son of a former policeman was in answer to assertions of defense counsel to the effect that defendant had incurred the wrath of the police department by bringing several suits against its members and that the police were out to "settle" defendant "once and for all", and was not erroneous as disclosing prosecutor's personal belief in defendant's guilt.

17. Criminal Law ⇐722(2), 1171(6)

In prosecution for receiving stolen goods, where the prosecutor referred to the defendant as the "mouthpiece" for his accomplices, the use of the term "mouthpiece" was improper because the term carries an unsavory connotation in the minds of many persons; however, the use of the term was not ground for reversal where it did not appear that any different verdict would have been probable had the prosecutor not used the term.

18. Criminal Law ⇐700

In prosecution for receiving stolen goods, where accomplices pleaded guilty to

certain charges brought against them and the court postponed their sentencing from time to time until after they had testified for the prosecution against defendant and such fact was brought out upon cross-examination and the prosecutor frankly admitted that "inducements" had been offered the accomplices for their testimony, these facts went to the credibility, not the competency, of the accomplices' testimony, but defendant was not denied a fair trial on any theory that the accomplices were coerced to testify untruthfully against him. West's Ann.Pen.Code, § 1111.

19. Criminal Law ⇐392

In prosecution for receiving stolen goods, the prosecution was entitled to explain why the man in whose room the defendant was arrested was not produced at the trial, in order to forestall any question which might arise in the minds of the jury as to why such man did not testify.

20. Criminal Law ⇐1170½(1)

In prosecution for receiving stolen goods, record disclosed that defendant was not prejudiced by ruling permitting questioning of officer, in rebuttal, by reading to him portions of the conversation from a transcript and asking him whether the conversation occurred.

21. Criminal Law ⇐1112

In prosecution for receiving stolen goods, where officer was called on rebuttal and testified that a particular conversation was recorded and that the transcript thereof from which the prosecutor read was typed by a clerk in his presence, record disclosed no improper alteration of the transcript.

22. Criminal Law ⇐706

In prosecution for receiving stolen goods, where accomplice testified that he paid another accomplice to obtain a driver's license for the first accomplice, record failed to show that prosecution suppressed evidence that the thumbprint on the license was not that of defendant.

23. Criminal Law ⇐706

In prosecution for receiving stolen goods, record failed to show the suppression of any recording of defendant's conversation with police officer concerning stolen watch.

24. Criminal Law ⇐829(16)

In prosecution for receiving stolen goods, the failure to give an instruction specifically directed to defendant's explanation of events as opposed to that of any other witness was not error in view of the instruction concerning the appraisal of the credibility of witnesses.

25. Criminal Law ⇐829(1)

In prosecution for receiving stolen goods, there was no error in refusing requested instructions where the subject matter thereof was covered by other instructions which were given.

26. Criminal Law ⇐824(5)

In prosecution for receiving stolen goods, the failure of the trial court, of its own motion, to instruct that alleged admission of defendant could not itself be used to establish guilt and could not be used unless corpus delicti of crime charged was independently proved, was not prejudicial error, where the uncorroborated testimony of the accomplices was sufficient to establish corpus delicti.

27. Criminal Law ⇐858(3)

In prosecution for receiving stolen goods, even if exhibits, including the allegedly stolen property, were taken into the jury room by "armed guards" without request by jury, such conduct could not exert any improper influence on the jury and could not influence them to believe that the assertedly stolen exhibits were in fact stolen. West's Ann.Pen.Code, § 1137.

28. Criminal Law ⇐622(2)

In prosecution for receiving stolen goods, the failure to grant a severance of defendant's trial from that of accomplice was not error on any theory that the number of defendant's challenges to the jury was limited where defendant did not exhaust his peremptory challenges to the jury.

29. Criminal Law ⇐1166(6)

In prosecution for receiving stolen goods, defendant could not complain that

the denial of his motion for a severance of his trial from that of accomplice prejudiced defendant in that accomplice sat at the defense end of the counsel table before testifying against defendant.

30. Conspiracy ⇐47
Receiving Stolen Goods ⇐8(3)

In prosecution for conspiracy to commit burglary and to receive stolen property, the evidence was sufficient to support verdict finding defendant not guilty of conspiracy to commit burglary and guilty of receiving stolen goods.

31. Criminal Law ⇐1158(1)

On motion for new trial, where conflicting affidavits are filed, the question of fact is one for determination of trial judge and his determination will not be disturbed on appeal if there is substantial evidence to sustain his finding.

32. Criminal Law ⇐938(1)

The refusal to grant new trial for newly discovered evidence was not error where the evidence was cumulative and impeaching and would not have caused the jury to reach a different conclusion regarding the guilt of defendant.

33. Criminal Law ⇐29

Where defendant received stolen watch and stolen fur coat on a single occasion, defendant was guilty of only one offense of receiving stolen property, notwithstanding that the watch and the fur coat were stolen from different sources.

34. Criminal Law ⇐984

Where defendant was guilty of only one offense of receiving stolen property consisting of watch and fur coat, a sentence in respect to watch and a second sentence in respect to fur coat would not be permitted to stand even though the sentences were ordered to run concurrently.

35. Criminal Law ⇐1186(7)

Where defendant should have been given only one sentence and not two sentences for receiving stolen goods, the reviewing court could reverse the judgments as to both counts, order such counts consolidated and remand the cause for rearraignment of the defendant for sentence on the consolidated count, or the reviewing court could reverse as to one count and affirm as to the other count.

Richard H. Cantillon, Beverly Hills, under appointment by the District Court of Appeal, Cantillon & Cantillon, R. Michael Cantillon and James P. Cantillon, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller and William E. James, Deputy Attys. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for respondent.

SCHAUER, Justice.

Lowell Lyons (hereinafter called defendant), Paul Ferguson, and James Pope were charged by indictment (count 1) with conspiracy to commit burglary and to receive stolen property; defendant and Ferguson were further charged (counts 2 through 6) with five counts of receiving stolen property. Ferguson pleaded guilty as charged in count 2 and his cause was referred to the probation department for a report; his only appearance at the trial was as a witness for the prosecution. Pope and defendant pleaded not guilty. Pope went to trial with defendant but during the trial the one count against him (conspiracy) was dismissed on the People's motion and he was called as a witness for the prosecution.

A jury found defendant not guilty under counts 1, 2, and 3 and guilty as charged in counts 5 (receiving a stolen watch, the property of Aaron Rothenberg) and 6 (receiving a stolen fur coat, the property of Donald Thomas Handy). Defendant was sentenced to concurrent terms in the state prison. He presents numerous assignments of error, including the contention that there is insufficient evidence to corroborate the testimony of accomplice-witnesses. For the reasons hereinafter stated we have concluded that the matters complained of by defendant, subsequently

detailed, either are not error or, in the circumstances, did not result in a miscarriage of justice (Cal.Const., art. VI, § 4½), except that defendant should have been sentenced for only one count of receiving stolen goods.

Ferguson, Pope, and Dann Rio, witnesses for the prosecution, were accomplices according to a possible view of their own testimony. The jury were instructed that if the crimes charged were committed by anyone, then these witnesses were accomplices as a matter of law and that the testimony of an accomplice is to be viewed with distrust and must be corroborated.

To show that there is inculpatory evidence apart from the testimony of the accomplices we first set forth a summary of such inculpatory evidence. Defendant himself testified as follows: He was a lawyer with practice largely in the field of criminal law. He represented Ferguson, who was charged in a federal case with conspiracy. On a number of occasions defendant accompanied Ferguson in the latter's car; on such occasions defendant would drive because he knew that Ferguson "was an exconvict and couldn't drive an automobile legally." Through Ferguson defendant met James Pope under the alias of James England. Through "England" defendant met Dann Rio and undertook to represent Rio in a narcotics case. Rio gave defendant $100 as a retainer. Subsequently Rio informed defendant that he was unable to raise the additional fee and, according to defendant's testimony at the trial, on the night of April 7, 1955 (the night before defendant's arrest), Rio "handed me that watch [the subject of count 5] and told me it ought to be worth $50 off the fee * * * and although I had a watch at the time I did accept that watch from Mr. Rio." Mr. Rothenberg, the owner of the watch, testified that it was stolen from his house in a burglary committed during his absence sometime between April 2 and April 7, 1955. Officer Hooper testified that he questioned defendant at the City Hall shortly after defendant's arrest; "I asked him to remove the property from his pockets; he put his property on the desk; in the property was a man's Helbros pocket watch. I asked him where he had gotten this watch, he said it was his, that he had had it for some time."

As to count 6, receiving a stolen fur coat, the corroborative evidence is as follows: The owner of the coat testified that it was stolen on the evening of April 7, 1955. Officer Roberts testified that on the morning of April 8, 1955, he saw defendant carrying a blue bag on which were the letters "PAA"; the bag was "stuffed full." Defendant was accompanied by Ferguson, who was carrying a beer carton. They entered the Crest Hotel. "[T]hree or four minutes" after defendant and Ferguson entered the hotel officers followed them to the room of one Gallo. Officer O'Mara testified that he and the other officers entered Gallo's room. Defendant "said, 'Who are you?' I said, 'I am a police officer.' And I said, 'You are under arrest.' And he said, 'What for?' And I said, 'For investigation of stolen articles.'" The beer carton was on the floor. On it lay a fur piece (not the subject of count 6). Also on the floor was the blue bag, closed. An officer opened it and found in it the fur coat which is the subject of count 6 and three white shirts.

Defendant testified that at least two of the shirts were his; that he had put them in the automobile in which he drove to the Crest Hotel; and that "to my knowledge" they were not in Gallo's room. Officer Hooper testified that when, shortly after defendant's arrest, the officer questioned defendant in the City Hall, "I asked Mr. Lyons about the fur coats that had been found in the room, he said that he hadn't seen any fur coats, didn't know what I was talking about."

The accomplice Ferguson testified as follows: He met defendant in November, 1954. Thereafter Pope got in touch with Ferguson and met him about a dozen times when defendant was present. On April 7, 1955, Rio, Pope, Ferguson, and defendant were present at a conversation when Pope "stated how much he would like to get from that fur coat" (the subject of count 6); "for the fur coat and three pieces of

jewelry he stated he would like it to bring $200." The next morning Ferguson took a fur coat in a beer carton and defendant took the fur coat which is the subject of count 6 in a bag initialed "PAA" to Gallo's room. Gallo "asked how much he was supposed to ask" for the furs; Ferguson said $1,100; Gallo "said he would try to get that much, he wouldn't know until he saw his parties on the other end of the line * * * About that time the police officers came in and arrested us."

In February, 1955, while Ferguson was in the county jail he heard of one Newton Erwin, who was also in jail "and I had a sort of sympathy for the man, and he wanted to make bail and it seemed as though he didn't have any collateral to make bail. * * * I told Mr. Lyons that I thought Mr. Erwin was a very nice gentleman * * *, and if there was anything we could do to further his bond I would like to do it." At a subsequent conversation among Mr. Davila, a bail bond broker, Ferguson and Lyons, it was agreed that fur coats obtained from Pope would be "put up * * * as collateral for Mr. Erwin's bond," and this was done.

Ferguson further described the sale of a fur coat, negotiated by Ferguson and defendant, to a Mr. Millin. The proceeds of the sale were turned over to Pope.

Davila and Millin, respectively, corroborated the testimony of Ferguson concerning the transactions with them.

The accomplice Pope testified as follows: On March 17, 1955, he was introduced to defendant by Ferguson, whom he had known for 12 years. In defendant's presence Pope "stated that I had numerous articles which I wished to dispose of. * * * Mr. Ferguson stated he could handle the matter for me. * * * I advised Paul [Ferguson] I had several furs and numerous small items of jewelry." There was not "any mention made as to where these articles came from." On March 18, 1955, in the presence of defendant, Pope turned over to Ferguson jewelry and furs. Ferguson "stated that he was not holding * * * That is a slang expression meaning broke. * * * I stated that I would give them a good break on the deal," that is, $200. "[I]n the course of the general conversation it was brought out that I was hot * * * that I had escaped." There was "general conversation" concerning burglaries and Ferguson "advised me to stay as low as possible, in view of the fact that I was an escapee, and * * * keep the heat on myself down to a minimum." There was conversation concerning obtaining identification for Pope under the name James England at a cost of $50.

At a third meeting among defendant, Pope, and Ferguson, Ferguson paid Pope $200; Pope handed Ferguson $50 to obtain a driver's license and other identification; and Pope delivered jewelry and furs to Ferguson.

At a subsequent meeting among Ferguson, defendant, and Pope, Ferguson delivered to Pope a receipt for the application fee for a driver's license. Thereafter Ferguson delivered the license in the name "Robert Englund" to Pope.

Thereafter Pope committed various burglaries and stole furs and jewelry and delivered some of them to Ferguson in the presence of defendant. He delivered stolen furs to Ferguson in defendant's presence on "perhaps four" occasions. Among the items which he stole were the subjects of counts 5 and 6. He stole the watch and fur coat which are the subjects of those counts on April 7, 1955, and took them to Rio's apartment. Ferguson and defendant arrived and Pope gave defendant the watch "as an additional $25 fee against Mr. Rio's bill."

The accomplice Dann Rio testified that on April 7, 1955, he, defendant, Ferguson and Pope had a conversation in Rio's apartment "with reference to how much money we wanted for the fur pieces * * * [W]e agreed on the sum of $200 for it, that and some jewelry." The fur coat which is the subject of count 6 was put in a blue bag initialed "PAA" and carried from

Rio's apartment; Rio did not remember who put the coat in the bag or who carried it from the apartment.

The rules concerning the sufficiency of evidence to corroborate the testimony of an accomplice are as follows: Section 1111 of the Penal Code provides, in part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof * * *"

[1] The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. (People v. Brown (1958), 49 Cal.2d 577 [1, 2], 320 P.2d 5; People v. MacEwing (1955), 45 Cal.2d 218, 223–225 [2, 3, 6, 7], 288 P.2d 257; People v. Santo (1954), 43 Cal.2d 319, 327 [4, 7], 273 P.2d 249; People v. Simpson (1954), 43 Cal.2d 553, 563 [4, 5], 275 P.2d 31; People v. Gallardo (1953), 41 Cal.2d 57, 62 [5, 6], 257 P.2d 29; People v. Barclay (1953), 40 Cal.2d 146, 156 [13a, 14], 252 P. 2d 321.)

[2] Defendant does not attempt to controvert the evidence that the watch had been stolen and was in defendant's possession at the time of his arrest, but contends that there is insufficient corroborative evidence to show guilty knowledge that the watch had been stolen. As stated in People v. Lopez (1954), 126 Cal.App. 2d 274, 278 [4], 271 P.2d 874, "[P]ossession of stolen property, accompanied by no explanation or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen." "False or evasive answers to material questions with reference to the ownership of stolen property tend to prove such knowledge." (People v. Reynolds (1957), 149 Cal.App.2d 290, 294 [2], 308 P.2d 48; see also, People v. Cole (1903), 141 Cal. 88, 90, 74 P. 547; People v. Boinus (1957), 153 Cal.App.2d 618, 621–622 [1, 2, 3], 314 P.2d 787; People v. Malouf (1955), 135 Cal.App.2d 697, 707 [8, 9], 287 P.2d 834; People v. Hartridge (1955), 134 Cal.App.2d 659, 665 [6], 286 P.2d 72; People v. Boyden (1953), 116 Cal.App.2d 278, 288 [12, 13, 14], 253 P.2d 773; People v. Jacobs (1925), 73 Cal. App. 334, 339–343 [2, 3, 4], 238 P. 770.)

[3] The jury could find that defendant's statement to the police officer, shortly after his arrest, that the watch "was his, that he had had it for some time" was a consciously evasive and misleading explanation. Under the authorities cited above this is sufficient to show a consciousness of guilt and justify an inference that defendant received the watch with knowledge that it was stolen. (Cf. People v. Wayne (1953), 41 Cal.2d 814, 823 [4, 5], 264 P.2d 547.) It follows that such evidence tends to connect the defendant with the commission of the offense and satisfies the requirements of section 1111 of the Penal Code. (People v. Santo (1954), supra, 43 Cal.2d 319, 327 [9], 273 P.2d 249.)

[4] As to the fur coat which is the subject of count 6 the jury could find that defendant falsely stated "that he hadn't seen any fur coats, didn't know what I was talking about." The trier of fact was entitled to believe that defendant had the fur coat in his possession under suspicious circumstances, yet, when questioned concerning that possession, offered no innocent explanation but rather falsely denied the fact of possession. Denial of posses-

sion of the goods, if such denial is shown to be false, is a persuasive circumstance tending to show guilty knowledge. (People v. Hartridge (1955), supra, 134 Cal. App.2d 659, 665 [6], 286 P.2d 72; People v. Boyden (1953), supra, 116 Cal.App.2d 278, 288 [13], 253 P.2d 773.)

[5] It is true that much of the evidence stated above was controverted. But, as stated in People v. Henderson (1949), 34 Cal.2d 340, 346–347 [6], 209 P.2d 785, "When as in the present record it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed. Questions of the weight of the evidence and the credibility of the witnesses are for the trial court, and since the circumstances reasonably justify the finding of guilt, an opposing view that they also may be reconciled with innocence will not warrant interference with the judgment on appeal." Regardless of how we might think we would resolve the conflicts if we were initially trying the issues of fact, our duty in the appellate function is clear. This is true also as to uncertainties in Pope's testimony as to just when defendant was present when Pope delivered stolen property to Ferguson. (See People v. Daugherty (1953), 40 Cal. 2d 876, 885 [4, 5], 256 P.2d 911; People v. Newland (1940), 15 Cal.2d 678, 680–684 [1], 104 P.2d 778, and cases cited.)

[6] Officer Roberts testified during the People's case in chief that when defendant and Ferguson went into the Crest Hotel "Mr. Lyons was carrying a cardboard box and Mr. Ferguson was carrying a blue handbag with the letters PAA on the side." Then in answer to the question, "This blue bag that you say Lyons was carrying, did it appear to have anything in it?" the witness answered, "Yes, it was stuffed full." On rebuttal Officer Roberts corrected his testimony, stating that "Mr. Lyons was carrying the blue bag with the PAA, and Mr. Ferguson the box." Defendant's counsel objected to this rebuttal testimony. He said, "There is apparently a conflict, and that is why we had these witnesses excluded. [There was an order for exclusion of witnesses from the courtroom when they were not testifying.] Now he is bringing him back in and the witness is changing his testimony." The court ruled, "If the witness wants to explain any mistaken statements made, made in error, he may do so at this time." On cross-examination on rebuttal Officer Roberts testified that on the night before his rebuttal testimony Officer Hooper called his attention "to the mistake that was in the transcript."

Defendant asserts that Officer Roberts "After admitting that he had violated the trial court's order sequestering the witnesses, in that he had discussed his testimony with Sgt. Hooper, changed his testimony in this respect." The appraisal of the effect of this change in testimony on Officer Robert's credibility was for the trier of fact.

[7] Defendant urges that the verdict of not guilty as to the conspiracy count was inconsistent with the verdicts of guilty as to counts 5 and 6 because among the overt acts charged in the conspiracy count were the possession by defendant of the articles which are the subjects of counts 5 and 6. "[T]he overwhelming weight of authority is that the acquittal of the defendant of the crime of conspiracy to commit a crime is not a bar to a subsequent prosecution of said defendant for the commission of said crime, even though said crime is alleged in the conspiracy indictment as the sole overt act committed in furtherance of the conspiracy." (People v. MacMullen (1933), 218 Cal. 655, 656 [1], 24 P.2d 793; People v. Lyon (1955), 135 Cal.App.2d 558, 586 [19], 288 P.2d 57, and cases cited [conviction of conspiracy does not place defendant in double jeopardy when he is subsequently prosecuted for the main crime].) It follows that acquittal of conspiracy here is not inconsistent with conviction of substantive offenses of receiving stolen goods. Defendant could, in fact, be guilty of receiving stolen goods without having conspired to receive them. (Cf. People v.

Keyes (1930), 103 Cal.App. 624, 632, 646, 284 P. 1096, 1105.

[8, 9] On cross-examination of Officer Hooper defense counsel asked, "Now, how many times from the 8th of April, 1955, to this day have you talked to Mr. Pope?" An objection that this was "outside the scope of direct examination" was sustained. Defense counsel stated, "it is on the limited proposition of motive that I am offering it—bias, prejudice" and the court replied, "I think the ruling will stand." In his brief defendant asserts, "That he [Officer Hoop-] er had contacted the witness Pope an unusual number of times, wined and dined with him would go to show that prejudice." However, defense counsel did not make an offer of proof in the trial court that he was attempting to show an unusual number or type of meetings between Hooper and Pope; defense counsel's question of Hooper might only have elicited the information that Hooper talked with Pope on a number of occasions in the ordinary course of his investigation. Where the question does not show on its face whether or not it is material, the questioner, in order to claim error in sustaining an objection thereto, must reframe it or make offer of proof to show its materiality. (People v. Singh (1920), 182 Cal. 457, 482 [19], 188 P. 987; People v. Monson (1951), 102 Cal.App.2d 308, 313 [6, 8], 227 P.2d 521; People v. Fredeen (1950), 101 Cal.App.2d 105, 107–108 [4], 224 P.2d 849; People v. McDonald (1930), 110 Cal.App. 183, 187 [3], 293 P. 883; see People v. Brown (1941), 43 Cal. App.2d 430, 433, 110 P.2d 1059.)

[10] Defendant's contention that the deputy district attorney was guilty of prejudicial misconduct is likewise without merit. In the course of his argument to the jury the deputy district attorney stated: "Remember, ladies and gentlemen, Mr. Haley [an attorney who permitted Ferguson to store property on his premises] is not on trial here. *Maybe this is a good point to bring up right now, but it is not the function of the District Attorney's office to go around recklessly indicting people and bringing charges against them. Our duties are not to prosecute people just for the sake of making prosecutions.* It is our duty to protect the citizens of the County against crimes.

"If the evidence disclosed that Mr. Haley actually had possession of that property, knowing it to be stolen, then the Grand Jury might have indicted Mr. Haley. But they did not. Do we have any evidence that Mr. Haley associated with Mr. Pope and Mr. Ferguson, as we have against Mr. Lyons? Do we have any evidence that Mr. Haley went to their homes, as we have against Mr. Lyons? Do we have any evidence that Mr. Haley acted as their mouthpiece, as we have against Mr. Lyons? If Mr. Haley was a party to a crime, proper governmental agencies will take care of that, but right now we are concerned only with Mr. Lyons. And when they say, 'Here is another attorney who did all this. In other words, I am not the only person dipping my fingers into the till. Why don't you get these other people?' Well, he is the only one here on trial and we are not concerned with anyone else." (Italics added.)

[11–14] Although no objection was made at the trial, defendant now contends that the italicized portion of the above statement constituted prejudicial miscount in that it implied to the jury that the deputy district attorney had extrajudicial knowledge of defendant's guilt. As stated in People v. Berryman (1936), 6 Cal.2d 331, 337, 57 P.2d 136, "The general rule regarding misconduct of the district attorney which tends to and is likely to result in prejudice to the defendant is that where no objection is made to such misconduct by the defendant, or where objection is made and the court sustains the objection and properly admonishes the jury, the misconduct claimed to be prejudicial to defendant's rights will not furnish grounds sufficient to justify the granting of a new trial or the reversal of the judgment. [Citation.] There are two exceptions to this general rule. One is where the case is closely balanced and there is grave doubt of defendant's guilt, and the acts of misconduct are such as to contribute materially to the ver-

dict, a miscarriage of justice results requiring a reversal. [Citation.] The other exception is where the act done or remark made is of such a character that a harmful result cannot be obviated or cured by any retraction of counsel or instruction of the court. In such cases the misconduct will furnish ground for a reversal of the judgment, even where proper admonitions are given by the court. [Citations.]" Whether a prosecutor has been guilty of prejudicial misconduct must be determined in the light of the particular factual situation involved. Previous authority is of little help. Suffice it to say that the conduct of the deputy district attorney here involved, did not approach the extraordinary misconduct revealed in such cases as People v. Kirkes (1952), 39 Cal.2d 719, 723–724 [1–4], 249 P.2d 1; People v. Vienne (1956), 142 Cal.App.2d 172, 173 [2a], 297 P.2d 1027; People v. Teixeira (1955), 136 Cal.App.2d 136, 147–148, 288 P.2d 535; and People v. Talle (1952), 111 Cal.App.2d 650, 673–677 [8–12], 245 P.2d 633, cited by defendant. Nor is this a case such as People v. Hale (1947), 82 Cal.App.2d 827, 838, 187 P.2d 121, where the trial court failed to sustain defendant's objections to the improper statements of the prosecuting attorney and made comments which tended to classify the prosecutor's remarks as a summation of the testimony and the inferences to be drawn therefrom.

In the subject case, just before making the above quoted remarks, the deputy district attorney posed the question, "Why isn't Mr. Haley [a prosecution witness] in here as a defendant?" This rhetorical question apparently related back to the fact that a defense attorney argued that "The only reason Mr. Haley is immunized is because he is putting Mr. Lyons in this case." The other defense counsel argued that "Mr. Haley said he did not know Mr. Pope * * Yet he had all this property * * * Mr. Pope had stolen, he had it all in his house." Whether or not Mr. Haley was an accomplice, the fact is that his testimony was not implicatory. Thus when considered in context the italicized portions of the prosecutor's remarks appear to fall within the scope of proper argument as an answer to the implications of defense counsel that Haley should have been prosecuted and to constitute an attempt to clarify for the jury matters which might have confused them. (Cf. People v. Perkin (1948), 87 Cal.App.2d 365, 367–369 [2], 197 P.2d, 39.) Any inference to the effect that the deputy district attorney had extrajudicial knowledge of the defendant's guilt is slight and was certainly susceptible to cure by admonition.

The foregoing remarks are equally applicable to other statements, set out below, which defendant contends indicated to the jury that the prosecutor had extrajudicial knowledge of the defendant's guilt.

In his argument to the jury the district attorney also stated: "And there has been only the insinuation, the insinuation that all of the People's witnesses who were accomplices or in any way connected with the defendant, were allowed to plead guilty to only one or two Counts. Ladies and gentlemen of the jury, that is a matter, I believe, of common knowledge, that if there are three or four Counts against some defendant, that defendant is permitted to take a plea to one or more of the Counts. And even after three days of trial they allowed Mr. Moeckel to plead guilty to two Counts of Robbery. Why? It is obvious. In his sentence the Judge made the sentences run concurrently. Why try him on two or three or four Counts when he can be found guilty on one Count, or when he pleads guilty to one or two Counts? The Judge made the sentences run concurrently. *If we took a plea of two Counts against Pope and one Count against Mr. Ferguson, the big receiver, we will offer Mr. Lyons the same consideration. If at any time during this trial he wanted to plea guilty to one Count, or if he would like to do so even now, we will give him the same consideration.*" (Italics added.) The court sustained defendant's objection to the italicized portion of the prosecutor's remarks and instructed the jury "to disregard the statement of counsel regarding any offer to accept a plea from Mr. Lyons." Defendant now argues

that the admonition was insufficient to cure the error. In the light of the circumstances indicated above, the contention is without merit.

[15] In the concluding phase of his closing argument the deputy district attorney stated: "And some of the jewelry is not in evidence. And the reason for that is because we could not show Mr. Lyon's connection with the other fur coats or with the other jewelry. The fur coat carried in this bag, * * * and that is here, but the fur coat carried by Mr. Ferguson in that cardboard box is not here because we cannot show Mr. Lyon's connection with that fur coat. * * * The reason the other furs are not here is because we could not connect Mr. Lyons with them." Defendant made no objection at the time but now contends the remarks implied to the jury that the prosecutor had personal knowledge of defendant's guilt. The contention is without merit. Defense counsel had earlier called the jury's attention to the fact that certain items referred to in the testimony had not been introduced into evidence. The remarks of the deputy district attorney were a legitimate explanation to the jury why such items had not been introduced. Even if we should assume that the remarks were improper their substance cannot be said to have contributed materially to the verdict.

[16] The deputy district attorney also argued as follows: *"But it is evident, ladies and gentlemen, that if anyone would have been given consideration by the Police Department, it would have been the son of a former policeman. They would not discriminate against a policeman's son.* On the contrary, it seems to me that they would have gone all out to give him every break possible.

"Mr. Cantillon [an attorney for the defendant] referred to 'Inspector Lyons' but I don't know what his father was. But I do know that the evidence has certainly shown the defendant is not a chip off the old block." (Italics added.) Defendant interposed no objection but now contends the italicized portion of the prosecutor's remarks amounted to an avowal of his personal belief in defendant's guilt. However, the statements of the prosecutor are a mere assertion of what he claimed was "evident" or that "the evidence has certainly shown," and were made in answer to defense counsel's assertions to the effect that defendant had incurred the wrath of the Police Department by bringing several suits against its members and the police were out to "settle" defendant "once and for all." No error appears in this instance.

[17] Defendant also urges that the deputy district attorney committed prejudicial misconduct by twice referring to the defendant as the "mouthpiece" for his accomplices. No objection was interposed at the trial. The term carries an unsavory connotation in the minds of many persons. Its use was improper and should not be condoned. However, under the facts of this case, it does not appear that any different verdict would have been probable had the deputy district attorney not used the term. It follows that its use is not ground for reversal. (People v. Watson (1956), 46 Cal.2d 818, 835, 836 [12], 299 P.2d 243.)

[18] Defendant contends that he was denied a fair trial in that the district attorney and superior court coerced the accomplices to testify untruthfully against him. This claim is not substantiated by the record. It does appear that the accomplices pleaded guilty to certain charges brought against them and that the court postponed their sentencing from time to time until after they had testified for the prosecution against defendant. This fact was brought out upon cross-examination and the prosecutor frankly admitted to the jury that "inducements" had been offered the accomplices for their testimony. The "inducements" obviously were promises of reduced sentences. These facts go to the credibility, not the competency, of the accomplices' testimony. (People v. Pantages (1931), 212 Cal. 237, 252–259 [8, 9, 10], 297 P. 890.) They furnish the defendant with a powerful weapon for attacking the credibility of the inherently suspect witnesses but since

the jury were fully apprised of the facts, and section 1111 of the Penal Code was satisfied, we cannot hold that the trial is shown to have been unfair in fact or in law.

Defendant, however, urges that since the proffered leniency was obviously conditioned on the accomplices' first testifying against defendant, that testimony was worthless as a matter of law, relying primarily on People v. Green (1951), 102 Cal. App.2d 831, 228 P.2d 867, and cases therein discussed. But in that case the promise of immunity was conditioned on the accomplice's testimony resulting in the conviction of the defendant. The Green case recognizes, at page 838 of 102 Cal.App.2d, at page 871 of 228 P.2d, that, "It is a practice which seems to be approved in all jurisdictions, if the ends of justice will be thereby served, to extend immunity to one jointly charged with crime, upon condition that he testify fully and fairly as to his knowledge of the facts out of which the charge arose." There is nothing in the present case to indicate that the promises of leniency were conditioned on anything other than the accomplices testifying fully and fairly as to their knowledge of the facts out of which the charges arose. It follows that the accomplices' testimony was not so inherently incredible as to result in incompetency.

Defendant relies upon the statement in People v. Walther (1938), 27 Cal.App.2d 583, 591 [7], 81 P.2d 452, that "When a codefendant who is a coconspirator has been offered immunity from prosecution in reward for his testimony, the cause should be promptly dismissed against him. Otherwise, the maintenance of the action against him throughout the trial may serve to intimidate the witness and furnish an inducement for him to color his testimony." We may assume that it would be better practice, lending credibility to the accomplices' testimony, to have promptly *sentenced* them, but we cannot believe that the failure so to do was so serious a matter that it deprived defendant of a fair trial.

[19] Defendant complains of the trial court's failure to sustain his objection to, and to grant his motion to strike, the testimony of Joseph Kurrus, a process server for the district attorney. Kurrus testified that he twice served a subpoena on Ernest Gallo, the person in whose room defendant was arrested, to appear at the trial, and that he again attempted to serve him but could not find him. Gallo did not appear at the trial. The prosecuting attorney in argument said, "I would like to have had Mr. Gallo here * * * to clear up some of the inconsistencies in the defendant's story, but we have been unable to locate him, although we have tried diligently." Defendant argues that Kurrus' testimony was presented to confuse the jury and cast suspicion on defendant by an implication that Gallo's testimony would be favorable to the prosecution. Gallo's testimony would clearly have been material. Although there is no showing that it would have been favorable to the prosecution, the prosecution was entitled to explain why Gallo was not produced, to forestall any question which might arise in the minds of the jury as to why Gallo did not testify. (See People v. Clark (1895), 106 Cal. 32, 38, 39 P. 53; People v. Schunke (1934), 140 Cal.App. 544, 549, 35 P.2d 388.)

[20] Defendant complains that the trial court erred in permitting questioning of Officer Hooper, in rebuttal, by reading to him portions of a conversation from a transcript and asking him whether the conversation occurred. To show that defendant made extrajudicial statements contrary to his testimony the following occurred on cross-examination of defendant: He was asked if he recalled being questioned on April 8, 1955, about 4 p. m. in the presence of Mr. Gallo and Officers O'Mara, Farquarson, Scheidecker, and Hooper and answered that he did. Defendant was then asked if he recalled the following portion of the conversation: "Mr. Gallo made a statement, and after that O'Mara said to Gallo, 'Now, you told us that he brought them over to have you sell them for him.' And Gallo said, 'That's right. At first I thought the coats were not stolen. In fact, I didn't think they were stolen because I

didn't think he would be jeopardizing himself.' And you said, 'Of course not.' And Gallo said, 'I didn't tell him where they came from, because I didn't know where they came from.' And you said, 'I thought his laundry was in the box.' And Farquarson said, 'Whose laundry?' And you said, 'Ferguson's laundry.'" The only answer which defendant gave to the above quoted question was, "I never said 'Ferguson's laundry' at any time. Hooper said that."

Defendant was asked if he recalled the following portion of the conversation: "Then Gallo said: 'Don't try to put the blame on me,' and then Hooper said to you: 'Is this man lying about the whole affair, then?' * * * You said: 'Now, look, the man may have had thoughts about it, the man is not a liar, but I did not have a conversation with him about selling furs.'" Defendant answered, "I did not say that, no. He [Hooper] called Mr. Gallo a damned liar at that time."

On rebuttal, when Officer Hooper was testifying, the prosecuting attorney identified the foregoing conversation and asked, "During that conversation, sir, were the following questions asked and the following answers given—" Defense counsel objected on the ground "that that is leading and suggestive." The objection was overruled and the examination proceeded as follows:

"Q. By Mr. Stovitz [prosecuting attorney]: Mr. Lyons said, 'I thought his laundry was in that box,' and Officer Farquarson said, 'Whose laundry?' And Mr. Lyons said, 'Ferguson's laundry.'

"Were those questions asked and did Mr. Lyons say, 'Ferguson's laundry?'

"A. Yes, he did.

"Q. During that conversation, sir, were the following questions asked and did Mr. Lyons make the following answers, Mr. Lyons made the statement, 'No, I don't recall hearing it,' and Gallo said, 'Don't try to put the blame on me.' And you said to Mr. Lyons, 'Is this man lying about this whole affair, then?' And Lyons said, 'Now, look. The man may have had thoughts about it. The man is not a liar, but I did not have a conversation with him about selling furs.'

"Mr. Richard Cantillon [defense counsel]: That is objected to as improper cross-examination.

"The Court: It is rebuttal.

"Mr. Stovitz: Yes, this is rebuttal, your Honor. I asked Mr. Lyons that question.

"Q. Did Mr. Lyons make that statement at that time, 'No, now, look. The man may have had thoughts about it. The man is not a liar, but I did not have a conversation with him about selling furs.'

"Mr. Cantillon: I will object to that, your Honor, on the ground it is leading and suggestive. I don't know why we just don't ask the officer what was said. He is reading from a transcript * * * and all he does is answer 'Yes' every time he asks him a question. * * * [This question was not answered.]

"Q. By Mr. Stovitz: Were the following questions asked and did Mr. Lyons give the following answers—you, Mr. Hooper, made the statement: 'The first you knew that he had more than one fur was when you saw this darker-colored fur?'

"Mr. Gallo said: 'The following morning at my place.'

"And you said: 'I see you are nodding your head, Mr. Lyons. Does that mean you are agreeing with the story?'

"And Mr. Lyons said: 'No, no. We had a long conversation that Wednesday night. A discussion was had about many different subjects. I never had these two items in my possession at any time. We were just having a conversation. I never offered those for sale. Ferguson had them in the box. I don't know what Ferguson had.'

"Was that statement made, sir?

"A. Yes, it was."

While the questioning was somewhat confusing, and the so-called rebuttal is not all strictly rebuttal, it is apparent that defendant could not have been prejudiced in this regard.

[21] Officer O'Mara was called on rebuttal and testified that the conversation in question was recorded and that the transcript thereof from which the prosecuting attorney read as above quoted was typed by a clerk in his presence. Without objection he testified affirmatively to the question whether defendant made the statement that he thought Ferguson's laundry was in the box.

On cross-examination of O'Mara the following occurred:

"Q. Can you tell me who drew a line through the name Lyons before the semi-colon and the words, 'I thought his laundry was in that box,' sir? (Showing document to the witness.) Who drew this line straight through the middle of the word Lyons?

"A. I don't know.

"Q. Who wrote out in the paragraph opposite that statement and apparently erased the word 'Gallo'?

"A. I don't know. It is not my writing."

Defendant complains that the transcript was altered. But there is nothing in the record which shows that the transcript was not altered to correct it so that it would reflect the truth.

Further cross-examination of defendant from a transcript of his questioning by Officers Armstrong and Hooper and further cross-examination concerning the questioning of defendant in Gallo's presence at 4:00 o'clock on April 8, could not have been error prejudicing defendant.

[22] Defendant asserts that the prosecution wilfully suppressed "vital finger print evidence." The factual basis of this contention is as follows: The accomplice Pope testified that he paid Ferguson a total of $100 for which Ferguson obtained a driver's license for Pope under the name "Robert Englund"; that Ferguson told Pope that "a person who answered my general description" had applied for the license; Pope believed that defendant was present during some of the conversations which led to the obtaining of the false license. The license was received in evidence at the request of defendant but marked as a People's exhibit. Defendant called Officer Hooper to the stand and he answered negatively questions whether he had caused an examination of the thumb print and signature on the license to be made and whether he had any idea whose thumb print and handwriting appeared thereon. To the question "And as you sit there now you have no idea who wrote on that application?" Officer Hooper testified, "No, I don't." The prosecuting attorney said, "That's objected to, your Honor, as being immaterial unless he has an idea as to who caused it. We all have an idea after listening to the evidence." The court ruled, "Well, the answer may stand."

It is defendant's position that the People suppressed the evidence that the thumb print was not that of defendant and that the prosecuting attorney, by his statement, "We all have an idea after listening to the evidence," implied that the thumb print was that of defendant. This argument is manifestly without merit. No such implication appears from the prosecuting attorney's statement; rather, "after listening to the evidence" it would appear that Ferguson obtained the license for Pope on application of an unidentified person "who answered [Pope's] * * * general description." If defendant thought that any implication arose that the thumb print was his, he was not prevented from offering evidence that it was not.

[23] As previously stated, Officer Hooper testified that when defendant was questioned about the watch he "said it was his, that he had had it for some time." Defendant testified that he did not make such a statement. On defense counsel's cross-examination of Officer Hooper he testified that the interrogation of defendant was re-

corded but that he did not have a transcript of the conversation concerning the watch which is the subject of count 5. Asked whether the conversation concerning the watch was recorded, Hooper answered, "No, I don't know whether that portion was recorded or not." Defendant argues that "it was manifest injustice for the police, and District Attorney, to suppress this recording. Obviously, a play-through of it would have exonerated the Appellant, and supported his statement that he made no such utterance. * * * It is inherently improbable that this part of the supposed recordation was not made * * * If there was a record, it should have been produced and played for the jury."

There is nothing in the record to support defendant's assertions that this portion of the conversation was recorded and the recording suppressed. The conversation occurred immediately after defendant was taken to the office of the police, and it may well have been that the recording of defendant's questioning had not commenced. In the absence of some factual support therefor, defendant's charge that a tape recording was deliberately suppressed is not well taken.

[24] Defendant complains that the jury were not instructed that private transactions are presumed to be fair and regular (Code Civ.Proc. § 1963, subd. 19) and that the court "gave no instruction embodying the principle that a defendant is presumed to speak the truth and that unless the presumption is destroyed by the evidence, the jurors are required to find that a defendant has spoken the truth." The record does not disclose that defendant requested any such instructions. But defendant complains that although there was abundant evidence presented by defendant concerning his relationship to the persons connected with the case the court gave no instruction at all covering the standard to be adopted by the jury in weighing defendant's explanation.

It is true that there was no instruction specifically directed to defendant's explanation of events as opposed to that of any other witness. But the court instructed the jury at length concerning the appraisal of the credibility of witnesses. Among other things the jury were told that "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, for or against any of the parties; by the character of his testimony * * * or by contradictory evidence."

"It has been repeatedly held to be improper for the court to single out a particular witness and to charge the jury how his evidence should be considered. [Citations.]" (People v. McDonnel (1949), 94 Cal.App.2d 885, 889 [5], 211 P.2d 910; accord, People v. Emmett (1932), 123 Cal. App. 678, 683 [7], 12 P.2d 92; People v. Quon Foo (1922), 57 Cal.App. 237, 241 [6], 206 P. 1028.)

[25] Defendant's requested and refused instruction that "The fact that an indictment has been filed * * * is not to be considered by you * * * on the proposition of the guilt or innocence of this defendant" and that the plea of not guilty raises the presumption of innocence, was covered by other, more accurate instructions.

Defendant complains of the refusal of the following instruction: "Where the District Attorney has arbitrarily selected one or more alleged co-conspirators to whom he has tendered immunity from prosecution in reward for his State's evidence against his alleged collegue, such evidence is open to suspicion, and under such circumstances the testimony of an alleged co-conspirator should be examined with great care." The substance of this instruction was covered by the following instructions which were given:

"[T]he testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and

caution and in the light of all the evidence in the case."

The presumption that a witness speaks the truth "may be repelled by * * * his interest in the case, if any, or his bias or prejudice, if any, for or against any of the parties * * *"

[26] Defendant complains that the trial court did not of its own motion instruct the jury that "the alleged admission of the defendant could not itself be used to establish guilt, nor could such admission be used unless the corpus delicti of the crime charged be independently proved." Defendant cites People v. Frey (1913), 165 Cal. 140, 147, 131 P. 127, where it was held error for the court to fail to instruct as to "the true rule with reference to the admission of confessions and the necessity for independent proof of the *corpus delicti*." But it has been held that failure to instruct that proof independent of the extra-judicial statements of defendant is necessary to prove the corpus delicti, although error, is not reversible where there was evidence independent of such statements. (People v. Clark (1953), 117 Cal.App.2d 134, 141 [4], 255 P.2d 79; People v. Chan Chaun (1940), 41 Cal.App.2d 586, 592 [8], 107 P.2d 455.)

The uncorroborated testimony of the accomplices was sufficient to establish the corpus delicti. (People v. Pearson (1939), 111 Cal.App.2d 9, 29 [37], 244 P.2d 35; People v. Snyder (1925), 74 Cal.App. 138, 143–144 [5], 239 P. 705.) We are satisfied that in the circumstances of this case the failure of the court, of its own motion, to give the subject instruction was not prejudicial error.

[27] Defendant complains that without the request of the jury armed guards took the exhibits, including the allegedly stolen property, into the jury room; that this was an improper influence on the jury which unfairly induced them to believe that the property was stolen. The only support in the record for this argument is the following entry in the clerk's minutes: "the jury retires for its deliberations. Without the presence of the jury, and with defendant and his counsel and the Deputy District Attorney present, defendant objects to jury having the exhibits with them and moves that the exhibits be withdrawn from the jury under PC 1137. The motion is denied and all exhibits that are admitted in evidence are permitted to be taken by the jury to the jury room."

Section 1137 of the Penal Code provides, "Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. * * *" Defendant concedes that the jury may also take clothing which has been introduced in evidence into the jury room (citing People v. Hower (1907), 151 Cal. 638, 645–646, 91 P. 507; People v. Mahoney (1888), 77 Cal. 529, 531–532, 20 P. 73). In People v. Van Skander (1937), 20 Cal.App.2d 248, 255–256 [8], 66 P.2d 1228, the prosecuting attorney, during argument, handed exhibits to the jury without request and told them that they could take the exhibits into the jury room with them. Defendant's contention that there was error in handing exhibits to the jury without their requesting them was rejected. In People v. Morales (1943), 60 Cal.App. 2d 196, 198 [2], 140 P.2d 461, the clerk, without the jury having made any request for exhibits, handed them to the jury. Defendant contended that it was error for this to have been done without a specific request by the jury. The appellate court says, "Assuming, but not holding, that any error appears no prejudice is shown and any possible error in this regard would not justify a reversal."

Here, assuming that the exhibits were taken into the jury room by "armed guards" without request by the jury, we are not prepared to hold that such conduct was error. It does not appear that such conduct could exert any improper influence on the jury, or could influence them to believe that the assertedly stolen exhibits were in fact stolen.

[28, 29] Defendant contends that his motion for a severance of his trial from that of Pope should have been granted. He complains that the number of challenges to the jury was limited and that the psychological effect of Pope's arising from the defense end of the counsel table and testifying against defendant was damaging to defendant. There is no showing that defendant exhausted his peremptory challenges to the jury. Therefore, it does not appear that he was prejudiced in this regard. (See People v. Griffin (1950), 98 Cal.App.2d 1, 49 [25], 219 P.2d 519.) Nor do we believe that defendant was prejudiced by the fact that Pope sat at the defense end of the counsel table before testifying against defendant. It should be noted that if defendant and Pope had been tried separately Pope could have testified against defendant. (People v. Burdg (1928), 95 Cal.App. 259, 268 [6], 272 P. 816.)

[30] Defendant asserts that there was a fatal variance between the pleading of count 6 of the indictment and the proof in that the proof established that defendant was guilty of burglary as a conspirator rather than of receiving stolen property. Defendant relies upon the Texas law that if there is a conspiracy pursuant to which a thief steals and delivers property to defendant, and there remains some act to be done by defendant with the property pursuant to the common design, defendant is guilty as a thief and cannot be convicted of receiving stolen property. (Evans v. State (1948) 152 Tex.Cr.R. 58), 211 S.W.2d 207, 209 [6]; McInnis v. State (1932) 122 Tex.Cr.R. 128, 54 S.W.2d 96, 98 [2, 3]; Byrd v. State (1931) 117 Tex.Cr.R. 489, 38 S.W.2d 332, 333–334.) It is defendant's position that the testimony of the accomplices shows that defendant was a member of a conspiracy to commit the burglaries, was liable as a burglar, and therefore could not commit the crime of receiving stolen property from himself. The jury's verdict on its face sufficiently resolves this argument against defendant. Defendant was found not guilty of conspiracy to commit burglary and to receive stolen goods. This interpretation of the evidence was permissible. Defendant could be found guilty as a receiver not pursuant to a prearranged plan but as a transaction independent of the burglary. And on the other hand, if we assume that defendant and the accomplices agreed in advance that the accomplices should steal the property and defendant would receive it, the legal effect of such conspiracy would not be to exonerate any of its participants from any crime committed pursuant to the agreement but, rather, would support a holding that all "are accomplices in the offense or offenses resulting from execution of such plan." (People v. Lima (1944), 25 Cal.2d 573, 577 [2], 578 [3], 154 P.2d 698.)

[31, 32] Defendant urges that the trial court erred in failing to grant him a new trial on the ground of newly discovered evidence contained in the affidavit of one Robert Erwin Morgan. Morgan, an inmate of Folsom, made the following averments: Officer Hooper approached him while he was in the county jail. Morgan had left a fur coat with defendant as a part payment of a retainer for legal services and was "hot" at defendant because defendant refused to return the coat. Hooper said, "we are led to believe that if any man could sack him [defendant] up you could do it. * * Would you be willing to say that you had given a stolen mink coat to Lyons?" Morgan answered, "I couldn't do that because the coat was not stolen." When Morgan insisted that "I could never lie to put another man in jail," Officer Armstrong, who was also present, said, "Wise guys like you belong in Folsom and by God I'll see that you end up there and for your information I'll have Lyons in jail with you within twenty-four hours and then you can both go to Folsom together."

Affidavits of defendant and his counsel to the effect that the foregoing evidence was newly discovered and could not have been obtained by reasonable diligence at the time of trial were presented.

An affidavit of Officer Hooper contradicting Morgan's affidavit was filed.

It has been held that "On a motion for a new trial, where conflicting affidavits are filed, the question of fact is one for the determination of the trial judge and his determination will not be disturbed upon appeal if there is substantial evidence, as there was in the instant case, to sustain his finding." (People v. Young (1938), 26 Cal.App.2d 700, 703 [4], 80 P.2d 138; see also, People v. Kawasaki (1913), 23 Cal. App. 92, 99, 137 P. 287.) Furthermore, it does not appear reasonably probable that this evidence, cumulative and impeaching, would have caused the jury to reach a different conclusion regarding the guilt of defendant. (People v. Peyton (1941), 47 Cal.App.2d 214, 224 [8], 117 P.2d 683.)

[33–35] Defendant meritoriously contends that the receipt by him of the two items of property which are, respectively, the subjects of counts 5 and 6, constituted only one criminal transaction and that therefore he should not have been sentenced on two counts. The evidence of the accomplices shows that defendant originally received the watch and the fur coat on a single occasion. Therefore, but one offense of receiving stolen property is shown, although the goods were stolen from different sources, and the duality of the sentences, even though they are ordered to run concurrently, cannot be permitted to stand. (People v. Smith (1945), 26 Cal.2d 854, 858–859 [4–7], 161 P.2d 941; People v. Roberts (1953), 40 Cal.2d 483, 491 [15–16], 254 P.2d 501.)

In a situation such as this, if any substantial objective of justice would be served thereby, this court could reverse the judgments as to both counts 5 and 6, order such counts consolidated, and remand the cause for rearraignment of the defendant for sentence and for sentence on the consolidated count. Inasmuch, however, as it does not appear that here either the state or the defendant will be prejudiced by a simple reversal as to one count and affirmance as to the other, and as finality of adjudication will thereby be expedited, we conclude that the latter procedure is the more desirable.

For the reasons above stated the judgment based on count 6 is reversed and the judgment based on count 5 and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I cannot agree that there was sufficient corroboration of the accomplice testimony as required by section 1111 of the Penal Code. Insofar as the watch (count 5) is concerned, we see that there was only defendant's reply that he had had the watch for some time whereas, in reality, he had received it the night before from Dann Rio as, according to defendant, partial payment for attorney fees. There is no evidence in the record to show that defendant knew of the stolen character of the watch as required by section 496, subd. 1 of the Penal Code. People v. Lopez, 126 Cal.App.2d 274, 271 P.2d 874 relied upon by the majority, was a case with an entirely different factual situation. In the Lopez case, the defendant made *several different answers* concerning his possession of stolen property. In the case at bar we have only defendant's statement that he had had the watch for some time. There is nothing to contradict his statement that it was given to him by Rio in part payment of attorney fees, and absolutely nothing to show that he knew of the stolen character of the watch.

With respect to the fur coat (count 6), the record shows that two of defendant's soiled shirts were in the PAA bag with the fur coat; that the bag was in the same room where defendant was found with the accomplices. The testimony concerning defendant's possession of the bag containing the fur coat is extremely dubious. The first witness testified that the accomplice had been carrying the blue bag marked with the letters PAA; thereafter the witness was contacted by Officer Hooper, although there had been an order

sequestering witnesses, and changed his testimony so that it then showed that defendant had been carrying the PAA bag which contained the fur coat. The only testimony in the record showing defendant *might* have had knowledge of the stolen character of the coat was that of accomplices.

It should be noted that practically all of the lengthy summations of the evidence in the majority opinion consist of various transactions between the accomplices concerning fur coats and jewelry with the theft or receipt of which defendant was not charged. All of the alleged conversations which would tend to show defendant's knowledge that the fur and watch were stolen were testified to by accomplices and such testimony was not corroborated. The fact that defendant was present in the room where the fur coat was found is surely not such corroboration as that called for by section 1111 of the Penal Code where it is declared "and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *" It appears to me that the so-called corroborating evidence requires "interpretation and direction from the testimony of the accomplice" in order to connect the defendant with the commission of the crime charged.

I find no substantiation in the record for the conclusion reached by the majority that the defendant "received the watch and fur coat on a single occasion," and that there was but one offense involved. Defendant received the watch on the night of April 7th. The only testimony linking him, even in the slightest degree, to the fur coat was concerning events on the 8th of April. There is nothing whatsoever to show that the watch and fur coat constituted a single occasion or part of a single offense. The majority opinion in its endeavor to show that there was corroboration of the accomplice testimony has this to say: "To show that there is inculpatory evidence apart from the testimony of the accomplices we first set forth a summary of such inculpatory evidence. *Defendant* himself testified as follows: He was a lawyer with practice largely in the field of criminal law. He represented Ferguson [an accomplice], who was charged in a federal case with conspiracy [etc.] * * *" It is apparent that the majority consider the fact that defendant represented criminals as corroborating evidence of the accomplice testimony. This is, of course, another instance where guilt by association is used to establish the *fact* of the crime charged. It is also the first case where, to my knowledge, an attorney who represents a person accused of crime has been considered as either an accomplice or as a principal to the crime charged. But here we have defendant's representation of the accomplices considered as "inculpatory evidence."

As the court held in People v. Reingold, 87 Cal.App.2d 382, 393, 197 P.2d 175, 182, "While it is true that the corroborative evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration, nevertheless, the rule is firmly established in our law that more is required by way of corroboration than mere suspicion or even grave suspicion. * * *" In the case at bar, all the record shows is "suspicion"—nothing more. Proof of a mere opportunity to participate in the crime raises no more than a suspicion of guilt and is insufficient corroboration (People v. Braun, 31 Cal. App.2d 593, 601, 88 P.2d 728); association with the actual perpetrators of the crime also gives rise only to a suspicion of guilt that he advised, encouraged and participated in the crime and is insufficient corroboration (People v. Braun, 31 Cal.App. 2d 593, 601, 88 P.2d 728; People v. Long, 7 Cal.App. 27, 93 P. 387; People v. Koening, 99 Cal. 574, 34 P. 238; People v. Fagan, 98 Cal. 230, 33 P. 60). In People v. Petree, 109 Cal.App.2d 184, 188, 240 P.2d 327, 329, the court said: That while con-

flicting statements may tend to discredit the witness "they are not evidence of the fact" in issue.

When defendant sought to show Officer Hooper's bias and prejudice by cross-examining him as to the number of times he had contacted Pope, an original co-defendant, conspirator, and witness for the prosecution, the proposed line of questioning was prohibited by the trial court. Although the scope of cross-examination is largely within the discretion of the trial court, a considerable latitude should be allowed to show the witness' state of mind and possible bias. People v. Winston, 46 Cal.2d 151, 157, 293 P.2d 40; People v. Pantages, 212 Cal. 237, 255, 297 P. 890; People v. Evans, 113 Cal.App.2d 124, 127, 247 P.2d 915. Under the peculiar facts of this case it appears to me that defendant should have been permitted to question Hooper as to the number of times he had been with Pope. It will be recalled that the People dismissed the charges against Pope (after the commencement of the trial) who then became a witness for the People. Inasmuch as there is only Officer Hooper's statement concerning defendant's reply when asked about the watch, his statement to defendant about an "anti-police" feeling, and the fact that he contacted Officer Roberts about the "mistake" in his testimony concerning defendant's possession of the blue bag, marked PAA, it appears to me that the defendant should have been permitted wide latitude in cross-examining Officer Hooper to show bias and prejudice against the defendant. When it is considered that the corroborative evidence as to the watch consisted entirely of Officer Hooper's statement, it becomes immediately apparent that the jury was entitled to have before it any available evidence on the matter of bias and prejudice.

It is argued that it was prejudicial error for the People to make the following statement in that it left the inference with the jury that the prosecution had personal knowledge of the guilt of the defendant: "Maybe this is a good point to bring up right now, but it is not the function of the District Attorney's office to go around recklessly indicting people and bringing charges against them. Our duties are not to prosecute people just for the sake of making prosecutions. It is our duty to protect the citizens of this County against crimes." There was no objection by defense counsel and no request at the time for an instruction admonishing the jury, although an instruction was given to the effect that statements of counsel did not constitute evidence in the case. A case somewhat similar is People v. Hale, 82 Cal.App.2d 827, 187 P.2d 121, 123, where the district attorney in his argument to the jury referred to the fact that the Grand Jury had indicted the defendants "on the theory that both defendants were guilty * * *" and after objection by defense counsel which was overruled by the court, the district attorney concluded with this statement: "That is why I say the grand jury was right when they indicted both of them." The court in the Hale case held that as to one defendant where the evidence of guilt was "much weaker" the remarks of the district attorney constituted prejudicial and reversible error. It appears that even had there been a request for an admonition at this time the error would not have been cured. The quoted remark assumes the guilt of the defendant and was highly prejudicial under the facts of the case. People v. Hale, 82 Cal.App.2d 827, 187 P.2d 121; People v. Berryman, 6 Cal.2d 331, 57 P.2d 136; People v. Vienne, 142 Cal.App.2d 172, 297 P.2d 1027; People v. Talle, 111 Cal.App.2d 650, 676, 245 P.2d 633.

Another instance of misconduct on the part of the district attorney which appears to have been highly inflammatory and prejudicial is the following statement made during closing argument: "And there has been only the insinuation, the insinuation that all of the People's witnesses who were accomplices or in any way connected with defendant, were allowed to plead guilty to only one or two Counts. Ladies and gentlemen of the jury, that is a matter, I believe, of common knowledge, that if there are three or four Counts against some defendant, that defendant is permitted to take a

plea to one or more of the Counts. And even after three days of trial they allowed Mr Moeckel to plead guilty to two Counts of Robbery. Why? It is obvious. In his sentence the Judge made the sentences run concurrently. Why try him on two or three of four Counts when he can be found guilty on one Count or when he pleads guilty to one or two Counts? The Judge made the sentences run concurrently. *If we took a plea of two Counts against Pope and one Count against Mr. Ferguson, the big receiver, we will offer Mr. Lyons the same consideration. If at any time during this trial he wanted to plead guilty to one Count, or if he would like to do so even now, we will give him the same consideration.*" An objection by defense counsel was sustained and the jury was admonished to disregard the remark. Defendant argues that no admonition could have cured the error inasmuch as it stressed his association with others who had pleaded guilty to the very charges for which he was on trial. In my opinion, defendant's argument is well taken and the remark constituted prejudicial misconduct on the part of the district attorney. People v. Kirkes, 39 Cal.2d 719, 249 P.2d 1; People v. Teixeira, 136 Cal.App.2d 136, 288 P.2d 535; People v. Bell, 138 Cal.App.2d 7, 291 P.2d 150.

In another instance it appears that the district attorney, in his argument to the jury, committed misconduct: "And some of the jewelry is not in evidence. And the reason for that is because we could not show Mr. Lyons' connection with the other fur coats or with the other jewelry. The fur coat carried in this bag, Exhibit 18 [the bag], was the ermine coat, and that is here, but the fur coat carried by Mr. Ferguson in that cardboard box is not here because we can not show Mr. Lyons' connection with that fur coat." It will be recalled that whether defendant carried the blue bag containing the fur coat was a very close issue of fact in the case. This statement assumes that the defendant was carrying the bag and that his guilt had been established. While there was no request for an admonition, it appears that in this instance, as in the preceding ones, an admonition would not have cured the highly prejudicial effect created by the district attorney in assuming personal knowledge of defendant's guilt.

Another instance of claimed prejudicial misconduct is the district attorney's reference to the defendant as the "mouthpiece" for the defendants who had pleaded guilty and whom he had represented and was to represent in other criminal matters. Defendant argues that this was an unwarranted attack upon his character since the term carries with it an unsavory connotation. It is my opinion that defendant's claim that the term carries an unsavory connotation is well taken. It also appears that the use of the term was unnecessary and that the prosecution should not indulge in defamatory remarks concerning the defendant in any criminal case and that the practice should not be condoned by this court. Standing alone it may not have prejudiced the jury unduly but taken together with the other errors in the case it is difficult to determine just what effect the use of the term may have had.

Defendant argues that he was denied due process of law in that the sentencing of Pope, Ferguson, and Rio was continued from time to time due to continuances in his case; that such postponement of imposing sentences on these accomplices until after the time defendant had been sentenced constituted intimidation and coercion of these witnesses against him. The district attorney admitted that "inducements" had been extended: "Counsel said there were inducements for Pope, Ferguson and Rio to testify, and I would be trying to fool you if I said there was not, ladies and gentlemen. The plain, ordinary, hard facts in this case are that we had to offer some inducements to Pope, Rio and Ferguson to testify. But were they given complete immunity? No. Have they been given lesser sentences? No. They were treated like every other criminal or any other person charged with a crime. Rio was given a

year in the County Jail as a condition of probation. That was apparently his first offense. He was sentenced before he testified here, ladies and gentlemen. He had nothing to gain and nothing to lose when he testified here.

"Mr. James Cantillon [attorney for defendant]: I object to that your Honor. There was testimony that the sentence to the burglary charge is still hanging over his head.

"The Court: That has been argued pro and con, of course. You may continue.

"Mr. Stovitz: How else would we get any testimony here, ladies and gentlemen, other than by the testimony of the accomplices? These men who will have to live in confinement, who will have to fear the ostracism that comes with being a stool pigeon, how can you get these men to testify? We have to say to them, 'Look, we will tell the Judge you cooperated in this case.' But are you going to say that the Judge is corrupt when he takes a defendant's cooperation into consideration? I don't think you can say that. I think the District Attorney's office has done its job here, and I think the Police Department has done its job, and I think the judges have done their job, and that is to protect you, ladies and gentlemen."

Pope, admittedly guilty of burglary, was sentenced to one year in the county jail and the remaining counts against him were dismissed; Rio, also admittedly guilty of burglary, was sentenced to a year in the county jail. What sentence was imposed on Ferguson does not appear, although the district attorney stipulated as follows with defense counsel: "His [Ferguson's] plea of guilty was entered on May 10, 1955, *and the time for the sentence has been continued from time to time due to continuances granted in the Lyons case.*" (Emphasis added.)

In People v. Walther, 27 Cal.App.2d 583, 591, 81 P.2d 452, 456, the court said: "When a codefendant who is a coconspirator has been offered immunity from prosecution in reward for his testimony, the cause should be promptly dismissed against him. Otherwise, the maintenance of the action against him throughout the trial may serve to intimidate the witness and furnish an inducement for him to color his testimony. Moreover, retaining a person as a party defendant throughout the trial, who has been promised immunity from prosecution in reward for his evidence may become a mere subterfuge to avoid the necessity of adhering to the established rule that the fact of the existence of a conspiracy may not be proved by the admissions of a coconspirator." It appears to me that the same rule should apply to sentencing accomplices who have pleaded guilty, in that refraining to do so until they have testified against one accused with them of conspiring, may very well color their testimony in the hope that the sentence imposed on them will be commensurate with the cooperation given by them to the prosecution. The People argue that there was not the slightest evidence that any leniency would be extended to these witnesses "only if their testimony resulted in the conviction of the appellant. * * *" It would appear from the district attorney's statement to the jury (heretofore quoted) that these witnesses had been promised "inducements" is sufficient to show that lenience had been promised them for their testimony against defendant. In People v. Green, 102 Cal.App.2d 831, 839, 228 P.2d 867, a witness had been promised immunity if he would give testimony which would result in another being bound over for trial. The court held that "A miscarriage of justice was occasioned through the use by the State of testimony which, because of the condition upon which immunity depended, was impure, dubious and 'tainted beyond redemption.'" The majority holds here that no such condition existed in the case at bar and that no reversible error is shown. While the admitted "inducements" undoubtedly consisted of leniency in sentencing the accomplices, it appears that the delay in sentencing the accomplices until defendant's trial was concluded was "in its practical and legal effect, indistinguishable from a threat." People v. Green, supra, 102

Cal.App.2d at page 838, 228 P.2d at page 872.

For the foregoing reasons, I would reverse the judgment and order denying a new trial.

Rehearing denied; CARTER, J., dissenting.



50 Cal.2d 211

ESTATE of Frances R. HOWELL, Deceased.

Walter R. HOWELL, Appellant,

v.

Mary F. O'MALLEY et al., Respondents.

L. A. 24604.

Supreme Court of California, In Bank.

April 22, 1958.

Proceeding on petition for revocation of probate of will. From an order of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., the petitioner appealed. The Supreme Court, McComb, J., held that where attestation clause signed by three witnesses and signature of testatrix appeared at bottom of page one of three page will and pages two and three only contained signature of testatrix at bottom of each page and on page three there was a 7½ inch blank space between testamentary provisions contained on that page and testatrix' signature, will was not executed in accordance with statutory requirement that will be subscribed at end thereof and that there must be at least two attesting witnesses, each of whom must sign instrument as a witness, at end of will.

Order reversed.

Opinion, 317 P.2d 69, vacated.

1. Wills ⇐111(2), 123(3)

Where attestation clause signed by three witnesses and signature of testatrix appeared at bottom of page one of three-page will and pages two and three contained only signature of testatrix at bottom of each page and on page three there was 7½ inch blank space between testamentary provisions contained on that page and testatrix' signature, will was not executed in accordance with statutory requirements that will be subscribed at end thereof and that there must be at least two attesting witnesses, each of whom must sign instrument as witness, at end of will. West's Ann. Prob.Code, § 50.

2. Wills ⇐108

Statutory requirements must be strictly followed in execution of will, and testator's intention is not to be considered in determining whether such requirements have been met.

3. Courts ⇐95(2)

Decisions of New York courts with reference to identical statutes concerning execution of wills are persuasive in California. West's Ann.Prob.Code, § 50.

Paul R. Hutchinson, Los Angeles, for appellant.

A. J. O'Connor and George J. Hider, Los Angeles, for respondents.

McCOMB, Justice.

[1] This is an appeal by Walter R. Howell from an order denying his petition for revocation of the probate of the will of Frances R. Howell, deceased.

Frances R. Howell died August 19, 1955, leaving the following document:

Last Will and Testament

I, Frances R. Howell, a resident of Los Angeles, California, declare this to be my last Will and revoke all other Wills previously made by me:

First: Mutual of New York Insurance Policy for One Thousand ($1,000.-00) Dollars to my son, Walter R. Howell, to be used for payment of funeral expenses: The remainder to be used for low masses.

Second: Equitable Insurance Policies for One Thousand ($1,000.00) Dollars each, total value — Two ($2,000.00) Dollars to be converted into U. S. Savings Bonds of the following denominations:
Two — One Thousand ($1,000.00) Dollar Bonds
Seven — One Hundred ($100.00) Dollar Bonds —
Total cost of these bonds — Two Thousand and Twenty-Five ($2,025.00) Dollars. The additional Twenty-Five ($25.00) Dollars to be paid from savings account. These bonds to be held until maturity for my granddaughters, Virginia and Francine Howell and to be divided

I appoint Walter R. Howell as Executor of this Will and Mary F. O'Malley as Co-Executrix of this Will.

This Will was signed by me on the fifth day of August, 1955, at 1458 Logan St., Los Angeles 26, California.

Mrs. Frances R. Howell

The foregoing instrument was, on the date thereof, signed by the testator, Frances R. Howell, in our presence, we being present at the same time, and she then declared to us that the said instrument was her last Will; and we, at the request of said Frances R. Howell, and in her presence, and in the presence of each other, have signed the same as witnesses. We further declare that at the time of signing this will the said Frances R. Howell appeared to be of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person whomsoever.

Margaret B. Conlon residing at 1453½ Echo Park Ave.
Signature of Witness

Kathryn C. Bates residing at 1466½ Echo Pk. Ave.
Signature of Witness

J. Alfred Bates residing at 1466½ Echo Pk. Ave.
Signature of Witness

Frances R. Howell

Last Will and Testament — Frances R. Howell Page Two

equally between them. If one dies, the survivor is to receive all the bonds.

Third: Reliance Insurance Policy for One Thousand ($1,000.00) Dollars, and Metropolitan Insurance Policy for Five Hundred ($500.00) Dollars I leave to my son, Walter R. Howell.

Fourth: United Air Lines Stock — Eighty (82) shares I leave to my daughter-in-law, Huguette Howell. If cashed, not more than Fifteen Hundred ($1,500.00) Dollars is to be used within the first year — The remainder after three years from date of this will.

Fifth: Boeing Aircraft Stock — Sixty (60) shares I leave to my son, Walter R. Howell. If sold not more than Fifteen ($1,500.00) Dollars to be used before three years from date of this will; the remainder five years from date of will.

Sixth: Mullins Manufacturing Co. Stock — One Hundred Five (105) shares I leave to my sister, Mary C. O'Malley and nieces, Rita A. and Mary F. O'Malley to be equally divided.

Seventh: Bank of America Stock — Twenty (20) shares I want equally divided among my good friends, Margaret Beacham, Ellen Tobin, Margaret Pohl, and Frances Murphy.

Eighth: First National Bank Stock — All shares I leave to my nieces, Rita A. and Mary F. O'Malley to be equally divided.

Ninth: Lackawanna Trust Co. Stock — One (1) share I leave to my niece, Rita A. O'Malley.

Tenth: The following stock to be divided equally between my granddaughters, Virginia and Francine Howell:
American Bank Note — Twenty (20) Shares
Ohio Edison Company — Four (4) Shares
Southern Company — Eight (8) Shares
Canadian Atlantic Oil Co. — One Hundred (100) Shares
If this stock is cashed, the money received must be used to buy U. S. Savings Bonds for Virginia and Francine Howell and bonds must be held until maturity.

Eleventh: Savings Account — Western Federal Savings Bank I leave to my son, Walter R. Howell — Not more than One Thousand ($1,000.00) Dollars can be used until after the second interest period, the remainder,

Frances R. Howell

Last Will and Testament — Frances R. Howell Page Three

if any, after the fourth interest period.

Twelfth: All my household and personal effects to be given to my son, Walter R. Howell and my daughter-in-law, Huguette Howell. All outstanding bills to be paid from balance in checking account and balance of U. S. Savings Bonds and if necessary from savings account.

} 7½ inches
} blank space

Frances R. Howell

This is the sole question presented for determination: *Was the purported will executed in accordance with the requirements of section 50 of the Probate Code?*

No. Section 50 of the Probate Code reads in part:

"Every will, other than a nuncupative will, must be in writing and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:

"(1) Subscription. It must be *subscribed at the end thereof by the testator* himself, or some person in his presence and by his direction must subscribe his name thereto. * * *

"(4) Attesting witnesses. There must be at least two attesting witnesses, *each of whom must sign the instrument as a witness, at the end of the will,* at the testator's request and in his presence." (Italics added.)

The purported will consists of three pages. The first page is a printed form entitled "Last Will and Testament." Two testamentary provisions and the appointment of executors were typed on the form. On the same page, in the space provided on the form, appear the signature of the testatrix, "Mrs. Frances R. Howell," and an attestation clause signed by three witnesses. There are two other typewritten pages with the heading "Last Will and Testament—Frances R. Howell," numbered "Page Two" and "Page Three." Page two is filled with testamentary provisions numbered third to eleventh inclusive, and page three contains testamentary provision numbered twelfth consisting of five lines and ending within the top quarter of the page. At the bottom of each page of the purported will appears the signature of the testatrix, "Frances R. Howell." On page three there are seven and one half inches of blank space between the testamentary provisions contained on that page and the signature at the bottom.

There is no evidence in the record that the three sheets were bradded or attached together or constituted a single document at the time they were signed by the testatrix.

It is apparent that the *purported will was not subscribed at the end thereof by the testatrix and the witnesses.* The real execution by the testatrix and by the witnesses is on the first page. This is obviously not at the end of the testamentary provisions.

Even if it be assumed that the signature of the testatrix at the bottom of page three

is sufficiently close to the end of the testamentary provisions to qualify as a signature at the end, it is still clear that the signatures of the witnesses are lacking at the end, and under section 50 of the Probate Code there is no way to go back to page one and pick up their signatures in order to validate the will.

[2] Statutory requirements must be strictly followed in the execution of a will, and the testator's intention is not to be considered in determining whether such requirements have been met. (In re Estate of Moore, 92 Cal.App.2d 120, 122 [1], 206 P. 2d 413.)

[3] The requirement that wills be executed at the end thereof was adopted from the English statutes by the State of New York and thereafter incorporated in the Field Codes in California. Hence, decisions of New York courts with reference to identical statutes are very persuasive in this state. (In re Estate of Dwyer, 159 Cal. 664, 676–677, 115 P. 235.)

In In re Andrews' Will, 162 N.Y. 1, 56 N.E. 529, 48 L.R.A. 662, a will had been prepared on a printed blank folded in the middle so as to constitute four pages. The signatures of the testatrix and the witnesses appeared on the back of the first page. The page on which the signatures appeared had been marked by the draftsman "3rd page." The first page of the second leaf contained bequests of personal property and a residuary clause, and the page was marked "2nd page." The Surrogate's Court held that the will had not been signed at the end and denied it probate. In affirming the order of the Surrogate's Court, the Court of Appeals said in 56 N. E. at page 530: "* * * the intention of the testator is not to be considered when construing this statute, but that of the legislature. The question is not what did the testator intend to do? but what has he done in the light of the statute? It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements. It is better this should happen under a proper construction of the statute, than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills." (See also In re Estate of Seaman, 146 Cal. 455, 465, 80 P. 700; In re Estate of Jordan, 81 Cal. App.2d 419, 421 [1], 184 P.2d 165; 94 C.J.S. (1956) Wills § 177, pp. 980–981; Page on Wills (3d ed. 1941), vol. 1, p. 566.)

In re Estate of Chase, 51 Cal.App.2d 353, 124 P.2d 895, is not contrary to the views herein expressed. In that case the instrument was entirely in the handwriting of decedent except for some printed matter on a printed form. The form had an attestation clause on the back, numbered page 4, where the will was signed by the testatrix and the witnesses. There were three sheets attached to the printed form, and the entire document was admitted to probate. The pages were numbered so that they could be identified, and the testatrix and witnesses signed in the space provided on page 4, which was at the end of the will.

The cited case is merely authority for the proposition that where a probate court finds, supported by substantial evidence, that a testatrix and witnesses have executed a will at the end thereof, it meets the requirements of section 50 of the Probate Code.

The order is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

50 Cal.2d 217

Ruth TRUST, Plaintiff and Appellant,

v.

ARDEN FARMS COMPANY (a California corporation) and Owens-Illinois Glass Company (a corporation), Defendants and Respondents.

L. A. 24850.

Supreme Court of California,
In Bank.
April 24, 1958.
As Modified on Denial of Rehearing
May 21, 1958.

Action by a customer against a milk company and bottle manufacturer for injuries sustained when bottle broke in the customer's hand. From a judgment of the Superior Court, Los Angeles County, Edward R. Brand, J., granting the defendants' motion for nonsuit the plaintiff appealed. The Supreme Court, McComb, J., held that the doctrine of res ipsa loquitur was not applicable; that there was no breach of warranty by the milk company; that a violation of the Agricultural Code was not shown; and that evidence was not erroneously excluded.

Judgment affirmed.

Gibson, C. J., and Carter and Traynor, JJ., dissented in part.

Opinion 316 P.2d 423, vacated.

1. Negligence ⇐121(2)

A plaintiff seeking to invoke the doctrine of res ipsa loquitur against a defendant who at a time prior to the accident had relinquished all control of the instrumentality causing the injury, must affirmatively establish that the condition thereof has not changed since it left the possession of defendant.

2. Negligence ⇐121(3)

In action by customer against milk company and bottle manufacturer for injuries sustained by customer when milk bottle broke in her hand, doctrine of res ipsa loquitur was not applicable, where as to milk company, any of plaintiff's children may have struck the bottle with another bottle and damaged it prior to the time of the accident, and as to the manufacturer, there was no evidence that the bottle was not mishandled or its condition changed after it passed from the manufacturer's control.

3. Sales ⇐441(3)

In action by customer against milk company for injuries sustained by customer when milk bottle broke in her hand, evidence was insufficient to establish a breach of warranty by the company.

4. Sales ⇐439

The doctrine of res ipsa loquitur relates to cases involving negligence and has no application to an alleged breach of warranty.

5. Negligence ⇐134(4)

In action by customer against milk company and bottle manufacturer for injuries sustained when milk bottle broke in customer's hand, evidence was insufficient to establish that defendants breached statute respecting condition of milk containers, where there was no evidence that bottle was not "sound, smooth and free from rust" as required by the statute when delivered by the company to the customer's porch. West's Ann.Agric.Code, § 701 (a–c).

6. Negligence ⇐124(1)

In action by customer for injuries sustained when milk bottle broke in her hand, evidence that there were other containers for milk such as round bottles, cardboard cartons and others was properly excluded as immaterial.

7. Negligence ⇐130(1)

In action by customer for injuries sustained when milk bottle broke in her hand, evidence that the milk company had delivered six allegedly defective bottles to the plaintiff's home during the six months following the accident was properly excluded.

8. Negligence ⇐130(1)

Generally, evidence of subsequent accidents have no probative tendency to show that a defendant might reasonably have anticipated the previous accidents and therefore such evidence is inadmissible.

9. Evidence ⇐519

In action for injuries sustained when milk bottle broke in customer's hand, testimony of expert as to whether bottle was safe and what the standards for milk bottle ought to be, was properly excluded where bottle had stood the test of at least several months use and witness testified that bottle had no defect that was apparent or could be demonstrated.

10. Evidence ⇐555

In action by customer for injuries sustained when milk bottle broke in her hand, where expert admitted that he had no prior experience with milk bottles or the dairy trade, no foundation was laid for his testimony regarding what the standards of safety for milk bottles were.

11. Evidence ⇐536

An expert is not qualified as a witness unless it is shown that he is familiar with the standards required under similar circumstances.

12. Appeal and Error ⇐971(2)

Ruling upon sufficiency of qualification of an expert will not be disturbed on appeal in the absence of a showing of an abuse of discretion.

13. Trial ⇐28(2)

In action by customer for injuries sustained when milk bottle broke in her hand denying plaintiff's request that jury be permitted to inspect the manufacturer's premises was not an abuse of discretion. West's Ann.Code Civ.Proc. § 610.

14. Appeal and Error ⇐969
Trial ⇐28(2)

The matter of inspection of defendant's premises is left to the sound discretion of the trial court and in absence of a showing of abuse thereof, trial court's denial will not be disturbed on appeal. West's Ann.Code Civ.Proc. § 610.

Jerrold A. Fadem, Los Angeles, for appellant.

Belcher, Kearney & Fargo, Louis E. Kearney, Gibson, Dunn & Crutcher, Ira C. Powers, Sherman Welpton, Jr., Los Angeles, and Steinhart, Goldberg, Feigenbaum & Ladar, San Francisco, for respondents.

McCOMB, Justice.

This is an action for damages for personal injuries suffered by plaintiff when a milk bottle she was handling in her kitchen broke as she was in the process of setting it down on a tile drainboard.

Defendants are Arden Farms Company, hereinafter called "Arden," and Owens-Illinois Glass Company, hereinafter called "Owens."

Owens manufactured a milk bottle which Arden filled with skim milk and delivered to plaintiff by placing it on her porch on a Thursday morning. Plaintiff took the milk bottle into her home and stored it in a refrigerator.

On the Sunday following the Thursday delivery of the bottle of skim milk here involved, plaintiff was in the process of setting the bottle, half filled with milk, down on a tile drainboard when it broke, and she sustained cuts about the wrist.

The trial court granted defendants' motions for a nonsuit. Plaintiff appeals from this order, presenting these questions:

First: *Was the doctrine of res ipsa loquitur applicable under the facts of this case as to (a) defendant Arden or (b) defendant Owens?*

[1, 2] *No.* A plaintiff seeking to invoke the doctrine of res ipsa loquitur against a defendant who at a time prior to the accident has relinquished all control of the instrumentality causing the injury must affirmatively establish that the condition of the instrumentality has not changed since it left the possession of defendant. (Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 195 [7], 293 P.2d 26; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 691 [10], 268 P.2d 1041; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458 [2], 150 P.2d 436.)

The rule is accurately stated by Mr. Chief Justice Gibson in Burr v. Sherwin

Williams Co., supra, as follows: "The instructions given, however, were erroneous in that, while they purported to state all the conditions under which res ipsa loquitur would be applicable, they did not inform the jury that plaintiffs must show that the instrumentality which caused the damage was not mishandled *or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied.*" (Italics added.)

In Honea v. City Dairy, Inc., 22 Cal.2d 614, 618 [3], 140 P.2d 369, this court said: "The mere breaking of the bottle alone cannot give rise to an inference that defendant was negligent in *failing to discover* the defect. While the dairy may have had a duty to make an examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection. (Citations.) In the present case there is no evidence that a feasible means of discovering the defect or flaw was available to this defendant. The language of the court in Loebig's Guardian v. Coca-Cola Bottling Co., 259 Ky. 124 [81 S.W.2d 910], is particularly appropriate. In holding that res ipsa loquitur was not applicable to the explosion of a coca-cola bottle, the court said (81 S.W.2d at pages 911–912): 'The defendant was not, under the circumstances, an insurer, and it was not shown that there was any more reasonably practicable method of inspection used in the industry than the method of inspection admittedly adopted by the defendant. Suppose the bottle *was* defective. A conclusion of negligence could not arise without some showing that the defect could have been discovered by the exercise of ordinary care. * * * In the instant case we are still left to conjecture as to the cause of the defect in the bottle and its contents or whether it was such a defect as might have been discovered by a more thorough inspection. Unless we are prepared to hold defendant as an insurer, it is hard to see how else it could be held responsible without some showing that its opportunity to exercise care was in some measure proportionate to the duty imposed—without some showing that a more thorough inspection would have been effective. Plaintiff's experts suggest various methods of testing bottles which might be applied, but it is not shown that these tests are commercially practicable or that they would have disclosed the complained-of defect. * * * We must measure the duty by ordinary standards and by consequences reasonably to be anticipated. Subject to these criteria, it is clear that the proof falls short of raising any inference of negligence.'

"In Licari v. Markotos, 110 Misc. 334 [180 N.Y.S. 278], the court held a bottler not liable for injuries caused by breaking of a bottle of a non-explosive cleaning and dyeing preparation, saying (180 N.Y.S. at page 280): 'Nor is there any force in respondent's contention, strenuously urged upon this appeal, that the defendant failed in his duty to inspect the bottles before filling them; this for the reason that there is no proof that any examination or inspection would have found the existence of any defect. If such had been the case, it was the plaintiff's duty to give evidence thereof. Bruckel v. J. Milhau's Son, 116 App.Div. 832, 836 [102 N.Y.S. 395]. In the absence of such evidence, the learned trial justice had no foundation upon which to predicate any finding of negligence on defendant's part, and a judgment for plaintiff could be based on none other than speculation and pure guesswork.'"

(a) With reference to Arden, the record discloses that on the day the bottle in question, filled with skim milk, had been delivered to plaintiff's porch, plaintiff had carried the container holding that bottle and other bottles of milk into the house, wiped the bottles, and put them in the refrigerator. All bottles of milk were stored on one wire shelf in the refrigerator, which shelf held eight bottles. The average daily delivery of milk to plaintiff's home was four bottles. When plaintiff had placed the bottles of fresh milk on this shelf, she followed her custom of moving

the bottles of older milk forward on the shelf and storing the bottles of fresh milk behind them. To this procedure there was one exception,—the bottle of skim milk received in the delivery was always kept at the front of the shelf.

The accident occurred on Sunday, March 7, 1954, and involved the bottle of skim milk delivered the preceding Thursday. Between the time of the delivery of the particular bottle of skim milk and the time of the accident, the bottle had been removed at least once by plaintiff and some of the contents used. Plaintiff had three children, aged 10, 9 and 5 at the time of the accident, each of whom had access to the milk in the refrigerator. The skim milk bottle was identified for the children by a band placed around the neck of the bottle by plaintiff.

From the foregoing evidence, it is clear that any of plaintiff's three children, having as they did access to the refrigerator at all times, may have struck the bottle of skim milk with another bottle and damaged it prior to the time of the accident, or it may in some other manner or fashion have been damaged.

The children were not called as witnesses to negate maltreatment of and damage to the bottle by them prior to the time of the accident. Plaintiff's husband, who also had access to the refrigerator, was called as a witness, but he made no attempt to show that the bottle had not been damaged after it had been received and prior to the time of the accident.

From the foregoing evidence, it is clear that the above stated rule was not met in the present case and that there is a complete hiatus as to what, if anything, happened to the bottle between the time it was placed in the refrigerator by plaintiff and the time the injury occurred. Hence, the doctrine of res ipsa loquitur was inapplicable to the facts of this case.

(b) With reference to Owens, there is a total absence of any evidence that the bottle was not mishandled or its condition changed after it passed from Owens' control.

Since the doctrine of res ipsa loquitur was not applicable and there was a total absence of any evidence of negligence upon the part of either defendant, the nonsuit was properly granted.

[3] Second: *Was there a breach of warranty upon the part of Arden?* [1]

[4] *No.* There was no evidence that the bottle was defective when delivered by Arden to plaintiff, and therefore there is no basis for claiming any breach of warranty. The doctrine of res ipsa loquitur relates to cases involving negligence and has no application to an alleged breach of warranty. (Oregon Auto-Dispatch v. Portland Cordage Co., 51 Or. 583, 94 P. 36, 95 P. 498, 499; Poovey v. International Sugar Feed No. 2 Co., 191 N.C. 722, 133 S.E. 12, 14 [3, 4]; Stonebrink v. Highland Motors, 171 Or. 415, 137 P.2d 986, 990; cf. Gerber v. Faber, 54 Cal.App.2d 674, 686 [4] et seq., 129 P.2d 485.

[5] Third: *Was there any evidence that defendants, or either of them, breached any of the provisions of section 701 of the Agricultural Code?* [2]

1. Plaintiff and defendant Owens stipulated that plaintiff had no cause of action for a breach of warranty against defendant Owens.

2. Section 701 of the Agricultural Code reads:

"(a) Every restaurant, school, hospital, soda fountain or other place where food or drink is served to the public, which sells milk, cream, ice cream, ice milk, buttermilk or any combination thereof for consumption on the premises, upon emptying the containers thereof, which are to be returned to the milk distributor or manufacturer, shall cause such containers, except glass containers, to be rinsed and drained.

"(b) All containers of milk, cream or products thereof which are delivered to the consumer by any retailer or distributor and which are to be returned to such retailer or distributor shall be rinsed and drained before they are returned.

"(c) All containers except single service containers of any kind in which milk or any product of milk is kept, stored,

No. There was no evidence that the bottle in question was not "sound, smooth and free from rust" as required by section 701 of the Agricultural Code when delivered by Arden to plaintiff's porch. The only evidence on this subject came from plaintiff's expert, who testified that the bottle had a "thin" area around the top but that it did not make such bottle unsafe for the use to which Arden applied it.[3]

Fourth: *Did the trial court err in excluding offered evidence?*

[6] *No.* Plaintiff contends that the trial court erred in not permitting her to introduce evidence:

(a) That there were other containers for milk such as round bottles, stippled bottles, cardboard cartons, and others.

This evidence was clearly immaterial to any issue before the court. Although glass is subject to breakage, it has many qualities as a food container which no paper container can fulfill, e. g., lower porosity, impermeability to odor, transparency, and cleanliness.

[7] (b) That Arden had delivered six allegedly defective milk bottles to plaintiff's home during the six months following the accident.

[8] This evidence was also properly excluded. It is the general rule that evidence of subsequent accidents has no probative tendency to show that a defendant might reasonably have anticipated the previous accident, and therefore such evidence is inadmissible. (McCormick v. Great Western Power Co., 214 Cal. 658, 668 [5], 8 P.2d 145, 81 A.L.R. 678).

Fifth: *Did the trial court unduly limit the examination of the expert witness, Benson?*

[9, 10] *No.* Plaintiff contends that the witness should have been permitted to testify as to whether the bottle was safe and what the standards for milk bottles ought to be.

This testimony was properly excluded for the reason that the bottle had stood the test of at least several months' use and the witness testified that the bottle had no defect that was apparent or could be demonstrated or established. He also admitted that he had had no prior experience with milk bottles or the dairy trade. Therefore, no foundation was laid for testimony from him regarding what the standards of safety for milk bottles were.

[11, 12] The rule is settled that an expert is not qualified as a witness unless it is shown that he is familiar with the standards required under similar circumstances (Huffman v. Lindquist, 37 Cal.2d 465, 476 [9], 234 P.2d 34, 29 A.L.R.2d 485); also, that the trial court's ruling upon the sufficiency of the qualification of an expert will not be disturbed on appeal in the absence of a showing of abuse of discretion. (Beresford v. Pacific Gas & Elec. Co., 45 Cal.2d 738, 749 [13], 290 P.2d 498, 54 A.L.R.2d 910; Bennett v. Los Angeles Tumor Institute, 102 Cal.App.2d 293, 296 [4], 227 P.2d 473; Rudat v. Carithers, 137 Cal.App. 92, 97 [3], 30 P.2d 435.)

transported or delivered, shall be sound, smooth, free from rust or open seams and at all times kept in a condition which will permit thorough cleansing of all surfaces with which the milk or its products come in contact. Containers including ice cream cabinets commonly used or intended for the reception, storage or delivery of milk, cream or products thereof shall be used exclusively for the storage and use of milk and milk products and shall not be used for any other purpose. All empty containers delivered to any producer, manufacturer, retailer or distributor for the reception of milk or any product of milk shall be kept in a clean, sanitary, and sterile condition and shall be used for no other purpose."

3. The witness testified:
"The Court: (Interrupting) There isn't any question but what thinner glass is more susceptible to breakage than thicker glass, but is it of such a degree that it would make the bottle, as a unit, unsafe, or have an effect on its safety—have an effect on its safety for the use for which it is intended?
"The Witness: I wouldn't say that, no."

In the present case the evidence did not meet the above requirements.

[13] Sixth: *Did the trial court err in denying plaintiff's request that the jury be permitted to inspect Owens' premises?*

No. Section 610 of the Code of Civil Procedure reads: "When, *in the opinion of the Court,* it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the Court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial." (Italics added.)

[14] It is thus evident that the matter of inspection is left to the sound discretion of the trial court, and in the absence of a showing of abuse of discretion, as in the present case, the trial court's denial of an inspection will not be disturbed on appeal. (Nunneley v. Edgar Hotel, 36 Cal.2d 493, 501 [6], 225 P.2d 497; Laguna Salada etc. Dist. v. Pacific Dev. Co., 119 Cal.App.2d 470, 477 [14], 259 P.2d 498.)

The judgment is affirmed.

SHENK, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment insofar as it sustains the granting of nonsuit as to Owens-Illinois Glass Company, but disagree with a similar conclusion reached in connection with defendant Arden Farms.

The majority concludes that plaintiff failed to present any evidence to negate maltreatment of the bottle by her and her family after its delivery, and thus, the doctrine of res ipsa loquitur does not apply. It is also held that there is no evidence to support a finding of breach of warranty since no defect in the bottle had been shown to exist. On the basis of the facts as stated in the majority opinion these conclusions are warranted. However, it is submitted that there are material omissions in the majority's factual statement, which, when viewed according to the rule on nonsuit, renders such conclusions erroneous.

The record reveals that plaintiff established the following uncontroverted facts. The bottle in question was manufactured by Owens sometime in 1953; part of the manufacturing process required that Arden's name be written on the bottle. Shortly thereafter the bottle was sent to Arden and used in their business of delivering milk for the months preceding the time of breaking in 1954. At the manufacturing stage bottles are subjected to a test for visual defects, and in addition, manufacturer Owens conducts statistical tests for latent defects. These statistical tests consist of taking a certain number of bottles from the production line and subjecting them to thermal-shock impact tests which reveal any latent defects. This test is regarded as 95–98 per cent effective in insuring that the remaining bottles not so tested will be free from hidden defects. At the bottling level, Arden inspects new as well as returned bottles for visual defects to discover any damage that might have occurred in shipping or while in use, but no test is maintained to discover latent defects.

Plaintiff's expert witness testified that he had examined the reconstructed parts of the broken bottle and that the cause of the bottle's breaking was impact, but that from observing the fragmentation pattern of the percussion cone and the absence of spalling (chipping and shattering) the contact was extremely mild. He further stated that an analysis of the fragmentation pattern led him to the conclusion that the bottle could have only broken because of a defect. His study indicated that the defect was at the base of the bottle, but it was impossible to determine its precise nature.

Plaintiff's milk delivery consisted of four quarts of milk, including a quart of skim milk, every other day, which was placed on a refrigerator shelf having space for eight quarts. The quart of skim milk being

distinguished from the other bottles by a blue rubber band placed around its neck.

As to the treatment of the bottle after it was delivered, plaintiff testified that she was always careful with the milk bottles, and that the skim milk while kept on the same shelf as the homogenized milk was apart from it, permitting access to the homogenized milk without disturbing the skim milk. Plaintiff also stated that no member of her family, including the children, had ever broken any bottles, and that no one but herself used the skim milk. No objection was made to the evidence of past acts of due care.

The question before this court is whether disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the evidence is of sufficient substantiality to support a verdict in favor of plaintiff (see, Leonard v. Watsonville Community Hospital, 47 Cal. 2d 509, 514–515, 305 P.2d 36).

Reading the evidence presented against the background of this rule, it must be concluded that plaintiff has established a prima facie case against Arden based upon three possible theories: (1) negligence by invoking the doctrine of res ipsa loquitur; (2) negligence by proof of specific acts; and (3) breach of warranty, rendering the nonsuit improper in this regard. However, as to Owens, plaintiff has failed to establish a prima facie case based either on the doctrine of res ipsa loquitur or specific acts of negligence, and since plaintiff stipulated that no breach of warranty action existed against Owens the granting of the nonsuit in this respect was proper.

In connection with the doctrine of res ipsa loquitur, it may be invoked where (1) defendant had exclusive control of the instrumentality causing the injury, and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence of defendant (see, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 457–458, 150 P.2d 436). The exclusive control requirement is modified to the extent that if defendant had control at the time of the alleged negligent act and plaintiff proves that the condition of the instrumentality causing the inury had not changed after it left defendant's possession, then plaintiff may avail himself of the doctrine providing the other condition is satisfied (see, Honea v. City Dairy, Inc., 22 Cal.2d 614, 617–618, 140 P.2d 369; Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 458, 150 P.2d 438). The extent of plaintiff's burden of proving that the condition of the instrumentality is unchanged is fully discussed in Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 458–459, 150 P.2d 439, where it is stated: "It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it. [Citation.] If such evidence is presented, the question becomes one for the trier of fact [citation], and, accordingly, the issue should be submitted to the jury under proper instructions." (See, also, Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 444, 247 P.2d 344.)

Contrary to the majority opinion there is evidence which can form the basis of a reasonable inference that the condition of the bottle had not changed. Plaintiff testified that she handled the bottle with due care. This evidence is sufficient to satisfy the requirement that the bottle had not changed insofar as plaintiff's handling is concerned (see, Honea v. City Dairy, Inc., supra, 22 Cal.2d 618, 140 P.2d 371). While there is no direct evidence that the bottle was carefully handled by third persons having access to it, there is circumstantial evidence on which a reasonable inference can be predicated that these persons exercised due care in handling the milk bottle, if they handled it at all. Plaintiff stated that no one in her family had ever broken a bottle. She added that the bottle was not used by any other member of her family. Such sole

use being guaranteed by the fact the bottle was designated by a blue rubber band, its purpose known to all members of the household. It was further established that while all the milk bottles were kept on the same shelf, the skim was kept "apart" from the homogenized milk. It may be inferred from the fact that the shelf had space for eight bottles, and only four were delivered every other day, that being "apart" was of sufficient degree that access to the homogenized milk was possible without disturbing the skim milk. From the combination of the facts that the skim milk was used only by plaintiff, and that no member of the family had ever broken a bottle, plus the inference that the skim milk was "apart" permitting access to other bottles, a jury could reasonably conclude that the third persons did not touch the skim milk or if they did it was done with due care.

Having met the burden of showing that her conduct and her family's action did not in any way deviate from the exercise of due care, which consequently excludes the possibility of the accident being caused by plaintiff or her family, plaintiff can now invoke the doctrine of res ipsa loquitur by showing that the manner in which the bottle was broken does not ordinarily happen without negligence for which Arden is probably responsible.

The substantive content of this requirement has been variable, and it is necessary to review the cases discussing it. As a preliminary point all cases agree that bottlers of beverages, including dairies, have a duty of care to inspect bottles whether newly purchased or returned by prior customers (see, Honea v. City Dairy, Inc., supra, 22 Cal.2d 618, 140 P.2d 371; Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 460, 150 P.2d 439; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 517, 203 P.2d 522; Zentz v. Coca Cola Bottling Co., supra, 39 Cal.2d 448, 247 P.2d 350). In Honea v. City Dairy, Inc., supra, it was held that the breaking of a milk bottle is alone insufficient under the doctrine of res ipsa loquitur to permit the additional and necessary inference of negligence by defendant, either in causing the defective condition or in failing to discover it by proper inspection. However, in reaching this conclusion a rule was suggested that where plaintiff can demonstrate that there was a defect and there were reasonable means of discovering the defect in the exercise of due care, then this constitutes sufficient evidence from which to infer that it is more probable than not defendant was negligent in failing to discover the defect. This suggested rule was adopted in Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 458, 150 P.2d 438, and again in Gordon v. Aztec Brewing Co., supra. In the Escola case this court permitted the application of the doctrine of res ipsa loquitur after plaintiff had established that no unreasonable extraneous force had acted upon the bottle subsequent to delivery, and upon the ground there was an inference that defendant failed to exercise due care in inspecting the bottle since it could be determined from the evidence that the bottle had a visual defect that could have been ascertained by a reasonable inspection. The evidence relied upon to create such an inference dealt with the inspection methods in the industry. Following the Escola case this court was faced with a similar question in Gordon v. Aztec Brewing Co., supra, and the Escola rule was followed. To summarize the law as it existed after the Aztec Brewing Co. case, plaintiff was entitled to invoke the doctrine of res ipsa loquitur in cases involving bursting or breaking bottles where (1) there was a showing that no external harmful force touched the bottle after leaving defendant's control and (2) where evidence was presented that the bottle contained a defect that could be discovered by a practicable and reasonable inspection.

In Zentz v. Coca Cola Bottling Co., supra, the former requirement was retained while the latter was altered materially. The rule this court announced therein stated that plaintiff may invoke the res ipsa loquitur doctrine where he introduces evidence sufficient to warrant an

inference that the bottle was not mistreated subsequent to its delivery by defendant and where the accident was of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and defendant is probably the person who is responsible (Zentz v. Coca Cola Bottling Co., supra, 39 Cal.2d 446, 247 P.2d 349). The court determined that if plaintiff demonstrated that he was not an intervening cause, the happening of the exploding bottle gave rise to an inference of negligent conduct on the part of the defendant. This ruling leads to the conclusion that it is no longer necessary to present evidence that the defect could have been discovered by a practicable and reasonable inspection before the doctrine of res ipsa loquitur may be invoked. The test now is whether from the happening of the accident it is more probable than not that defendant was negligent.

Applying this rule to the case at bar it is clear that an inference of negligence arises from the breaking of the bottle. Plaintiff has established that no harmful intervening forces touched the bottle after it left defendant's control; common experience tells us that glass milk bottles, when handled as plaintiff did, do not ordinarily break, and since Arden has a duty to inspect bottles for visual defects, it is more probable that a dangerous bottle was placed on the market by a negligent act of Arden, and it is, therefore, responsible for the damage caused. Moreover, in this case we have expert testimony that the bottle broke as a result of a defect, which renders the inference that defendant was negligent in either wholly failing to inspect the bottle, or in failing to make a reasonable inspection all the more probable. This probability is further underscored by the principle that the possibility of the defect in the bottle being latent and not visually discoverable is regarded as insufficient to prevent the application of the doctrine of res ipsa loquitur (Zentz v. Coca Cola Bottling Co., supra, 39 Cal.2d 449, 247 P.2d 351).

I am unconvinced by the distinction attempted to be drawn in the Zentz case between bottles that contain carbonated beverages and bottles that contain milk or non-carbonated beverages (see dissenting opinion, Honea v. City Dairy, Inc., supra, 22 Cal.2d 623, 140 P.2d 374). The question is not whether the bottle contains carbonated or non-carbonated beverages, but whether it is safe to use for the purpose designed. If a bottle containing milk breaks in a customer's hand, the inference of defendant's negligence is no less probable than if a bottle containing a carbonated beverage explodes. In either case the bottle was not safe for its proposed use because of some defect from which we infer a bottler's negligence in failing to discover it. The nature of the beverage adds nothing to this inference.

In addition, plaintiff's evidence would support a finding that Arden failed to reasonably inspect the bottle, violating its duty of care. As discussed previously, plaintiff and her family did not mistreat the bottle subsequent to its delivery by defendant, and what is the corollary, the defect was in existence prior to plaintiff's handling. Owens established that their inspection for latent defects is 95–98 per cent infallible, which plaintiff's expert substantiated, further stating that he found no latent defect in the bottle. This evidence plus the fact that the bottle was in use for several months by Arden sustains a reasonable inference that the bottle had no latent defects, and the defect that did exist was a visible one. From the foregoing it follows that the defect was one that defendant should have discovered when inspecting the bottles and failure to do so constitutes negligent conduct which the jury could find proximately caused plaintiff's injury.

The evidence presented by plaintiff, as indicated above, also supports a cause of action predicated on breach of implied warranty under section 1735 of the Civil Code. In substance section 1735 provides that the seller of goods impliedly warrants to the buyer who relies on the seller's skill

that the goods shall be reasonably fit for the purpose sold or if a sale by description the goods are of merchantable quality. Preliminary to maintaining an action for breach of warranty the California cases require privity,* i.e., the buyer can only sue his immediate seller (Burr v. Sherwin Williams Co., 42 Cal.2d 682, 695–696, 268 P.2d 1041), notice (Whitfield v. Jessup, 31 Cal.2d 826, 828, 193 P.2d 1), sale (Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 676, 59 P.2d 144), and a reliance on the seller's judgment that the goods are fit for the purpose sold (Civ.Code, § 1735).

These prerequisites have been satisfied. It is clear plaintiff was in privity with Arden, that proper notice was given and that plaintiff relied on Arden's judgement that the bottle was safe as a container for milk. However, a question does arise as to whether there was a sale of the bottle. This has never been authoritatively answered in California and there is a split among the cases in other jurisdictions that have considered the question, but the weight of authority is that there is a sale of the bottle. In Naumann v. Wehle Brewing Co., 127 Conn. 44, 15 A.2d 181, is was held that the warranty under the sales act extends to a returnable beverage container, ruling that there had been a sale of the bottle. To the same effect, McIntyre v. Kansas City Coca Cola Bottling Co., D.C.Mo., 85 F.Supp. 708, 711; Nichols v. Nold, 174 Kan. 613, 258 P.2d 317, 38 A.L.R.2d 887; Mead v. Coca Cola Bottling Co., 329 Mass. 440, 108 N.E.2d 757. In two other states, New Jersey and New York, the courts have ruled that in the sale of consumer goods in a bottle, the seller warrants the fitness of the container as much as the contents on the ground that the container is an essential part of the transaction, it being immaterial whether the bottle is sold with the contents or subject to a refund of deposit or return. Cooper v. Newman, City Ct., 11 N.Y.S.2d 319; see, Healey v. Trodd, 124 N.J.L. 64, 11 A.2d 88.

The jurisdictions that have denied extending the warranty to the container have done so on the grounds either that the container was not covered by the act (Poplar v. Hochschild, Kohn and Co., 180 Md. 389, 24 A.2d 783), or that the Uniform Sales Act had not been adopted in their jurisdiction (Soter v. Griesedieck Western Brewery Co., 200 Okl. 302, 193 P.2d 575, 4 A.L.R.2d 458). In the only California case, the court, in dictum, discussed the question in a light that does not speak favorably of extending warranty to the container (Gerber v. Faber, 54 Cal.App. 2d 674, 687–688, 129 P.2d 485). However, this case is by no means conclusive and should not operate to prevent this court from considering the problem as an original proposition.

I am persuaded that the more reasoned rule, supported by the realities of the situation is that the warranty extends to the milk bottle whether returnable or not, there being a "sale" of the milk bottle within the meaning of that word as it is used in Civil Code section 1735, when it is delivered to a customer. In fact the buyer had no choice but to accept the bottles delivered by Arden. They were selected solely by the seller for the purpose of containing milk, and placed at the buyer's doorstep by Arden's choice alone. Since a container is necessary for the sale of milk, Arden in any such sale must provide a container suitable for the purpose and the failure to provide such container would render the sale of milk as we know it today commercially impossible. Thus, the dairy's sale involves the container as much as the milk. The fact the bottle may be returned does not prevent there being a "sale" of it, for returning bottles is not mandatory upon the customer, who may

* California admits an exception to the privity requirement in cases involving foodstuffs where it is held that an implied warranty of fitness for human consumption runs from the manufacturer to the ultimate consumer regardless of privity of contract. Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799; Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 689, 163 P.2d 470.

keep it in his discretion, but returns it as a matter of convenience to himself and the dairy, which in turn saves him additional expense in purchasing milk.

With the preliminary requirements satisfied it is now possible to consider whether the evidence would support a verdict that there has been a breach of implied warranty. This question involves ascertaining what it is that Arden impliedly warrants. Plaintiff contends the implied warranty is that the bottle is fit for the purpose for which it is supplied, namely as a container for milk, and that when a defective bottle is placed on the market there is a breach of this warranty, which renders Arden absolutely liable to an immediate buyer without proof of negligence for any injury caused by the defect.

Normally it is a policy question whether a particular warranty should be imposed, which imposition requires the court to choose a party who is best suited to bear the burden of absolute liability in order to protect the consumer who is not in a position to do so himself (see, concurring opinions, Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 462–464, 150 P.2d 440–441; Gordon v. Aztec Brewing Co., supra, 33 Cal.2d 530, 203 P.2d 532). Fortunately in this case we are aided in our policy decision by a statement of legislative intent which strongly suggests that the implied warranty argued for is to be applied. This statement is found in section 701 of the Agricultural Code and provides in part: "(c) All containers except single service containers of any kind in which milk or any product of milk is kept, stored, transported or delivered, shall be sound, smooth, free from rust or open seams and at all times kept in a condition which will permit thorough cleansing of all surfaces with which the milk or its products come in contact. * * *" This section creates a duty on the part of all suppliers of milk products to use sound bottles and thereby argues powerfully for the proposition that an implied warranty in this respect is to be imposed. Certainly section 701 permits us to wean ourselves from the belief that such a warranty is against traditional practices. Adding to the force of the statute, cases where implied warranties have been found to exist, such as food cases referred to above, and cases involving fitness and strength of component parts of machinery (Tremeroli v. Austin Trailer Equip. Co., 102 Cal. App.2d 464, 227 P.2d 923) there seems little or no reason for determining that such a warranty does not exist in this case. To the contrary all authority and reason press for the application of such a warranty since Arden is in the better position to know of the quality of the thing dealt with and may forestall any injury to its customers, who obviously refrain from taking protective care in reliance on the seller removing all dangers of defective bottles. And finally as a matter of policy a warranty should be imposed on the grounds that "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." Concurring opinion, Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 462, 150 P.2d 441. Arden can be held to impliedly warrant, therefore, that all milk bottles will be safe for normal use and free from any unreasonable dangerous defects.

To render Arden liable under the warranty theory plaintiff must show that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some special use which was brought to the attention of the seller, and that the unreasonably dangerous condition existed when the goods left the seller's hands (Mix v. Ingersoll Candy Co., supra; Silva v. F. W. Woolworth Co., 28 Cal.App. 2d 649, 83 P.2d 76). The same evidence used to establish the theories of negligence also may be applied to demonstrate that there was a defect, which rendered the ordinary use of the bottle dangerous, and that it existed prior to plaintiff's acquisition. Having introduced evidence to support the essential elements in a breach of warranty

action Arden is liable regardless of any proof of negligence.

Turning to the question of the correctness of the nonsuit as to Owens we need discuss only the theories of negligence in view of the stipulation pertaining to breach of warranty.

As far as the doctrine of res ipsa loquitur is concerned, it appears that based upon past experience we cannot say that from the breaking of the bottle it is more probable than not Owens was negligent. The evidence established that the defect was a visible one and not latent, indicating that Owens performed its duty to inspect for latent defects with due care. Secondly the bottle was in use for several months after its delivery to Arden. The inference from this evidence is that the defect developed sometime after Arden put it to use since past experience and common knowledge tell us that if the defect that existed at the time of the breaking, existed when the bottle was acquired by Arden, the bottle would have been broken in Arden's plant or by the first several customers using it. Because it did not break the most probable inference is that the bottle left Owens free of defects.

Nor can the res ipsa loquitur doctrine be invoked on the ground that plaintiff is in doubt as to which defendant is liable. Plaintiff relies on Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, and Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91, but in those cases the application of the doctrine was permitted because plaintiff was faced with the dilemma of being able to prove a negligent act, but unable to prove which of the multiple defendants committed the act. In the instant case plaintiff is not faced with such dilemma, but is able to show exactly which defendant was negligent and what the nature of this negligence was. Under such circumstance plaintiff cannot claim multiple defendants justifies invoking the doctrine of res ipsa loquitur.

As for proving Owens committed specific acts of negligence the record is devoid of any evidence which would support such a finding.

For the foregoing reasons the judgment of the trial court should be affirmed as to defendant Owens, but reversed with respect to defendant Arden Farms.

TRAYNOR, Justice (concurring and dissenting).

The evidence that plaintiff handled the bottle carefully and that the impact causing it to break was only a mild one was sufficient to support a finding that it was defective when Arden Farms delivered it to plaintiff. It is reasonable to infer not only that this impact occurred when plaintiff placed the bottle on the drain board but that it was no more severe than the normal impact attending such placement. Therefore plaintiff's expert could justifiably conclude that the bottle was defective in some way at the time it broke, even though he could not determine the nature of the defect from an examination of the broken bottle. It could reasonably be inferred that no other member of plaintiff's family handled the bottle, since she was the only one who used skimmed milk and it was her custom to identify the bottle of such milk with a rubber band and to set it to one side of the milk-bottle tray in the refrigerator. Conceivably others in the family could have struck the other bottles against that one; but that possibility is remote given the evidence that no member of the family had ever broken a milk bottle. Milk bottles are ordinarily sturdy enough to withstand the impacts of normal usage. The bottle in question was not, and it is therefore reasonable to conclude that it was defective when delivered to plaintiff. See Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 532, 203 P.2d 522, concurring opinion.

Although I believe that there is also sufficient evidence of the other elements of a cause of action for breach of warranty, I would emphasize that "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." Ketterer v. Armour & Co., D.C., 200 F. 322, 323; Klein v. Duchess Sandwich Co. Ltd., 14 Cal.2d 272, 282, 93 P.2d 799. Liability should not be determined mechani-

cally by fortuitous circumstances. It should not be controlling that the injury occurs after rather than before a sale. Compare Mead v. Coca Cola Bottling Co., 329 Mass. 440, 108 N.E.2d 757, 759 [bottle exploded after it was taken from vending machine: warranty] with Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305, 307, 163 A.L.R. 235 [bottle exploded before customer in self-service store carried it past the check stand: no warranty]. It should not be controlling that the bottle is sold rather than bailed. See, Cooper v. Newman, City Ct., 11 N.Y.S.2d 319, 320; Geddling v. Marsh, [1920] 1 K.B. 668, 672–673. It should not be controlling that the consumer is found to be in privity of contract with the defendant rather than not. See, Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799. The liability of the manufacturer should not turn on whether he has "contracted" to assume it under such erratic tests that haphazardly afford recovery to some and deny it to others. "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 440, concurring opinion; see, 2 Harper and James, Torts, pp. 1570 et seq.

In the Escola case, as in Gordon v. Aztec Brewing Company, 33 Cal.2d 514, 203 P.2d 522, the court invoked res ipsa loquitur to affirm judgments for damages resulting from explosions of beverage bottles. My own concurrence in those judgments rested on the ground that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." 24 Cal.2d at page 461, 150 P.2d at page 440. I adhere to that view and would therefore reverse the judgment of nonsuit in favor of Arden Farms in this case.

Although this court in Burr v. Sherwin Williams Company, 42 Cal.2d 682, 695–696, 268 P.2d 1041, refused to extend strict liability to property damage in the absence of privity of contract or an express representation of the manufacturer relied upon by the ultimate purchaser, it has recognized that manufacturers are strictly liable to the consumer in cases of foodstuffs. Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799. To date a majority of the court have solved the problem of liability for harm caused by defective food containers in terms of negligence without considering strict liability as an alternative ground of recovery. Honea v. City Dairy, Inc., 22 Cal.2d 614, 140 P.2d 369; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344. Whatever the arguments for limiting the manufacturer's strict liability to foodstuffs, there is no rational basis for differentiating between foodstuffs and their containers. (Nichols v. Nold, 174 Kan. 613, 258 P.2d 317, 323, 38 A.L.R.2d 887; Cooper v. Newman, City Ct., 11 N.Y.S.2d 319, 320; Haller v. Rudmann, 249 App.Div. 831, 292 N.Y.S. 586, 587; McIntyre v. Kansas City Coca Cola Bottling Co., D.C., 85 F. Supp. 708, 711; Mahoney v. Shaker Square Beverages, Ohio Com.Pl., 102 N.E.2d 281, 289; Geddling v. Marsh, [1920] 1 K.B. 668, 672–673; Morelli v. Fitch and Gibbons, [1928] 2 K.B. 636, 642–644; see, Prosser, Torts, [2nd ed.] § 84, p. 509.) It would clarify the law to repudiate that differentiation openly rather than to circumvent it covertly and haphazardly by leaving juries free to impose strict liability if they so choose, under the guise of res ipsa loquitur. See concurring opinion in Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 532, 203 P.2d 522, and cases cited.

There is no evidence that the bottle was defective when it was delivered to Arden Farms by Owens-Illinois. Since it withstood usage by Arden Farms and its customers for many months, the only reasonable inference is that it was not defective when Owens-Illinois delivered it to Arden Farms. The nonsuit in favor of Owens-Il-

linois was therefore proper under any theory of liability. I would therefore affirm the judgment as to defendant Owens-Illinois and reverse it as to defendant Arden Farms.

GIBSON, Chief Justice (concurring and dissenting).

It is clear that, as to Owens, the judgment of nonsuit should be affirmed. The parties stipulated that plaintiff had no cause of action against Owens for breach of warranty, and she failed to make a prima facie case against this defendant based no negligence. Although there is substantial evidence that the breaking of the bottle resulted from a defect in it, there is no evidence from which it can be inferred that this defect was present when the bottle was delivered by Owens to Arden, who thereafter used it for several months before it broke.

With respect to Arden, however, I am of the view that the judgment of nonsuit should be reversed, because the evidence is not insufficient as a matter of law to sustain plaintiff's cause of action for breach of warranty. As shown by the discussion in the concurring and dissenting opinions of Justices CARTER and TRAYNOR, there is testimony from which the jury could reasonably infer that the bottle was not improperly handled in plaintiff's home and that when the bottle was delivered by Arden it contained a defect which caused it to break. If an inference to that effect were drawn by the jury, the defect in the bottle would constitute a breach of warranty by Arden under section 1735 of the Civil Code (Uniform Sales Act, § 15), which reads in part: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, *except as follows:* (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." (Italics added.)

Section 1735 does not refer merely to goods sold but to all "goods supplied under a contract to sell or a sale." It has been held that when bottled beverages are sold, the bottles in which they necessarily must be delivered are *supplied under the contract of sale* within the meaning of the statute although the bottles are bailed rather than sold. Geddling v. Marsh (1920), 1 K.B. 668; see 1 Williston on Sales (rev. ed. 1948), 582, n. 1. The Geddling case related to a sale of "lime juice and soda" in bailed bottles and was decided under section 14 of the English Sale of Goods Act, 1893, which contains provisions nearly identical with those quoted above from section 1735. The findings in that case showed that the sale came within the first subdivision of the section, but the reasoning of the court is equally applicable to a sale coming within the second subdivision. Accordingly, even if we assume that the bottle involved here was bailed, it would be subject to any warranty which would be applicable under either of the quoted subdivisions if the bottle had been sold.

The sale of a bottle of milk by a dairy under the circumstances appearing here clearly comes within the language of the second subdivision of the statute, and the seller's implied warranty of merchantable quality under this provision includes a warranty that his product is reasonably fit for the general purpose for which goods of that kind are sold. See Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 194, 293 P.2d 26; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 694, 268 P.2d 1041. It is obvious that a milk bottle which is so defective that it will break

under normal handling is not fit for the ordinary use for which it was intended and that the delivery of such a defective bottle constitutes a breach of warranty.

The buyer may recover for breach of the statutory warranty without proving negligence on the part of the seller. Tremeroli v. Austin Trailer Equip. Co., 102 Cal. App.2d 464, 475, 227 P.2d 923; Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 689, 163 P.2d 470; 1 Williston on Sales (rev. ed. 1948), 617. Accordingly, it is not necessary to consider in this dissent whether the evidence is sufficient to support a judgment upon the theory that Arden was negligent. Likewise it is not necessary to discuss whether our decision in Honea v. City Dairy, Inc., 22 Cal.2d 614, 140 P.2d 369, precludes resort to the doctrine of res ipsa loquitur under the evidence presented here.

I would affirm the judgment with respect to Owens and reverse it with respect to Arden.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



159 Cal.App.2d 764

In the Matter of the ESTATE of Leo John MEYERS, Deceased.

Florence MORRIS, Muriel Meyers and Nathan Morris, Petitioners and Appellants,

v.

Michael S. BERMAN, Respondent,

Anne H. B. Meyers, Contestant.

Civ. 21971.

District Court of Appeal, Second District, Division 3, California.

April 29, 1958.

Rehearing Denied May 15, 1958.

Hearing Denied June 25, 1958.

Proceeding on petition to remove administrator of estate of decedent. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered an order denying the petition and petitioners appealed. The District Court of Appeal, Parker Wood, J., held that in view of holding on prior appeal from petition for removal of administrator that mere pendency of action against administrator and others of an action to set aside certain conveyances of property held in joint tenancy by administrator and decedent did not warrant removal of administrator, and in view of facts appeal in such action against administrator was still pending, and property in controversy was in charge of a receiver, and principal ground upon which removal of administrator was sought was judgment rendered against administrator in action in which appeal was pending, trial court could not be deemed to have erred in overruling petition for removal.

Order affirmed without prejudice to a subsequent application.

1. Executors and Administrators ⇐35(1)

A trial judge possesses wide discretion determining whether the facts of a particular case warrant the removal of an administrator.

2. Executors and Administrators ⇐35(19)

In view of holding on a prior appeal from petition for removal of administrator that mere pendency of action against administrator and others of an action to set aside certain conveyances of property held in joint tenancy by administrator and decedent did not warrant removal of administrator, and in view of facts appeal in such action against adminstrator was still pending, and property in controversy was in charge of a receiver, and principal ground upon which removal of administrator was sought was judgment rendered against administrator in action in which appeal was pending, trial court could not be deemed to have erred in overruling petition for removal.

A. A. Rotberg, Los Angeles, for appellants.

Sydney Tannen, Beverly Hills, and Wright, Wright, Goldwater and Wright, Los Angeles, for respondent Michael S. Berman.

PARKER WOOD, Justice.

Florence Morris and Muriel Meyers who are daughters of Leo John Meyers, deceased, filed a petition for the removal, and for the suspension of the powers, of Michael S. Berman as administrator of the estate of said deceased. Nathan Morris, the husband of Florence, was nominated by Florence and Muriel as administrator of said estate. Anne Meyers, the surviving wife of said deceased, filed a petition for appointment of herself as administratrix of said estate, in the event Michael is removed as administrator. The petitions were denied "and dismissed." Florence, Muriel, and Nathan appeal from that order.

Prior to the filing of the present petition, Muriel filed a petition for the removal of Michael as administrator. That petition was granted. On the appeal therein, the order was reversed. In re Estate of Meyers, 130 Cal.App.2d 145, 278 P.2d 471.

The petition for removal and suspension of the powers of Michael, as administrator, alleges: Michael filed an inventory wherein he listed property of the appraised value of $900; he did not list therein certain separate property of Leo, the apparent title to which was in the names of Leo and Anne as joint tenants, or in the names of Leo, Anne, and Michael as joint tenants; he did not list, in the inventory, property which was acquired with the proceeds of Leo's separate property; creditors' claims in the sum of $1,737.12 have been filed and approved, and the amount of approved claims exceeds the appraised value of the property listed in the inventory; Michael either converted to his own use the automobile which was the property of Leo, or he allowed Anne to sell the automobile and to retain the proceeds; at the time of his death, Leo owned certain separate property in addition to the property listed in the inventory; Leo had signed certain grant deeds and other documents and had deposited them in escrow in connection with the contemplated acquisition of a 72-unit apartment building by Leo, Anne, and Michael, as joint tenants; after Leo's death, Michael and Anne used those deeds and documents to acquire deeds which purported to convey said apartment building to Anne and Michael as joint tenants; on September 10, 1952, petitioners (Florence and Muriel) commenced an action against Anne, Michael, and Michael's wife Audrey, whereby petitioners sought (1) to set aside, on the grounds of fraud and undue influence, the purported conveyances under which Anne, Michael, and Audrey claimed to have acquired title to "said real property," and (2) to declare a trust, and (3) for an accounting; on the trial of that action the court found that Anne, in order to defraud Leo, Florence, and Muriel, and to get Leo's separate property for herself and Michael, unduly influenced Leo to execute conveyances and to accept conveyances which purportedly conveyed title to Leo, Anne, and Michael as joint tenants; on November 1, 1955, a judgment was entered in that action setting aside the purported conveyances and adjudging that the properties belong to the heirs of Leo and should be administered in his estate; the judgment also provided that the representative of Leo's estate should recover from Anne and Michael $66,588.74, subject to administration in Leo's estate; Anne, Michael, and Audrey appealed from the judgment, and the appeal is pending; Leo's estate is the beneficiary of the judgment and it is the duty of the administrator to "defend the appeals"; Michael, individually, and Anne and Audrey are judgment debtors and "appellants from a judgment" rendered in favor of Leo's estate, and Michael is disqualified by such conflict of interest from continuing to act as administrator and he should be removed; Michael is incompetent to act as an administrator of an estate having rental income properties; after Leo's death, Michael collected all rents from said property; he has not kept books of account or formal records of receipts and disbursements of rents and he has permitted original records of rents received to become lost and destroyed; Michael has failed to deposit, in a bank account maintained for that purpose, rentals from the property, and he appropriated "proceeds from the rental" of the property to his own use, although the property was in need of

repair, and although trust deed installments were not currently paid and the property was in danger of being lost by foreclosure; Michael did not utilize all the rentals for maintenance of the property or for paying installments on trust deeds.

When the present petition came on for hearing, Michael, the administrator, and Anne, the surviving wife, objected to the introduction of any evidence on the ground that the matter is res judicata. They also made a motion that the petition be dismissed upon the grounds that it does not state a cause of action, "it is res judicata," no justiciable issues are presented by it, and no facts are stated therein which warrant the removal of the administrator.

The trial judge stated that it appears that the decision on the former appeal "must be classed as being res judicata on this subject to the extent that there are no facts, other than the facts which could have been presented at the time the other petition was heard * * *. Here certain facts are now alleged which were known, or should have been known to the petitioners at the time they filed the other petition, and should then have been included in such petition * * * and the failure to do so would still make the case res judicata upon the facts which were then existent, and it would only go into the realm of not being res judicata with respect to any facts which transpired subsequent to that date. It appears, and the Court [trial court] has been advised by counsel, that Judge Nix [trial judge in the action to set aside deeds] has found and entered judgment to the effect that the joint tenancy deeds which are involved are void and by virtue of that fact the property is estate property." The trial judge also said that the fact as to rendering of judgment could not have been stated in the former petition, but that "the claim that such activities had occurred [activities which allegedly were the basis for the judgment] could have been set forth in the petition as a ground for removal, but that was not done." The judge, after stating that he understood that a receiver had been appointed, asked the attorneys for the parties herein if a receiver had been appointed. The attorneys replied in the affirmative. The judge said that the facts stated herein were insufficient to warrant the removal of the administrator, and that the petition would be denied.

The minute order states that the petition of Florence and Muriel, for removal of administrator and for suspension of his powers, is denied; and that all other petitions are dismissed. The formal order, signed by the judge, states that the petition of Florence and Muriel for removal of the administrator and for suspension of his powers, and the petition of Nathan Morris for letters of administration, and the petition of Anne for letters of administration, are denied and dismissed.

Appellants contend that their petition for the removal of the administrator shows that Michael is not qualified to be the administrator. They argue that their petition shows that there is a conflict of interests between Michael, individually, and Michael, as administrator, in that there is a judgment against Michael and Anne, his mother, to the effect (1) that certain properties in which Michael and Anne claimed interests as joint tenants were properties of Leo's estate, and (2) that the representative of Leo's estate should recover $66,588.74 from Michael and Anne (as rents and profits received by them from the joint tenancy property). Appellants also argue that their petition shows a further conflict of interests between Michael, individually, and Michael, as administrator, in that Michael and his mother have appealed from said judgment. They argue further that the matters decided upon the former appeal are not res judicata; that the present petition shows that, after the determination of the former petition, judgment had been rendered against Michael and Anne in the action which was pending against them when the former petition was heard; that the judgment was based on fraud and undue influence; that Michael failed to keep books of account, failed to use rental income for the protection of the joint tenancy property, and used grant deeds and an assignment of a trust deed for his own benefit. It is to be noted

that the present petition states the court found that Anne, in order to defraud Leo and his daughters, unduly influenced Leo.

In the former petition the alleged ground for removal of the administrator was that he had neglected the estate and had neglected to file any inventory or to perform any other act in connection with the administration. In the opinion on the former appeal it was said (130 Cal.App.2d at page 147, 278 P.2d at page 472) that the findings with respect to the adverse interests of Anne and her alleged influence over Michael were not, in view of the evidence, a sufficient ground for removal of Michael as administrator. Also, in that opinion it was said (130 Cal. App.2d at page 147, 278 P.2d at page 472) that the attorneys for the parties had advised the court that there was a pending suit in equity commenced by Muriel and Florence against Anne, Michael, and Michael's wife to set aside conveyances of property in joint tenancy upon the grounds of fraud and undue influence. In that opinion it was said (130 Cal.App.2d at page 149, 278 P.2d at page 473): "Without doubt appellant intended to support the claims of his mother as well as the claims of himself and his wife to joint tenancy interests in the real property, but this fact did not warrant his removal as administrator. His inaction to assert claims on behalf of the estate against his mother and his wife and his natural unwillingness to surrender his own claims to joint tenancy interests interfered in no manner with the prosecution of the claims of Mr. Meyers' daughters made on behalf of themselves and the estate." It was also said therein (130 Cal.App.2d at page 149, 278 P.2d at page 474) that a person holding property in joint tenancy with a decedent is not "for that reason alone unfit to act as executor or administrator of the estate of the deceased joint tenant. * * * It is a factual question depending upon the circumstances of the particular case. The law does not say that a surviving joint tenant may not act as the administrator. * * * To be sure there may be circumstances which would warrant the court in denying the right of administration to a surviving joint tenant but there would have to be a showing of real necessity. The mere fact of the existence of joint tenancy ownership of the decedent and the survivor in property which but for the joint tenancy would have devolved upon the estate does not meet the requirement either in law or in fact."

[1, 2] Appellants state in their brief that the principal facts upon which the removal of the administrator is sought, or the suspension of his powers requested, are "based on the judgment which was rendered" against the administrator, his wife, and his mother in the action to set aside the alleged joint tenancy conveyances. When the former petition was heard, that action was pending in the trial court. On the appeal from the order made on the former petition it was held in effect, as above indicated, that the mere pendency of the action regarding the alleged joint tenancy interests did not warrant the removal of the administrator. When the present petition was heard, a judgment in said action had been rendered against the administrator, his wife, and his mother. An appeal from that judgment was taken, and the action is still pending. There is an indefinite allegation in the present petition with reference to the alleged conversion of the automobile. It appears, however, that the automobile is listed in the inventory. The trial judge possesses a wide discretion in determining whether the facts of a particular case warrant the removal of an administrator. In re Estate of Palm, 68 Cal.App.2d 204, 211, 156 P.2d 62. In view of the opinion on the former appeal, and since the action against the administrator was still pending, and the trial judge possesses a wide discretion in such matters, and the property in controversy is in charge of a receiver, it cannot be said that the trial court erred in its ruling.

The order is affirmed, without prejudice to a subsequent application.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SCHAUER, J., dissenting.

159 Cal.App.2d 770

Florence MORRIS and Muriel Meyers, Plaintiffs and Respondents,

v.

Anne H. BERMAN, also known as Anne H. Berman Meyers, Mitchell Michael Stanley Berman, also known as Stanley Michael Berman and Michael Stanley Berman, and Audrey Jean Berman, his wife, Defendants and Appellants.

Civ. 21972.

District Court of Appeal, Second District, Division 3, California.

April 29, 1958.

Hearing Denied June 25, 1958.

Action for judgment declaring that decedent's wife, step-son and his wife were trustees for daughters of decedent as to one-third of a certain realty of decedent which they allegedly claimed as surviving joint tenants, and for one-third of all other property which they allegedly unlawfully acquired from decedent. The Superior Court, Los Angeles County, Lloyd S. Nix, J., entered judgment adverse to defendants and they appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained findings that decedent's wife and his step-son exercised undue influence on decedent in obtaining conveyances to such property to them as joint tenants with decedent, and that decedent and his wife did not acquire any community property during their marriage.

Attempted appeal from ruling on demurrer dismissed, and judgment affirmed.

1. Deeds ⇐196(3)
Husband and Wife ⇐36, 49½(7), 49¾(5)

In transactions between a husband and wife, a confidential relationship exists, although mere fact that there is such confidential relationship does not raise a presumption that a voluntary deed or conveyance or a gift from husband or wife is the result of undue influence. West's Ann. Code Civ.Proc. § 472.

2. Deeds ⇐196(3)

Where there was a confidential relationship between husband and wife, and wife unduly profited and gained advantage by reason of her confidential relationship, a presumption arose that wife received joint tenancy interests in separate properties of husband as the result of undue influence.

3. Husband and Wife ⇐264
Trusts ⇐110

In action for judgment declaring that decedent's wife, stepson and his wife were trustees for daughters of decedent as to one-third of a certain realty of decedent which they allegedly claimed as surviving joint tenants, and for one-third of all other property which they allegedly unlawfully acquired from decedent, evidence sustained findings that decedent's wife and his stepson exercised undue influence on decedent in obtaining conveyances to such property to them as joint tenants with decedent, and that decedent and his wife did not acquire any community property during their marriage.

4. Trusts ⇐111

In action for a judgment declaring defendants were trustees for plaintiffs as to certain realty owned by decedent as a joint tenant with defendants, on ground defendants' interest in such realty was procured by undue influence, question of whether defendants, who were decedent's wife and stepson, or either of them, overcame presumption of undue influence existing as a result of their confidential relationship with decedent, was the question of fact.

5. Appeal and Error ⇐996, 1010(1), 1011(1)

A finding of a trial court that property is either separate or community property is binding and conclusive upon the appellate court if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences.

6. Husband and Wife ⇐257

Where certain realty was owned by husband before marriage, sale of such realty after marriage was a sale of husband's separate property, and apportionment of a part of the profits therefrom as community property, was not required, on

theory that profits from such sales were attributable to husband's managerial skill.

7. Limitation of Actions ⇐102(9)
Trusts ⇐365(5)

Where from time of marriage pursuant to wife's plan to obtain husband's property, wife and her son exercised undue influence upon husband and obtained from him, at various times after the marriage, joint tenancy interests in the separate property of husband as a result of such undue influence wife and her son held property as trustees for husband and as heirs, and such confidential relationship and undue influence having continued, causes of action by heirs for a judgment determining their interest in such property were not barred by the statute of limitations or by laches.

8. Limitation of Actions ⇐184
Pleading ⇐236(6)

Where, in action for a judgment as to interest of heirs in property of decedent, based on undue influence exerted on decedent in obtaining certain interests in his property, by his wife and her son, defenses to the effect that causes of action were barred by statute of limitations and laches were not pleaded, trial court would not be deemed to have abused its discretion in denying a motion made about three and one-half months after the trial, but before the findings or judgment were signed, to amend the answer by alleging that causes of action were barred by statute of limitations and laches, especially in view of fact defendants had demurred to the complaint and amended complaint on grounds, among others, that the causes of action were barred by the statute of limitations and laches, and such demurrers were overruled. West's Ann.Code Civ.Proc. §§ 472, 473.

9. Declaratory Judgment ⇐252

Where defendant, in an action for a declaration that defendants were trustees for heirs of decedent as to one-third of certain realty which he had owned in joint tenancy, defendant-wife of decedent was not a personal representative of the estate, and with respect to her claim to alleged joint tenancy property was not in privity with his estate but a stranger thereto, superior court properly determined the issues in the exercise of its equity jurisdiction, rather than in the exercise of its probate jurisdiction.

10. Appeal and Error ⇐102

A ruling on a demurrer to make first amended complaint is not an appealable order.

Sydney Tannen, Beverly Hills, and Wright, Wright, Goldwater and Wright, Los Angeles, for appellants.

A. A. Rotberg, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action to establish a trust in real and personal property in favor of plaintiffs as heirs of Leo John Meyers, deceased, and for an accounting. The court found, among other things, that any purported interest of defendants in the properties was acquired by fraud and undue influence and was held in trust for decedent and his heirs. The judgment was that the properties are owned by the heirs of decedent and are subject to administration of his estate, and that the administrator of said estate recover $66,588.74 from defendants Anne H. Berman Meyers (the surviving wife of decedent) and Michael S. Berman (the son of Anne). Defendants appeal from the judgment.

Appellants contend, among other things, that the evidence does not support the findings above mentioned.

On August 19, 1939, Leo John Meyers married defendant Anne H. Berman Meyers. Leo had been married to Mollie Meyers. Two daughters, plaintiffs Florence Morris and Muriel Meyers, were born of that marriage. Leo and Mollie were divorced in 1928 and Mollie was given custody of Florence and Muriel. In 1932 Leo was given custody of Florence and Muriel and thereafter they resided with him. In

1935, when Florence married Nathan Morris, she left Leo's home.

A few days after the marriage of Leo and Anne, Muriel went to San Francisco and remained there about two years. In 1941 she returned to Los Angeles and resided with Leo and Anne about five days. She then moved to an apartment. Between 1945 and 1948, she visited Leo and Anne eight or nine times. In July, 1948, Leo and Anne visited Muriel. Muriel did not see Leo thereafter.

During the first few months after the marriage of Leo and Anne, they visited Florence and her husband, or Florence and her husband visited Leo and Anne, once or twice a week. Thereafter the visits were less frequent. Between 1941 and 1943, Florence saw Leo once. Between 1943 and 1945, Leo and Anne visited Florence a few times. About December, 1945, Leo and Anne met Florence and her husband at one of the apartment houses involved herein. Florence did not see Leo thereafter.

Anne had been married previously and a son, defendant Michael S. Berman, was born of the previous marriage. At the time of the marriage of Leo and Anne, Michael was about 12 years of age. Michael resided with Leo and Anne from March, 1940, until he entered the Navy in 1945.

At the time of the marriage of Leo and Anne, Leo was engaged in the finance and used car business, and he owned four parcels of real property, herein referred to as Parcels 1, 2, 7 and 10. Parcels 1, 2, and 7 were unimproved lots. Parcel 10 was improved with a store and 2-unit apartment house.

On October 17, 1939, a grant deed, dated September 28, 1939, and signed by Leo, was recorded. That deed purported to convey Parcel 7 to Anne.

On December 6, 1939, a grant deed, signed by Mr. and Mrs. Kurclick, was recorded. That deed purported to convey two unimproved lots (herein referred to as Parcel 11) to Leo and Anne as joint tenants. Soon thereafter a house was constructed on the lots. On May 13, 1940, a declaration of homestead on Parcel 11, signed by Leo and Anne, was recorded.

On March 25, 1940, three grant deeds, dated December 15, 1939, and signed by Leo, were recorded. Those deeds purported to convey Parcels 1, 2 and 10 to Anne.

On April 23, 1939, prior to the marriage of Leo and Anne, one Goodman commenced an action against Leo. In February, 1940, the action was tried, and on April 23, 1940, a judgment for $15,545.83 was entered against Leo.

In September, 1940, Leo and Anne, individually and as "copartners operating under the name of L. J. Meyers Finance Co. also known as L. J. Meyers," filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The schedules attached to that petition listed, among the assets, Parcels 1, 2, 7, 10 and 11. The values of those parcels, as given in the petition, were: Parcel 1, $1,000; Parcel 2, $5,000; Parcel 7, $2,000; Parcel 10, $10,000 and Parcel 11, $10,000. On June 25, 1942, the bankruptcy proceedings were terminated and possession of the assets then in the bankruptcy estate was restored to Leo and Anne. The record on appeal herein does not designate the value or nature of those assets, but the record indicates that the parcels of real property referred to above were restored to Leo and Anne. (On January 17, 1947, Parcel 11 was sold; and a trust deed, executed by the purchaser to secure her note for $10,000, was recorded. The note was payable to Leo and Anne as joint tenants.)

On November 5, 1942, four grant deeds, signed by Leo and Anne, were recorded. Those deeds, dated November 4, 1942, purported to convey Parcels 1, 2, 7 and 10 to Katherine Shostak and Sydney G. Shostak (Anne's sister and brother-in-law).

On September 19, 1944, a grant deed, dated November 10, 1942, and signed by the Shostaks, was recorded. That deed purported to convey Parcel 10 to Leo, Anne, and Michael, as joint tenants. (On January 12, 1948, Parcel 10 was sold; and a trust

deed, executed by the purchasers to secure their note for $16,000, was recorded. The note, which was payable to Leo, Anne, and Michael as joint tenants, will be referred to as Parcel 5d.) On August 6, 1946, a grant deed, dated November 28, 1942, and signed by the Shostaks, was recorded. That deed purported to convey Parcel 7 to Leo and Anne as joint tenants. (On August 6, 1946, Parcel 7 was conveyed by Leo and Anne to third persons.)

On November 19, 1948, a grant deed, dated December 15, 1942, and signed by the Shostaks, was recorded. That deed purported to convey Parcels 1 and 2 to Leo and Anne as joint tenants.

On May 17, 1941, during the bankruptcy proceedings, Leo acquired record title to a lot improved with a 20-unit apartment house. That property is hereinafter referred to as Parcel 12. On September 30, 1942, Leo acquired record title to a lot improved with a 8-unit apartment house. That property is hereinafter referred to as Parcel 13. On September 19, 1944, two grant deeds, dated April 15, 1944, and signed by Leo, were recorded. Those deeds purported to convey Parcels 12 and 13 to Leo, Anne, and Michael as joint tenants. (On March 1, 1949, Parcel 13 was sold.)

On June 8, 1945, certificates for four shares of stock of Santa Carmelita Mutual Water Co. were issued to Leo and Anne as joint tenants. On October 7, 1946, a certificate for four shares of stock of that company, were issued to them as joint tenants. Those certificates are hereinafter referred to as Parcel 5g.

Parcel 17 is a 6-unit bungalow court. On August 22, 1945, Mrs. Shostak conveyed that parcel to Leo and Anne as joint tenants. Also on said date Leo and Anne conveyed that parcel to one Gonzales, who executed a trust deed thereon to secure a note for $8,250, payable to Leo and Anne as joint tenants. On February 20, 1946, Leo and Anne signed a document which stated that they held the trust deed for the benefit of Michael. Apparently the note was paid before Leo died. Parcel 17 is not in controversy here.

Parcel 14 is a single residence. On December 17, 1945, that parcel was conveyed by Mr. and Mrs. Erbacker to Leo and Anne, purportedly as joint tenants. (On February 8, 1948, Parcel 14 was sold, and the purchasers executed a trust deed thereon to secure their note for $14,000. The note, which was payable to Leo, Anne, and Michael as joint tenants, will be referred to as Parcel 5c.)

On June 20, 1946, a lot was conveyed by Mr. and Mrs. Schloen to Leo and Anne, purportedly as joint tenants. That lot, which adjoins Parcel 2, will be referred to as Parcel 2a.

On October 6, 1946, two lots, at La Quinta in Riverside County, were conveyed by the Shostaks to Leo and Anne, purportedly as joint tenants. That property will be referred to as Parcel 5f.

Between March 1, 1949, and February 26, 1951, certain third persons conveyed five additional parcels of real property to Leo, Anne, and Michael, purportedly as joint tenants. Those parcels are referred to as Parcels 3, 4, 5, 15, and 16. Those parcels were, respectively, a 16-unit apartment house; a 2-unit apartment house; an 18-unit apartment house; a single residence; a single residence. Parcel 15, a single residence, was sold March 1, 1949.

Rentals from the income properties, above referred to, were deposited in Leo's checking account.

In January, 1946, Leo opened a checking account in the Bank of America, and he was the only one authorized to sign checks on that account. On February 27, 1950, Leo underwent an operation for cancer. On March 3, 1950, while Leo was in the hospital, a representative of the bank went to the hospital, at the request of Anne, and interviewed Leo with reference to opening a joint account in the names of Leo and Anne. Leo wrote an "X" on a signature card and purportedly opened a joint tenancy account at the bank. This account is

referred to as Parcel 5e. Leo and Anne were authorized to sign checks on that account. The balance in Leo's checking account, $880.41, was transferred to the joint account. Also, $4,250, which was in his savings account, was transferred to that account. In July and November, 1951, and March, 1952, Leo underwent further operations for cancer. He died on July 12, 1952. He was about 73 years of age.

At the time of Leo's death, the following described property was in the names of Leo and Anne as joint tenants: Parcels (of real property) 1, 2, 2a and 5f; Parcel 5g, the water stock; and 5e, the joint tenancy account of $6,892.74. At the time of Leo's death, the following described property was in the names of Leo, Anne, and Michael as joint tenants; Parcels (of real property) 3, 4, 5, 12 and 16; Parcel 5d, the note for $16,000 secured by a trust deed on Parcel 10; and 5c, the note for $14,000 secured by a trust deed on Parcel 14.

On July 14, 1952, the day of Leo's funeral, Anne withdrew $5,000 from the joint tenancy account in the bank.

Leo and Anne had opened an escrow on May 12, 1952, with reference to the exchange or sale of Parcels 12, 16, and 5c (being the 20-unit apartment house, a single residence, and the $14,000 note, which were in the names of Leo, Anne, and Michael.) Leo and Anne had signed escrow instructions which provided that Leo and Anne were to deliver, into the escrow, deeds to Parcels 12 and 16 and an assignment of the note and trust deed (Parcel 5c). Those instructions also provided that title to 18 lots (improved with 72 apartments—and subject to an encumbrance of $451,441.48), hereinafter referred to as Parcel 6, would be conveyed to Leo, Anne, and Michael as joint tenants. Leo, Anne and Michael, signed and delivered into the escrow grant deeds to Parcels 12 and 16 and an assignment of the note and trust deed (Parcel 5c). The spaces in those deeds and in the assignment, where the names of the grantees and the assignee were to be written, were left blank at the time Leo and Anne delivered the deeds and assignment into escrow. On July 31, 1952, after Leo's death, the escrow instructions were amended to provide that title to Parcel 6 was to vest in Anne and Michael as joint tenants. On August 1, 1952, after names of the grantees and the name of the assignee had been inserted in the blank space, the two deeds and the assignment of the trust deed were recorded. The grantees and the assignee, so referred to, were persons who are not involved in the controversy here. The deeds and assignment state that Leo, Anne, and Michael acknowledged, on May 12, 1952, that they executed the deeds and assignment. On August 1, 1952, Parcel 6 (the 18 lots with 72-unit apartment house thereon) was conveyed by Don Ja Ran Construction Co., Inc., and Kleefeld & Son Construction Co., Inc., as grantors, to Anne and Michael, purportedly as joint tenants.

In May or June, 1952, Leo left Parcel 5d (that is, the note secured by a trust deed on Parcel 10) and the trust deed and an assignment of the trust deed with William Eaton, an escrow clerk, so that those documents might be inspected by prospective purchasers. The assignment was signed by Leo, Anne, and Michael. Leo left no written instructions with the documents. On August 13, 1952 (after the death of Leo) Anne signed escrow instructions for the sale of the note and trust deed to Mr. King. At that time, the principal amount of the note was $10,847.79. The note was sold at a discount and the proceeds from the sale ($10,047.79) were paid to Anne. The assignment, which was dated August 12, 1952, states that Leo, Anne, and Michael acknowledged, on August 12, 1952, that they executed the assignment. That date was after the death of Leo.

On December 4, 1952, Michael was appointed administrator of Leo's estate. Thereafter he filed an inventory and appraisement of the estate which listed real property of the appraised value of $250, and listed personal property of the appraised value of $650. Creditors' claims against the estate, in the amount of $1,737.12, were filed and allowed.

On September 10, 1952, prior to the appointment of Michael as administrator of Leo's estate, Florence and Muriel commenced this action against Anne, Michael, and Audrey Jean Berman (Michael's wife) to establish a trust in real and personal property in favor of plaintiffs, as heirs of Leo; and for an accounting. The defendants demurred generally, and on the grounds that the action was barred by laches and the statute of limitations. The demurrer was sustained with leave to amend. On January 9, 1953, plaintiffs filed an amended complaint wherein it was alleged that by fraud and undue influence, Anne and Michael induced Leo to transfer large sums of money and real property, which was Leo's separate property, to Leo, Anne, and Michael as joint tenants, and to acquire, with the proceeds from Leo's separate property, property in the joint names of Leo, Anne and Michael.

In the second cause of action it was alleged, in addition to the allegations of the first cause of action, that Leo received no consideration for the joint tenancy interests or property transferred to Anne and Michael.

The third cause of action alleged that the transfers of the joint tenancy interests were made by mistake of Leo as to the effect of the transfers.

The fourth cause of action alleged that defendants had acquired the rents, issues and profits from the real and personal property and had refused to account to plaintiffs therefor.

The prayer was for judgment declaring that defendants are trustees for each plaintiff as to one-third of the real properties; and ordering that defendants account for all other property which they unlawfully acquired from Leo, and that each plaintiff recover from defendants one-third of the value of such property.

Defendants demurred generally to the amended complaint, and also on the grounds that the action was barred by laches and the statute of limitations. The general demurrer to the third cause of action (re mistake) was sustained without leave to amend. The demurrer to the other causes of action was overruled. Defendants' answer was in substance a denial of the allegations of the amended complaint. Defendants did not plead affirmative defenses. On December 23, 1954, Anne filed a "Proposed Supplemental Answer" in which she alleged that the court has no jurisdiction of the subject of the action, and that "without prejudice to this defendant's additional defenses as by this defendant heretofore pleaded * * * all the property, title to which stands in the names of both this defendant and Leo John Meyers, Deceased, and/or which belongs to both this defendant and said Leo John Meyers, deceased, is the community property of this defendant and said Leo John Meyers, deceased."

The court found, as follows: At the time Leo married Anne, he owned real and personal property of a value in excess of $150,000, and Anne did not own any property. During the marriage Anne did not acquire any separate property, and Leo and Anne did not acquire any community property. At the time of Leo's death, all property in which he had an interest was his separate property or was acquired from proceeds of his separate property. Prior to the marriage of Leo and Anne, a relationship of mutual love and affection existed among Florence and Muriel and Leo, and Leo made repeated statements that Florence and Muriel would be well provided for in the event of his death. From the inception of her marriage to Leo, Anne, pursuant to a plan and design to influence Leo against Florence and Muriel in order to obtain Leo's property for herself and Michael, began a course of conduct designed to estrange Leo from Florence and Muriel and to prejudice Leo against them and to cause Leo to place his trust and confidence in Anne and Michael, so that Leo would not give Florence and Muriel any of his money or property or provide for them when he died, and so that Anne and Michael would obtain all of Leo's money and property, and to thereby defraud Florence and Muriel of their just share of Leo's property and

estate and to defraud Leo and obtain joint tenancy interests in his separate property to the personal benefit of Anne and Michael, and to render ineffective any will by which Leo could have devised his separate estate to Florence and Muriel. Commencing the day following Anne's marriage to Leo, Anne, pursuant to said design, and with the intention of forcing Muriel to leave Leo's home so that Anne could more easily influence Leo against Florence and Muriel and could dominate Leo, insulted and upbraided Muriel and within three days forced Muriel to move from Leo's home. In furtherance of said design, Anne brought Michael to live with Leo and Anne, and Michael lived with them for many years. In furtherance of said design, and for the purpose of keeping Leo away from his daughters, Anne upbraided and insulted the daughters to such an extent that she offended them, upset Leo, and isolated him from them. Pursuant to said design, Anne intercepted mail which the daughters sent him, refused to give such mail to him, and refused to inform him of telephone calls from them. Between 1945 and the time of Leo's death on July 12, 1952, Anne prevented Leo and Florence from seeing or communicating with each other. Between 1949 and the time of Leo's death, Anne prevented Leo and Muriel from seeing or communicating with each other. Anne disliked Florence and falsely accused her of attempting to break up Anne's marriage. Anne stated repeatedly that she would get all of Leo's money and that she would see that neither Florence nor Muriel would receive any of Leo's money. Immediately following the marriage, Anne began to and did dominate and control the relationship between Leo and his daughters; and Anne unduly influenced Leo and poisoned his mind against his daughters. Anne told Leo that Florence and Muriel did not love him and that they only wanted his money and were waiting for him to die so that they could get his money. By reason of the fiduciary relationship existing between Leo and Anne, and by reason of the confidence Leo had in Anne, Leo believed said statements and he was unduly influenced against his daughters. Said statements were false and were known by Anne to be false and were made for the purpose of influencing Leo against his daughters. Anne destroyed the affection which Leo had for Florence and Muriel and, as a result of the acts of Anne, Leo was deprived of the affection and advice of Florence and Muriel and he was left entirely to the will and control of Anne. In February, 1950, Anne knew that Leo was suffering from cancer and was confined to a hospital. In July and November, 1951, Leo was again hospitalized for further surgery. Leo died on July 12, 1952. Anne, who knew how to communicate with Florence and Muriel, failed and refused to notify them of Leo's illness or death, or of the time and place of his funeral.

The court found further, as follows: Anne, for more than ten years before her marriage to Leo, knew Sam H. Robinson, an attorney. A short time before Leo and Anne were married, Leo was involved in litigation, and Anne induced Leo to engage Robinson as his attorney. During that time, Robinson also acted as attorney for Anne and represented her in various legal matters; and Robinson, at Anne's request (apparently after marriage), prepared twelve conveyances of real property affecting the separate property of Leo. A fiduciary and confidential relationship existed between Robinson and Leo, and also between Leo (as one party) and Anne and Michael (as the other parties). Shortly after Anne's marriage to Leo, Anne induced Leo to engage Sydney G. Shostak, her brother-in-law, to prepare income tax returns for Leo, Anne and Michael and to advise them on income tax matters. During approximately seven years prior to Leo's death, Leo engaged Shostak as his income tax advisor and accountant, and Shostak prepared all their income tax returns and advised Leo, Anne and Michael with reference to income tax and other matters. A fiduciary and confidential relationship existed between Leo and Shostak, and Leo had great trust and confidence in Shostak. In furtherance of said design

and in order to defraud Leo and in violation of the fiduciary obligations which Michael, Anne, Robinson and Shostak owed to Leo, and in order to defraud Florence and Muriel and to personally benefit Anne and Michael, Anne, Michael, Robinson and Shostak induced Leo (1) to sign documents which purported to transfer Leo's separate property to Leo, Anne and Michael as joint tenants, and (2) to acquire separate property in the names of Leo, Anne and Michael as joint tenants for the alleged purposes of minimizing taxes and preventing attachment of the property by Leo's creditors. In furtherance of said design to defraud Leo, to exclude Florence and Muriel from receiving their share of Leo's property, and to personally gain from said confidential relationship, Anne and her attorney Robinson induced Leo, (1) during the first four months after said marriage, to sign four grant deeds which purported to convey to Anne four parcels of real property which were Leo's separate property (Parcels 1, 2, 7, and 10); (2) they induced Leo to use his separate estate to acquire an additional parcel of real property by a deed which purported to vest title in the names of Leo and Anne as joint tenants (Parcel 11); (3) in 1942, Anne and her attorney Robinson induced Leo to join Anne in signing four grant deeds which purported to convey four parcels of Leo's separate property to the Shostaks (Parcels 1, 2, 7 and 10) and thereafter at the request of Anne, Robinson prepared, and the Shostaks signed and acknowledged two grant deeds affecting two parcels of Leo's separate property (Parcels 1 and 2) which deeds contained no names of grantees, and Anne, in violation of her fiduciary obligation to Leo, altered said deeds and wrote in the names of Leo and Anne as joint tenants and caused the deeds to be recorded; (4) during 1942, at the request of Anne, her attorney Robinson prepared, and the Shostaks signed, two additional grant deeds which purported to convey to Leo and Anne, as joint tenants, two additional parcels of property which were Leo's separate property (Parcels 7 and 10). In furtherance of said design to defraud Leo, and to exclude Florence and Muriel from receiving their share of Leo's separate property, and to personally gain from said confidential relationship, Anne, Michael, Robinson, and Shostak induced Leo (1) in 1944 to sign two grant deeds which purported to convey to Leo, Anne and Michael, as joint tenants, two parcels of Leo's separate property (Parcels 12 and 13); and (2) in 1945 to acquire, with the proceeds of his separate property, a parcel of property under a grant deed which purported to convey the property to Leo and Anne as joint tenants (Parcel 14); (3) in 1948 to acquire, with his separate funds, a parcel of real property (Parcel 15) and a trust deed (Parcel 5c) which purported to vest title in Leo, Anne and Michael as joint tenants; (4) in 1949 to acquire, with his separate funds, three parcels of property under three grant deeds which purported to convey title to Leo, Michael and Anne as joint tenants (Parcels 3, 4 and 16); and (5) in 1951 to acquire, with his separate funds, a parcel of property under a grant deed which purported to convey title to Leo, Michael and Anne as joint tenants (Parcel 5). In 1952 during the last illness of Leo, and in furtherance of said design, Anne, Michael and Shostak induced Leo to sign two grant deeds covering two parcels of property (Parcels 12 and 16), and to endorse in blank two promissory notes (Parcels 5c and 5d) secured by two trust deeds, and to sign two assignments of the trust deeds. When Leo signed the deeds and assignments, those documents did not contain names of grantees or assignees. Those parcels of real property, the notes, and the trust deeds were the separate property of Leo but were standing in the names of Leo, Michael, and Anne as joint tenants. After Leo signed the deeds and the assignments, and after he endorsed the notes, he deposited the documents in an escrow pursuant to escrow instructions which were signed by Leo, Anne and Michael. (A later finding herein is to the effect that one of those notes, Parcel 5d was delivered by Leo to an escrow agent, pursuant to his oral instructions, for inspec-

tion by prospective purchasers.) The escrow had not been completed at the time of Leo's death. After Leo died, Anne and Michael caused the two deeds and the two assignments of trust deeds, which Leo had signed, to be altered by inserting in the deeds the names of the grantees (persons not involved here) and by inserting in the assignments the names of the assignees (persons not involved here) and by causing all of said documents to be acknowledged after Leo's death. Thereafter, Anne and Michael caused "the same" to be sold for their personal benefit, and they obtained title to Parcel 6 (the 72-unit apartment house) as joint tenants, and they obtained cash from the sale of one of said notes (Parcel 5d) and the trust deed securing that note. During the entire existence of Anne's marriage to Leo, she actively arranged for the preparation, and for the execution by Leo, of all deeds and all assignments of trust deeds under which interests in Leo's separate property were purportedly conveyed to Anne, or to Anne and Michael as joint tenants. Anne signed, and actively induced Leo to sign, escrow instructions which directed that title to Leo's separate property be conveyed to Leo and Anne, or to Leo, Anne, and Michael, as joint tenants. Anne and Michael unduly profited and gained an advantage over Florence and Muriel and obtained property of great value as a result of their said acts and conduct and the violation of their confidential relationship with Leo. Leo signed all of said grant deeds under which title to Leo's separate property was purportedly transferred to Anne, or to the Shostaks, or to Leo and Anne, or to Leo, Anne and Michael as joint tenants, and he accepted title to property under deeds and assignments of trust deeds which purported to vest title in Leo and Anne, or in Leo, Anne and Michael, as joint tenants, while acting under the complete domination and control of Anne, Michael, Sydney Shostak, and Anne's attorney, Robinson. Said grant deeds, trust deeds and assignments of trust deeds were procured by and through the undue influence and fraud of Anne and Michael imposed on Leo to such an extent as to completely subjugate his will and mind, so that said purported conveyances under which Leo acquired his separate property in the names of Leo and Anne, or Leo, Anne and Michael, were not the free and voluntary acts of Leo and were in violation of the fiduciary and confidential relationship which existed between Leo (as one party) and Michael, Anne, Robinson and Shostak (as the other parties).

The court found further, as follows: Leo never intended to make any gift of his said property to Katheryn or Sydney Shostak, or Anne, or Michael, and neither of the Shostaks, nor Anne, nor Michael, gave any consideration for said purported conveyances or transfers and each of "the same" was procured by the undue influence and fraud of Michael and Anne and the undue influence of Anne's attorney, Robinson, and her brother-in-law, Sydney G. Shostak, to such an extent that the will and mind of Leo were completely subjugated. Leo never intended to transfer or convey to Katheryn or Sydney Shostak, or to Anne or Michael any interest in his separate property, and Leo exercised complete and exclusive control over his said separate property. On March 3, 1950, in furtherance of said plan and design, Anne fraudulently induced Leo to sign an "X" on a bank signature card which purported to establish a joint tenancy bank account between Leo and Anne, and she fraudulently induced Leo to transfer to said account all the funds from Leo's separate bank account. Leo intended only to authorize Anne to pay his bills while he was temporarily disabled and did not intend to make Anne a joint tenant "in" his bank account or give her any interest in his funds. After Leo signed the signature card, he exercised sole control over the account and signed all checks thereon except those which he specifically authorized Anne to sign. During the entire period of Anne's marriage to Leo, Anne kept all the books and records relating to the income and property of Leo and had full knowledge of all Leo's income

and property and used said knowledge for the benefit of herself and Michael in order to gain undue advantage over Leo and to defraud Florence and Muriel.

The court found further that at the time of his death, Leo was the owner of certain real and personal property which are referred to in the findings as Parcels 1, 2, 3, 4, 5, 5a, 5b, 5c, 5d, 5e, 5f and 5g, and that said property was owned by Leo prior to his marriage to Anne, or was acquired from the rents, issues, profits and proceeds of property which Leo owned at the time of said marriage. Parcels 1, 3, 4, 5, 5f and 5g, referred to in the findings, are the same as the parcels referred to hereinabove (preceding the findings) by the same designations; Parcel 2, referred to in the findings, is the same as Parcel 2 and 2a, referred to above; Parcel 5a is the same as Parcel 12, referred to above; Parcel 5b is the same as Parcel 16, referred to above; Parcel 5c is the note for $14,000 secured by a trust deed on Parcel 14, referred to above; Parcel 5d is the note for $16,000 secured by a trust deed on Parcel 10 referred to above.

The court found further, as follows: In March, 1952, Leo delivered to an escrow agent a trust deed note for $16,000 having an unpaid balance of $10,847.79, herein described as Parcel 5d, payable to Leo, Anne, and Michael as joint tenants, with an undated assignment in blank signed by Leo, Anne, and Michael, and an undated assignment in blank of a trust deed securing said note, signed by Leo, Anne, and Michael. At said time Leo gave oral instructions to the escrow agent to hold the same for inspection by prospective purchasers and to await his approval of written escrow instructions. On August 12, 1952, one month after Leo's death, Anne caused said documents to be altered by inserting the name of an assignee in the assignments of said note and trust deed, causing both instruments to be currently dated and acknowledged as to all the assignors, "including Leo John Meyers, who was then deceased," and she caused said note and trust deed to be sold for $10,047.79, and she and Michael retained the proceeds for their own use and benefit. Prior to July 12, 1952, Leo delivered into escrow uncompleted and acknowledged grant deeds to Parcels 5a and 5b (also known as 12 and 16) and an assignment in blank of the promissory note, Parcel 5c, secured by trust deed and an assignment in blank of the trust deed for use in connection with the acquisition of Parcel 6. About August 1, 1952, after Leo's death, Anne and Michael caused said documents to be altered by inserting in said deeds the names of the grantees and by inserting in said assignment of said trust deeds the names of the assignees, and caused said documents to be acknowledged and sold, and they used Parcels 5a, 5b, and 5c as the consideration for the acquisition of Parcel 6. Said Parcel 6 was acquired by Anne and Michael with the separate property of Leo, and they, (Anne and Michael) hold "the same" in trust for the heirs of Leo and "the same" is the separate property of Leo. Neither Michael nor his wife, Audrey, has any right, title or interest in any of the property described in the findings, and Anne has no right, title or interest therein except as an heir of Leo. Since Leo's death, Anne and Michael have jointly collected, retained and used the rents, issues and profits from Parcels 1, 2, 3, 4, 5 and 6 inclusive, and have retained and used the proceeds from the sale of the note and the trust deed (the note being referred to as Parcel 5d), and they retained and used the bank account referred to as Parcel 5e, and they have refused to account to Florence and Muriel for such sums and for such property and they have wrongfully converted, retained and used $66,588.74 to the damage of the heirs of Leo and his estate. By reason of the undue influence exerted and the fraud practiced upon Leo by Anne, whatever purported interest Anne, Michael and Audrey acquired in the property, described in the findings, "was in fact acquired in trust for and as trustee for" Leo, and "by reason of his death, for his heirs," Anne, Florence and Muriel, in equal shares. Michael and Audrey claim

some interest in said real and personal property under and by virtue of said conveyances, and their claims are without right and they have no interest therein. Anne, as a surviving joint tenant, claims some interest in said property, and said claim is without right and Anne has no right, title or claim to said property except, as an heir of Leo, and she is entitled to share equally with Florence and Muriel in the separate property and estate of Leo, subject to administration. There was no community property acquired during the marriage between Leo and Anne.

The court found further that except, as otherwise specifically found, all the facts alleged in the first, second and fourth causes of action of the first amended complaint are true; and that the allegations of the defendants' amended answer to the first amended complaint, and the allegations of a supplemental answer of Anne, in conflict with the foregoing findings are untrue.

The judgment provided: (1) The grant deeds affecting Parcels 1, 2 (*and 2a*) from Leo to Anne, and the deeds from Anne and Leo to the Shostaks, and the deeds from the Shostaks to Leo and Anne, as joint tenants, are set aside and declared to be of no force and effect insofar as any purported interest therein of Sydney G. Shostak, Katherine Shostak, or Anne, Michael and Audrey "are concerned," and said property is declared to belong to, and be the separate property of, Leo and to belong to his heirs, subject to administration "in" his estate. (2) Any and all interests acquired by Anne, Michael, and Audrey in Parcels 3, 4 and 5 were obtained as the result of the fraud and undue influence of Anne and Michael, and were held in trust for Leo, and said property is the separate property of Leo and title thereto is in the heirs of Leo, subject to administration in his estate. (3) Any and all interests acquired by Anne in Parcels 5f and 5g were obtained as the result of the fraud and undue influence of Anne, and were held in trust for Leo, and said property is the separate property of Leo and title thereto is in the heirs of Leo, subject to administration in his estate. (4) At the time of his death, Leo was the owner, as his sole and separate property, of Parcels 5a, 5b and 5c, and any interest of Anne, Michael and Audrey therein was obtained as the result of the fraud and undue influence of Anne and Michael and was held in trust for Leo; Anne and Michael "having sold" said Parcels 5a, 5b and 5c and having used the proceeds to acquire Parcel 6, the title to said Parcel 6 is held by Anne and Michael in trust for the heirs of Leo, and title to said parcel is in the heirs of Leo, subject to administration in his estate. (5) At the time of his death, Leo was the owner, as his sole and separate property, of Parcels 5d and 5e; Anne and Michael sold Parcel 5d, and withdrew and used Parcel 5e and have collected and used the rents and profits from Leo's real property; and pursuant to the account (in this action) Anne and Michael, are indebted to the representative of Leo's estate, and the representative of Leo's estate shall have and recover from Anne and Michael, jointly and severally, the sum of $66,588.74, subject to administration in Leo's estate. (6) Anne, Michael and Audrey have no right, title or interest in Parcels 1, 2, (2a), 3, 4, 5, 5f, 5g and 6, except such interest as Anne may have as an heir of Leo. (7) Parcels 1, 2, (2a), 3, 4, 5, 5f, 5g and 6 are the separate property of Leo and title thereto is vested in the heirs of Leo subject to administration in his estate.

Appellants contend that the findings to the effect that they exercised undue influence upon Leo are not supported by the evidence. They argue that the fact that Leo and Anne were husband and wife did not raise a presumption of undue influence; the fact that Anne, by reason of the marriage relationship, may have had a strong general influence over Leo was not sufficient evidence unless undue influence was brought to bear directly upon the acts of Leo in executing the deeds and other documents; there was no evidence that Anne or Michael or anyone made false representations as to a material fact or exercised pressure which overpowered Leo's mind at the time the deeds or other documents were executed;

there was no evidence that anyone exercised such influence over Leo that his acts in executing deeds, and purchasing property, in joint tenancy with Anne and Michael were not expressions of his own desires; four witnesses, with whom Leo had business dealings with reference to the property here involved, observed that Leo was acting according to his own will; there was no evidence that Anne took an unreasonable advantage over Leo or that Anne unduly benefited by the deeds she received; the trial court overlooked the consideration furnished by Anne, namely, 13 years of harmonious marital relationship, and her participation in Leo and Anne's business of buying and selling real property; the uncontradicated testimony of plaintiffs' and defendants' witnesses rebuts any inference of undue influence and shows that Leo was acting according to his own will.

"In transactions between a husband and wife, the rule with respect to confidential relations obtains (Civ.Code, § 158), and precludes either from obtaining an unfair advantage of the other through fraud, mistake or undue influence. Such transactions are considered subject to the rules which affect the relationship between a trustee and beneficiary; their relationship is in fact presumed to be confidential [citations], and, where either obtains an advantage over the other, the transaction is presumed to have been without adequate consideration, and to have been secured through undue influence, and the burden is then cast upon him who has the advantage to show that it was fair and free from fraud or undue influence." Dale v. Dale, 87 Cal.App. 359, 364, 262 P. 339, 341.

"[T]he mere relationship of husband and wife does not constitute *prima facie* evidence of undue influence against the wife [citations], nor is there any presumption that a voluntary deed of conveyance or gift from husband or wife is the result of undue influence; and while it may be presumed that a wife has influence over her husband, this influence is not presumed to be undue (McDougall v. McDougall, supra [135 Cal. 316, 67 P. 778]) unless it appears from the face of the transaction or from the proof that the marital confidence was used to take an unfair advantage or that this confidence was subsequently violated [citations]." Faria v. Faria, 100 Cal.App. 177, 185, 280 P. 187, 190; see also Buchmayer v. Buchmayer, 68 Cal.App.2d 462, 467, 157 P.2d 9.

[1–3] In the present case there was a confidential relationship between Leo and Anne. The mere fact that there was a confidential relationship between them did not raise a presumption that Anne exercised undue influence over Leo in the transactions involved here. The court found that Anne unduly profited and gained an advantage as a result of her acts and conduct and the violation of her confidential relationship with Leo. There was evidence that at the time of the marriage Leo owned four parcels of real property and a finance company. The court found that the property he owned at said time was of the value of $150,000. There was evidence that at the time of the marriage Anne was the owner of a claim of approximately $2,000 against Sydney Shostak for money lent. The court found that at said time Anne did not own any property. It is conceded that within four months after the marriage the title to four parcels (which Leo owned at the time of marriage) was in the name of Anne. Even though Anne testified that three of the four parcels were transferred to her as a gift, the court found in effect that the four parcels were transferred to her because she and others induced Leo to transfer the parcels for the purpose of preventing attachment of the property by Leo's creditors. After the bankruptcy proceeding was terminated, the four parcels were transferred to the Shostaks so that, according to the testimony of Anne, the Shostaks could retransfer the parcels in joint tenancy. Anne testified that she "told Leo that it would be a nice idea if we put it all in joint tenancy for him and for myself. My son [Michael] was a minor then [about 15 years of age], and someone advised him and advised me to put it through a third party—why, what, I don't know. That is why I gave it to

Sydney Shostak and Katherine Shostak and they in turn gave us a deed back as joint tenants." By the deeds from the Shostaks, three of the parcels were in the names of Leo and Anne as joint tenants, and one of the parcels was in the name of Leo, Anne and Michael. As hereinabove shown, there was evidence that other property, acquired during marriage, was placed of record in the names of Leo and Anne, or Leo, Anne and Michael, as joint tenants. Anne testified that all the property, which was in joint tenancy, had been placed in joint tenancy because "we [Leo, Anne and Michael] had money together." The court found, however, that neither Anne nor Michael gave any consideration for the conveyances or transfers. According to the inventory in Leo's estate, filed by Michael, the administrator, the estate of Leo consisted of one parcel of real property, an automobile, and "Miscellaneous antiques," which were of the total appraised value of $900 at the time of Leo's death. The joint tenancy property included 4 apartment houses (16 units, 20 units, 18 units, and 2 units—subject to encumbrances), 9 lots, 2 notes secured by trust deeds, 4 shares of water stock, and the bank account. It is to be noted that the apartment houses, the notes, and one lot were in the names of Leo, Anne and Michael. It is also to be noted that Michael, the son of Anne, was included as a joint tenant (as to several parcels of property) while he was a minor—when such legal disability would present an obstacle in the matter of a transfer, disposition, or recovery of the property. It was a question of fact for the trial court as to whether Anne unduly profited or gained an advantage by reason of the confidential relationship that existed between her and Leo. There was substantial evidence to support the finding that Anne unduly profited and gained an advantage by reason of such confidential relationship. It appearing that there was a confidential relationship between Anne and Leo, and that Anne unduly profited and gained an advantage by reason of her confidential relationship, a presumption arose that Anne received joint tenancy interests in the properties as the result of undue influence. See Smith v. Lombard, 201 Cal. 518, 524, 258 P. 55; Lyon v. Lyon, 145 Cal.App.2d 660, 665, 303 P.2d 39; and Krug v. Meeham, 109 Cal. App.2d 274, 278–279, 240 P.2d 732. There was substantial evidence from which the trial court could infer that Michael received joint tenancy interests in the properties principally by reason of the acts of Anne. The first transfer of property whereby Michael received a joint tenancy interest was in 1942 when Michael was made a joint tenant with Leo and Anne in Parcel 10, which parcel had been Leo's separate property. At that time Michael was about 15 years of age, and there was no evidence that he participated in the procurement of the deed. In an annotation in 96 A.L.R. at page 613, it is said: "[A] gift, grant, or bequest procured by undue influence is vitiated thereby, and it is immaterial that in the procurement thereof the immediate beneficiary did not participate." That annotation cites, among other cases, Moore v. Moore, 81 Cal. 195, 22 P. 589, 874, wherein a brother of a decedent obtained from decedent's widow deeds in favor of children of said decedent by a former marriage. In that case the widow sought to cancel the deeds on the grounds of her mental impairment and the undue influence of decedent's brother. It did not appear therein that the children participated in obtaining the deeds. The judgment of the trial court therein cancelling the deeds was affirmed. In the present case there was evidence that Leo placed trust and confidence in Michael. Anne testified that Leo trusted Michael and treated him like a son. There was further evidence that Leo trusted Michael in that Michael collected rents for Leo. There was substantial evidence to support the finding that a confidential relationship existed between Leo and Michael. Also, there was substantial evidence to support the finding that Michael unduly profited and gained an advantage by reason of the confidential relationship that existed between him and Leo, and by reason of the confidential relationship that existed between Anne and Leo. The question as to

whether Anne and Michael or either of them overcame the presumption of undue influence was a question of fact for the trial court. Patterson v. Davis, 121 Cal. App.2d 152, 159, 262 P.2d 601. The court found that the joint tenancy interests of Anne and Michael were procured by their undue influence. By such finding it is implied that they did not overcome the presumption. The findings to the effect that Anne and Michael exercised undue influence are supported by the evidence.

[4, 5] Appellants contend that the finding that Leo and Anne did not acquire any community property is not supported by the evidence. They argue that since all the property, except Parcels 1 and 2 and the $16,000 note, was acquired during marriage, there is a presumption that all the property, with those exceptions, was community property. They argue further that the evidence presented by respondents (Florence and Muriel) was not sufficient to rebut that presumption. It seems that appellants' argument is to the effect that the evidence does not support the finding that all the property was Leo's separate property or was acquired from proceeds of his separate property. In Re Estate of Smith, 86 Cal.App.2d 456, at page 470, 195 P.2d 842, at page 850, it was said: "There are certain presumptions as to the community nature of property acquired after marriage (Civ.Code, § 164), but whether such presumptions have been rebutted is primarily a question of fact." In Re Estate of Trelut, 26 Cal.App.2d 717, 723, 80 P.2d 147, 150, it was said: "[A] finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. [Citation.] Further, a finding against a presumption is binding upon the appellate court [citation], unless the evidence to rebut it is so weak and improbable that the finding is without substantial support." Principles of law relative to the matter of determining whether property is community or separate property are stated in detail in Thomasset v. Thomasset, 122 Cal.App.2d 116, 264 P.2d 626. There was evidence that at the time of the marriage (in 1939) Leo was engaged in the finance and used car business; no profits were received from that business after the marriage; in 1940, the bankruptcy proceedings were commenced, and thereafter the assets of the business were liquidated; Leo did not re-engage in the finance or used car business; during the marriage he did not receive compensation for services; at the time of the marriage, Anne was employed as a bookkeeper in a garment factory and she continued working there; she sold antiques, at the family residence, from 1940 to 1947 and she made a profit of approximately $500 a year from those sales; in 1944 and 1945 she was employed by a cleaning and dyeing company from which she received $3,164.85 for her services; from 1947 to 1952 she conducted an antique and gift store; Leo assisted her in that business, which was operated as a partnership consisting of Leo, Anne and Michael; income tax returns filed by them, as such partners, showed losses from that business amounting to $11,663.78; Leo's medical expenses in 1950, 1951, and 1952 amounted to $9,879.05. There was no evidence as to amount of the living expenses during marriage. Anne testified to the effect that she could not estimate the amount of such expenses; that their living expenses were not high but were moderate in amount. A husband may properly pay the living expenses of the family from community earnings, if any, and preserve his separate property. Thomasset v. Thomasset, supra, 122 Cal.App.2d 116, 264 P.2d 626, 633. "Evidence that there was no excess of community income over community expenses is as effective to prove that all assets [of the estate] are separate property as a specific showing from which separate source each asset flowed." In re Estate of Ades, 81 Cal.App.2d 334, 339, 184 P.2d 1. In the present case the court

could infer from the evidence that the living expenses exceeded the community earnings. As above stated, it was a question of fact for the trial court as to whether there was community property. The evidence was sufficient to support the findings to the effect that there was no community property, and that all the property was Leo's separate property.

[6] Appellants argue further that when Leo sold Parcel 7 in 1946 and Parcel 10 in 1947 he was in the business of buying and selling real property, and that the profits from those two transactions were attributable to his managerial skill and therefore a portion of such profits was community property. Those parcels were owned by Leo before the marriage, and the sale of them after marriage was, of course, a sale of his separate property. The court was not required to apportion a part of the profits therefrom as community property.

[7, 8] Appellants contend that the causes of action were barred by the statute of limitations and laches. They argue that all the transactions, except the one involving Parcel 5, occurred more than three years before Leo's death, and that the transactions, except those involving Parcels 3, 4, and 5, occurred more than four years before Leo's death. The defenses to the effect that the causes of action were barred by the statute of limitations and laches were not pleaded. About three and one-half months after the trial, but before the findings and judgment were signed, defendants made a motion, under the provisions of section 472 of the Code of Civil Procedure, to amend the answer by alleging that the causes of action were barred by the statute of limitations and laches. That section pertains to an amendment before "the answer or demurrer is filed." Presumably the defendants intended to make the motion under section 473 of the Code of Civil Procedure. Whether or not the motion should be granted was a matter within the discretion of the trial judge. The motion to amend was denied. As hereinabove stated, the defendants had demurred to the complaint and amended complaint on the grounds, among others, that the causes of action were barred by the statute of limitations and laches. The demurrers were overruled, and as above stated, the defendants did not plead those defenses in their answer. It was alleged in the amended complaint, among other things, that Anne entered upon a plan to obtain Leo's property; Leo had great confidence in Anne and Michael; commencing shortly after the marriage Leo, relying upon the great confidence he had in Anne and Michael and under their undue influence, transferred from time to time large sums of money and joint tenancy interests in real property to Anne and Michael. The court found, in effect, that from the time of the marriage and pursuant to Anne's plan to obtain Leo's property, Anne and Michael exercised undue influence upon Leo and obtained from him, at various times from the marriage to and including 1951, joint tenancy interests in his separate property. The court also found that Anne and Michael held the property as trustees for Leo and his heirs. The confidential relationship and the undue influence having continued, as found by the court, and the property having been held by Anne and Michael as trustees, it appears that the causes of action were not barred by the statute of limitations or by laches. "As a general rule, the statute of limitations does not run where the parties occupy a fiduciary relationship toward each other and the relationship has not been repudiated or terminated by the parties. This rule is applicable to resulting trusts. * * *" 31 Cal.Jur.2d p. 451, § 22; see also In re Estate of Clary, 203 Cal. 335, 341, 264 P. 242. In Re Estate of Hettermann, 48 Cal.App.2d 263, 119 P.2d 788, a question was whether a will was made under the undue influence of decedent's wife. On appeal therein it was held that the evidence was sufficient to support the jury's finding that the will was made under the undue influence of the wife. It was said therein, 48 Cal.App.2d at page 273, 119

P.2d at page 794: "It appears that decedent lived nearly 15 years after he executed the will, but this fact also, while it should be considered by the jury in passing on the question, does not necessarily prove that the will was not the product of undue influence. [Citation.] The jury may have thought that the influence persisted through these years and prevented any change of the will." In San Joaquin Valley Bank v. Dodge, 125 Cal. 77, at page 84, 57 P. 687, at page 689, it was said: "Amendments to pleadings are left much to the discretion of the court below, and it is presumed that such discretion will always be exercised in furtherance of justice, and with the end in view of disposing of cases upon their merits. We cannot interfere, except in cases where such discretion is abused. In view of the fact that the application was made after the case had been submitted, and was made for the purpose of allowing defendant to plead the statute of limitations, we cannot say that the court abused its discretion." In the present case it cannot be said that the trial judge abused his discretion in denying the motion to amend. The judge did not err in overruling the demurrer.

[9] Appellants contend that the court erred in determining the issues in the exercise of its general equity jurisdiction. They argue to the effect that since they made timely objection to a hearing by the court in the exercise of its equity jurisdiction, the issues should have been determined by the court in the exercise of its probate jurisdiction. It appears that Anne pleaded in her supplemental answer that the superior court (as a court of equity) did not have jurisdiction of the "subject of the action." It also appears that at commencement of the trial the attorney for appellants objected to the hearing of the matter by the court in the exercise of its equity jurisdiction, and he argued that the matter should be heard in the exercise of probate jurisdiction. It is not clear whether the objection was on behalf of the three defendants, Anne, Michael, and Michael's wife, or only on behalf of Anne. It will be assumed that the objection was intended to be on the behalf of the three defendants. Appellants cite Schlyen v. Schlyen, 43 Cal.2d 361, 273 P.2d 897, wherein a will contest and an action to cancel deeds were consolidated for trial. In that case the defendant did not object, until after judgment, to the trial of the deed issues in the exercise of general equity jurisdiction. The court held therein (43 Cal.2d at page 378, 273 P.2d at page 906) that defendant had waived the objection. It was said therein, 43 Cal.2d at page 378, 273 P.2d at page 906: "[T]hat in the absence of a demurrer, answer * * * or other timely objection on the ground that the issues involved should be tried in probate, the superior court may adjudicate those issues with the same force and effect as if the objection had not been made; * * * that when as here the issues pertain only to the rights of parties in privity with the estate and do not involve the rights of third parties or strangers to the estate the superior court sitting in probate has jurisdiction and should adjudicate them, but that such jurisdiction is not exclusive, depending on the facts of the particular case and may be waived." Appellants, in the present case, argue that the Schlyen case supports their contention that the matter should have been heard "in probate," and not in equity since they made timely objection to a trial by the superior court in the exercise of its equity jurisdiction. In the Schlyen case the widow was the only defendant and, although she was sued individually, she was also the personal representative of the estate. As hereinabove shown, the court in the Schlyen case said in effect that all the parties therein were in privity with the estate and that the matter should have been heard in probate if a timely objection to hearing the matter in equity had been made. In the present case Anne, the widow, was one of the defendants but she was not the personal representative of the estate, and she was claiming title to the joint tenancy property as against the estate. A further respect in which the present case is distinguishable from the Schlyen case is that Audrey Jean Berman, the wife of Michael, who is a party defend-

ant, is not in privity with the estate. In Merola v. Superior Court, 125 Cal.App.2d 1, 269 P.2d 664, the superior court in the exercise of its probate jurisdiction made an order directing the widow to deliver certain bonds to the executor, and declaring that the bonds were the property of the estate. The court said in 125 Cal.App.2d at page 4, 269 P.2d at page 665: "The widow claims that the property involved is her sole property; i. e., that some of it was given to her by the decedent during his lifetime and that the rest of it upon his death became her sole property as the surviving joint tenant. She claims adversely to the estate, not in privity with it, and is not a personal representative of the estate claiming title in her individual capacity. The contest, therefore, is between the estate and a stranger to the estate and the principle that the probate court may not try title applies." In Central Bank v. Superior Court, 45 Cal.2d 10, at page 14, 285 P.2d 906, at page 908, it was said: "It is the general rule that the superior court while sitting in probate is without power to decide a disputed claim between an estate and a stranger thereto." In the present case Anne is not a personal representative of the estate, and, with respect to her adverse claim to the alleged joint tenancy property, she is not in privity with the estate but is a stranger thereto. In Central Bank v. Superior Court, supra, it was said in 45 Cal. 2d at page 17, 285 P.2d at page 910: "But a surviving wife's claim to her share of the community property is said to come to her through probate, Probate Code, § 202, so that her claim is in privity with the estate and should be litigated therein." In the present case, however, it is to be noted that, in the supplemental answer filed by Anne, she alleged that the property was community property. In the prayer of her supplemental answer she stated: "That if the Court finds against this defendant as a surviving joint tenant, then, that the Court order that all of the property * * * is the community property" of Anne and Leo. She presented evidence on the subject of community property. The court did not err in determining the issues in the exercise of its equity jurisdiction.

[10] Defendants state in their notice of appeal that they appeal from the ruling on their demurrer to the first amended complaint. Such a ruling is not an appealable order. Lavine v. Jessup, 48 Cal.2d 611, 614, 311 P.2d 8.

The attempted appeal from the ruling on demurrer is dismissed. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



159 Cal.App.2d 673

PEOPLE of the State of California, Respondent,

v.

George Edwin ANDRUS and Mildred Elizabeth Florance, Appellants.

Cr. 1163.

District Court of Appeal, Fourth District, California.

April 24, 1958.

Rehearing Denied May 19, 1958.

Hearing Denied June 17, 1958.

Prosecution of defendants for various sexual offenses. The Superior Court of Orange County, Franklin G. West, J., entered judgment of conviction for violation of Penal Code, § 288 and order denying new trial and defendants appealed. The District Court of Appeal, Waite, J. pro tem., held that evidence sustained convictions, and opening statement of prosecution referring to background of association of defendants was not prejudicial since conduct on the part of defendants both before and after offenses were relevant circumstances which might have bearing on plan or intent.

Affirmed.

Opinion, 47 Cal.2d 25, 300 P.2d 825, vacated.

1. Criminal Law ⇐1171(2)

In prosecutions for violation of section 288 of Penal Code by defendants, one of whom was victim's mother, opening statement of prosecution referring to background of association of defendants was not prejudicial since conduct on part of defendants both before and after offenses might have bearing on a plan or intent of defendants. West's Ann.Pen.Code, § 288.

2. Criminal Law ⇐730(2)

In prosecutions for violation of section 288 of Penal Code, opening statement of prosecution to effect that defendant, who was not victim's father slept in the same bedroom with victim, did not constitute prejudicial error where court sustained objection on ground that matter was argumentative and both court and counsel told jury that opening statement was not to be considered in evidence. West's Ann.Pen. Code, § 288.

3. Criminal Law ⇐1144(15)

It will be presumed that jury followed instructions of court with respect to disregarding statements of counsel.

4. Conspiracy ⇐43(12)

A conspiracy may be proven even if not pleaded.

5. Criminal Law ⇐1171(2)

In prosecutions for violation of section 288 of Penal Code by defendants, one of whom was the victim's mother, opening statement of counsel to effect that there was a plan on part of both defendants to commit sex acts on children, was not prejudicial even though there was no charge of conspiracy. West's Ann.Pen.Code, § 288.

6. Criminal Law ⇐730(2)

In prosecutions for violation of section 288 of Penal Code by defendants who were connected with a religious organization, prosecution's opening statement to effect that People would prove matters with help of God, did not constitute prejudicial error where court admonished jurors to disregard statement. West's Ann.Pen.Code, § 288.

7. Criminal Law ⇐1171(2)

Fact that some of remarks in prosecutor's opening statement were not substantiated or that certain evidence was eventually stricken does not show prejudice in absence of a showing of bad faith.

8. Criminal Law ⇐1171(2)

An opening statement is supposed to be an outline of what People intend to prove, but failure to do so, either on account of rules of evidence or for any other reason, does not necessarily indicate prejudice.

9. Criminal Law ⇐706

Mere fact that improper questions may have been asked by prosecution and objections thereto sustained, did not necessarily result in misconduct.

10. Infants ⇐20

Evidence sustained conviction of violations of section 288 of Penal Code by defendants, one of whom was victim's mother. West's Ann.Pen.Code, § 288.

11. Infants ⇐20

In prosecution for violation of section 288 of Penal Code no corroboration of victim's testimony is required. West's Ann. Pen.Code, § 288.

12. Infants ⇐20

In prosecution for violation of section 288 of Penal Code, requisite intent may be found from surrounding circumstances. West's Ann.Pen.Code, § 288.

13. Criminal Law ⇐1169(5)

In prosecutions for violation of section 288 of Penal Code, where testimony of deputy sheriff as to a conversation with one defendant was given and later stricken after court heard recording of conversation out of presence of jury, on ground that statement was a confession which did not appear to have been freely and voluntarily made, there was no prejudicial error when court admonished jury to disregard testimony entirely. West's Ann.Pen.Code, § 288.

14. Criminal Law ⇐641(1)

In prosecutions for violation of various sexual crimes, where court granted various continuances which gave defendants approximately a month's time for preparation for trial, there were no substantial

rights of defendants which were denied with respect to representation by counsel. West's Ann.Pen.Code, §§ 261, subd. 1, 288; West's Ann.Welfare & Inst.Code, § 702.

15. Criminal Law ⇐942(2)

In prosecutions for violation of section 288 of Penal Code, there was no abuse of discretion by trial court in refusing to grant new trial on basis of letter signed with the name of victim and to the effect that one of the offenses testified to occurred after victim's 14th birthday. West's Ann. Pen.Code, § 288.

16. Criminal Law ⇐829(15)

In prosecutions for violation of section 288 of Penal Code, rejection of requested instructions to the effect that jury should not return a verdict of guilty upon circumstantial evidence alone unless proved circumstances were not only consistent with hypothesis of guilt but irreconcilable with any other rational conclusion, did not constitute error since subject was adequately covered by other instructions. West's Ann. Pen.Code, § 288.

17. Infants ⇐20

Direct testimony of complaining witness to the acts committed, may be sufficient to indicate requisite intent to violate section 288 of Penal Code. West's Ann.Pen. Code, § 288.

18. Criminal Law ⇐381

If after weighing all evidence jury is convinced beyond a reasonable doubt of defendants' guilt, it is the jury's duty to find him guilty notwithstanding testimony that he was or is a person of good character.

19. Criminal Law ⇐822(1)

Instructions are to be considered in their entirety.

20. Criminal Law ⇐806(1)

Court is not required to remind jury in more than one instruction of its duty that if it can draw two conclusions from evidence with equal propriety it must adopt the one of innocence.

Samuel Dreizen, Santa Ana, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WAITE, Justice pro tem.

The Grand Jury of Orange County returned an indictment charging appellants with five separate offenses. In Count One appellants were charged with violation of section 288 of the Penal Code committed upon Charlotte F. Florance on or about February 18, 1955. Count Two charged the commission of a similar offense upon the same child on or about December 20, 1955. In Count Three appellants were charged with violating Penal Code, section 261, subd. 1, accomplished with Sarah Lou Andrus on or about February 19, 1955. In Count Four, appellants were charged with incest in violation of Penal Code Section 285, committed with respect to the same person, and on or about the same date as in Count Three. In Count Five appellants were charged with violation of section 702 of the Welfare and Institutions Code.

After motions made in propria persona to set aside the indictment under section 995 of the Penal Code had been denied, appellants pleaded not guilty to the charges and moved to disqualify the Superior Court Judges of Orange County. The Court found that neither Judge Shea nor Judge West was disqualified. Appellants then procured counsel and made a motion for change of venue which was denied, but the Court granted their motion to set aside their pleas and considered a new motion to dismiss the indictment under Penal Code, section 995. The motion was granted as to Count Five and denied as to the remaining Counts, whereupon appellants pleaded not guilty to each of the four Counts remaining. After trial before a jury appellants were found guilty as to Counts One

and Two and appellant Andrus was found guilty of violation of section 702 of the Welfare and Institutions Code, a lesser offense included within the offense charged in Count Three. Appellant Florance was found not guilty as to Count Three and both appellants were found not guilty as to Count Four.

After the return of the jury's verdicts the Court adjourned criminal proceedings for the purpose of determining the question of sexual psychopathy, and after a hearing appellants were found to be sexual psychopaths within the meaning of the Welfare and Institutions Code, § 5500 et seq., and were committed to the Patton State Hospital for a period not exceeding ninety days. In subsequent proceedings the Court found appellants not to be sexual psychopaths and criminal proceedings were reconvened. Motions for new trial were denied as to each appellant with respect to Counts One and Two. Motion for a new trial of appellant Andrus as to Count Three was granted, and on motion of the District Attorney Count Three was dismissed. Probation was denied and both appellants were sentenced to the State Prison for the term prescribed by law on Counts One and Two, the terms being ordered to run concurrently. Each appellant has appealed from the judgment of conviction and from a denial of the motion for a new trial, urging several grounds for reversal.

A summary of the facts in the light most favorable to respondent (People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513) shows that Charlotte Florance, daughter of appellant Florance was thirteen years of age at the time of the offense alleged in Count One on February 18, 1955, the child having been born January 3, 1942. She lived in Orange with her family until June or July of 1955, at which time the family moved to Buena Park. Charlotte was acquainted with Sarah Lou Andrus, daughter of appellant Andrus, and Sarah Lou had lived in the Florance residence in Orange for a time. During the period when Charlotte was living in Orange she went to Buena Park and spent the night with appellant Andrus, and the following morning discussed the incident with Sarah Lou, who recalled that the conversation took place in February 1955.

Charlotte had become a member of a religious organization of which appellant Andrus was minister and she had asked appellant Andrus for instruction to aid her in understanding sex. Before Charlotte went to spend the night with appellant Andrus she had a conversation with her mother, appellant Florance, who told her that she (Charlotte) was going to do what God wanted her to do and that she would have to do anything that appellant Andrus asked her to do. After arrival at the Buena Park residence Charlotte and appellant Andrus went to bed together. The girl related her problems to appellant Andrus and he talked to her about the body and about life. While they were in bed together appellant Andrus fondled Charlotte on her private parts and on her breasts.

Some time near Christmas 1955, the exact date not being recalled by Charlotte, she went to bed again with appellant Andrus, at which time she told him she was fearful of something which had happened in connection with her sister and that she wanted instruction as to an erection and what it meant for a man to be released. Appellant Andrus again fondled Charlotte on her private parts and had her rub his private parts. Appellant Florance stated in the presence of a Deputy Sheriff on February 1, 1956, with respect to Counts One and Two, that she was aware of the instruction being given her daughter by appellant Andrus and was aware of the events after they transpired. The evidence shows that on both occasions above related appellant Florance told Charlotte to go with appellant Andrus and do as he requested.

Appellant Andrus admitted going to bed with Charlotte on the occasion in February, 1955, but contended that it was merely a discussion about her problems and that there was no demonstration. He testified that at no time did he touch Charlotte's private parts nor did he place his hand be-

neath her nightgown; and that his only intent on that occasion was as a marriage counsellor to help Charlotte and give her instructions on how to solve her problem of fear. As to the offense alleged in Count Two, appellant Andrus denied he was in bed with Charlotte on or about that date and that after the incident on February 18, 1955, he gave her no further instruction before her fourteenth birthday, which occurred January 3, 1956.

Appellant Florance testified that she had no knowledge of the matters alleged in Count Two and that she was not present at any of the acts alleged in either Count One or Count Two.

[1] Appellants first contend that the District Attorney was guilty of prejudicial misconduct in his opening statement, in his interrogation of various witnesses, and in his argument to the jury. In his opening statement the Deputy District Attorney referred to background association of the appellants in 1954 and we find nothing prejudicial in the statements made. Relevant circumstances in such a case include companionship and conduct on the part of the defendants both before and after the offense and such circumstances might be of value by way of proof as bearing on a plan or on intent (People v. Moore, 120 Cal.App.2d 303, 260 P.2d 1011).

[2, 3] Another instance of alleged misconduct occurred when the Deputy District Attorney stated "* * * and here is a man, a man not her father and the two of them sleeping in the same bedroom." An objection on the ground that the matter was argumentative in form was sustained by the Court and thereby any prejudice was obviated. People v. Burwell, 44 Cal.2d 16, 37, 279 P.2d 744. Both the Court and counsel told the jury that the opening statement was not to be considered as evidence, and in the formal instructions to the jury the Court again reminded the jurors that any statement by counsel as to the facts must not be regarded as evidence. It is presumed that the jurors followed the instructions of the Court. People v. Sutic, 41 Cal.2d 483, 494, 261 P.2d 241.

[4, 5] Appellants urge that further prejudice occurred in statements to the effect that there was a plan on the part of both appellants to commit sex acts on the children and argued that there was no charge of conspiracy. The presence of a plan may well be a crucial factor in the case of aiding and abetting and a conspiracy may be proved even if not pleaded. People v. Tanner, 3 Cal.2d 279, 44 P.2d 324. It is apparent that no prejudice resulted.

[6] Finally, in connection with the opening statement, it is contended that prejudice resulted when the prosecutor stated that he thought the People would prove the matters with the help of God. The Court ordered the latter portion of the statement stricken as being outside the scope of the opening statement, but appellants urge that irreparable damage resulted in view of the fact that appellants were connected with a religious organization. However, the Court admonished the jurors to disregard the statement and formally instructed them that they were not to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

[7, 8] The fact that some of the remarks in the prosecutor's opening statement were not substantiated or that certain evidence was eventually stricken does not show prejudice in the absence of a showing of bad faith. An opening statement is supposed to be an outline of what the People intend to prove. The failure to do so, either on account of the rules of evidence or for any other reason, does not necessarily indicate prejudice. People v. Planagan, 65 Cal.App.2d 371, 407, 150 P.2d 927.

[9] The contention of appellants that prejudicial misconduct occurred in the interrogation of certain witnesses is not borne out by the evidence. Without reciting in detail all of the questions asked,

it is sufficient to say that the trial Court sustained objections where proper and the jury was adequately admonished on each occasion. We find nothing in the conduct of the Deputy District Attorney which would indicate bad faith and the mere fact that improper questions may have been asked, and objections thereto sustained, does not necessarily result in misconduct. As stated by the Court in People v. Hooker, 130 Cal.App.2d 687, 279 P.2d 784, 789: "All questions propounded by the deputy and all terms used by him appear to have been used solely to develop the true facts. * * * If his behavior at the bar is free from venom against the accused; if he uses no terms designed solely to create prejudice against the accused; if he persists in an ordinary procedure with the view of presenting only the facts against the prisoner, it cannot be said that his conduct was prejudicial."

[10–12] It is next contended that the evidence is insufficient to justify the verdict as to both counts on which the appellants were found guilty. Without elaborating on the statement of facts hereinbefore set forth, it is enough to say that the testimony of Charlotte Florance is sufficient to support both counts as to the appellant Andrus, and that the evidence furnished by Charlotte Florance and Sarah Lou Andrus is ample to support the verdicts as to the appellant Florance. In a prosecution for violation of Penal Code, section 288, no corroboration of the victim's testimony is required. (People v. Westek, 31 Cal.2d 469, 190 P.2d 9), but in the present case there is corroboration in the testimony of Sarah Lou Andrus and of the deputy sheriff. It is also urged that there is nothing to show any intent to incite the lust or passion of either the appellant Andrus or Charlotte as to Count One, but it is well settled that in a prosecution under the statute here involved, the requisite intent may be found from surrounding circumstances, People v. Jones, 42 Cal.2d 219, 266 P.2d 38; People v. Hyche, 52 Cal.App.2d 661, 126 P.2d 885. In connection with Count Two, it is further contended that the evidence is insufficient to show that the offense occurred prior to Charlotte's fourteenth birthday in view of the fact that the child indicated uncertainty as to the exact time of the offense. From the evidence here the jury could properly determine that the incident took place around Christmas 1955, prior to Charlotte's fourteenth birthday (See People v. Crownover, 34 Cal.App.2d 7, 92 P.2d 929; People v. Haywood, 131 Cal.App.2d 259, 280 P.2d 180.)

[13] It is next contended that certain testimony of Deputy Sheriff Frank Dean, which was later stricken, was prejudicial. The witness testified to a conversation with the appellant Andrus February 1, 1956, wherein appellant Andrus acknowledged certain conduct with Charlotte on the occasions covered by Counts One and Two. After hearing a recording of said conversation out of the presence of the jury, the Court ordered stricken all of the testimony of the witness concerning the conversation of February 1, 1956, on the ground that the statement was a confession and that it did not appear to have been freely and voluntarily made. After the testimony was stricken the Court admonished the jury to disregard the testimony entirely because it was not legally admissible. The judge then asked if the admonition was clear to all of the jurors and all replied in the affirmative. The Court further instructed the jury formally that if any evidence was admitted, and later ordered stricken, the jury must disregard entirely the matter so stricken. As stated by the trial judge there was ample evidence, independent of the testimony of Deputy Sheriff Dean, which established the commission of the offenses, and since it is presumed that the jury obeyed the admonition to disregard the stricken matter, no prejudice resulted. See People v. Sourisseau, 62 Cal.App.2d 917, 145 P.2d 916.

It is next contended by appellants that the Court erred in not granting their motion for an advisory verdict of not guilty at the close of the prosecution's case, but in view of the discussion as to the suffi-

ciency of the evidence it is apparent that such instruction was properly refused. When there is evidence from which an inference of guilt is justified, the case will not be taken from the jury because an inference of innocence could also be drawn. People v. Wescott, 99 Cal.App.2d 711, 222 P.2d 256.

[14] It is next urged that appellants were denied due process of law by being deprived of the right of counsel at all stages of the proceedings, but we find no merit in this contention. On February 14, 1956, appellants were represented by counsel at arraignment. The Court granted their motion for a continuance to February 21, 1956, on which date appellants' then counsel stated that a difference of opinion had arisen between himself and his clients which appeared irreconcilable. Appellants acknowledged this to be the fact, whereupon the Court granted counsel's motion to withdraw and continued the matter to February 28, 1956, in order to allow appellants time to secure new counsel. On the latter date appellants asked for more time and the Court granted another continuance to March 6, 1956, on which date appellants indicated that they had not completed their arrangements for counsel and the Court granted a further continuance to March 20, 1956. On that date appellants stated that they had arranged for counsel but needed time within which to obtain a loan for counsel fees. The Court granted a continuance to April 3, 1956, stating that appellants must enter their pleas at that time with or without counsel. On April 3, 1956, the appellants being present without counsel, appellant Andrus stated that the counsel they desired was unable to be present but that appellants were willing to proceed with a motion under Penal Code, section 995. As hereinbefore noted the motion was denied but was subsequently entertained again after appellants had secured counsel. Appellants were represented by their present counsel at all times after May 23, 1956, and the trial did not commence until June 18, 1956, hence there was approximately a month's time for preparation for trial. At all times noted, appellants were at liberty on bail and it is clear that no substantial right was denied with respect to representation by counsel. People v. Greene, 108 Cal.App.2d 136, 141, 238 P.2d 616.

Appellants next complain of alleged errors in rulings of law made by the trial court, contending that the court erred in denying their motion under Penal Code, section 995; in denying their various motions for mistrial; in striking certain testimony; in refusing to strike certain testimony; and in denying their motions for a new trial. Without going into detail on each of these matters, suffice it to say that a careful examination of the voluminous transcript and the lengthy briefs convinces us that no prejudicial error occurred in any of the instances specified. The trial judge was extremely careful to protect the rights of the appellants at all times, constantly reminding the jurors to bear in mind the admonitions of the court in all respects. Some of the instances complained of have previously been considered under the contention of appellants that the district attorney was guilty of misconduct and need not be repeated here.

[15] In connection with the motion for a new trial appellants produced a letter signed "Charlotte Florance" which was to the effect that after thinking the matter over Charlotte could now remember that the second incident occurred after her fourteenth birthday As the Court said in People v. Tallmadge, 114 Cal. 427, 430, 46 P. 282, 283:

> "* * * It cannot be said that, as a matter of law, a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony. If that were so, justice would be defeated in many grave cases. Notwithstanding such an affidavit, the appellate court will rest largely upon the discretion of the judge who heard the trial, and will not disturb his ruling except in clear cases of abuse of dis-

cretion." See also: People v. Lee, 9 Cal.App.2d 99, 105–108, 48 P.2d 1003; People v. Jenkins, 118 Cal.App. 115, 119, 4 P.2d 799."

No abuse of discretion appears in the case before us.

Finally, it is contended by appellants that the Court erred in refusing to give two instructions requested by appellants, in giving an instruction on the Court's own motion and in modifying two instructions requested by appellants.

[16, 17] The two instructions refused were pratically identical, one referring to the defendant and to the crime charged against him and the other referring to the defendants and to any crime charged against them. Both instructions were to the effect that the jury could not return a verdict of guilty upon circumstantial evidence alone unless the proved circumstances were not only consistent with the hypothesis of guilt but were irreconcilable with any other rational conclusion. Appellants contend that it was necessary to rely on circumstantial evidence in the determination of intent, but in a case of this nature the direct testimony of the complaining witness as to the acts committed, may sufficiently indicate the requisite intent. People v. Norton, 141 Cal.App.2d 790, 297 P.2d 439. The Court did instruct the jury, among other things, that when the case which has been made out by the People rests entirely or chiefly on circumstantial evidence and in any case before the jury may find a defendant guilty, basing its findings solely on such evidence, each fact essential to complete a chain of circumstances that will establish the defendants' guilt must be proved beyond reasonable doubt, and that a necessary element in the offenses charged in Counts One and Two, is the existence of the specific intent therein described. The appellants were not prejudiced by the refusal to give the requested instructions since the subject was adequately covered by other instructions.

[18] There is no merit in appellants' contention that the Court erred in giving an instruction on its own motion regarding character evidence. The concluding portion of the instruction given stated that if after weighing all the evidence the jury is convinced beyond a reasonable doubt of the defendants' guilt, it will be the jury's duty to find him guilty notwithstanding testimony that he was or is a person of good character. This is a correct statement of the law. People v. Navarette, 21 Cal.App.2d 598, 69 P.2d 449.

[19] Further alleged error is predicated upon the court's modification of two defense instructions by adding the words "subject to my other instructions", and it is contended that the effect of adding the qualification was to confuse the jury. Instructions are to be considered in their entirety (People v. Tolmachoff, 58 Cal. App.2d 815, 825, 138 P.2d 61), and the only effect of the modification here was to charge the jury to consider the instructions together. It should be noted that the instructions given included those to the effect that the laws of this state do not prohibit sex instruction; that it is not a crime in itself for one to instruct another with respect to sex; that if the jury finds from the evidence that the defendants' intent was to give sex instruction and that it was not to arouse, appeal to, or gratify the lust or passion of the defendant or the child, then a violation of Penal Code, section 288 has not been established.

[20] The one remaining modification complained of was in a defense instruction to the effect that before the jury could find the defendants guilty as to Count Two, the jury must believe beyond a reasonable doubt and to a moral certainty, that Charlotte was under the age of fourteen at the time the alleged offense was committed; that if the jury does not so believe, the defendants are not guilty. The remaining portion of the instruction which was stricken by the Court is a reminder to the jury that if it can draw two conclusions from the evidence with equal propriety it must

adopt the one of innocence and find the defendant not guilty. The stricken portion was given to the jury in another instruction and the Court was not required to remind the jury of its duty in this respect in more than one instruction. People v. Morlock, 46 Cal.2d 141, 150, 292 P.2d 897.

Upon consideration of the entire record in accordance with Article VI of section 4½ of the California Constitution, we conclude that appellants had a fair and impartial hearing, that no prejudicial error appears and that there has been no miscarriage of justice requiring a reversal of the judgment.

The judgment and the order denying the motion for a new trial are affirmed as to each appellant.

BARNARD, P. J., and MUSSELL, J., concur.



160 Cal.App.2d 141

Verlah Fern TEW, Plaintiff and Appellant,

v.

Willie TEW, Defendant and Respondent.

Civ. 9250.

District Court of Appeal, Third District, California.

May 6, 1958.

Action against plaintiff's divorced husband for an accounting and other relief. The Superior Court, Solano County, Harlow v. Greenwood, J., entered an order granting defendant's motion to dismiss action pursuant to West's Ann.Code Civ. Proc. § 583, and plaintiff appealed. The District Court of Appeal, Peek, J., held that plaintiff had waived failure to give her notice of intention to move for dismissal and that, since plaintiff's motion to set cause for trial was not filed until approximately seven years after action was commenced and same attorney remained as defendant's counsel of record throughout such period of time, action was dismissible under statute for failure of plaintiff to act with due diligence to bring action to trial, though defendant had been absent from state during most of time since action was commenced.

Order affirmed.

1. Dismissal and Nonsuit ⇐60(3)

Where plaintiff's motion to set cause for trial was not filed until approximately seven years after action was commenced and same attorney remained as counsel of record for defendant throughout such period of time, though defendant had been absent from state during most of such peperiod, action was dismissible under statute for failure of plaintiff to act with due diligence to bring action to trial. West's Ann.Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇐60(1)

Trial court, independent of statute, has inherent power to dismiss action which has not been diligently prosecuted. West's Ann.Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇐70

Where, though plaintiff's counsel appeared at and participated in hearing of defendant's motion to dismiss action for failure of plaintiff to act with due diligence to bring action to trial within five years, no question was raised as to lack of notice of motion and no request was made for a continuance to enable plaintiff to make factual showing as to absence of defendant from state during most of time since commencement of action and lack of attorney-client relationship between defendant and his counsel of record, failure to give plaintiff notice of defendant's intention to move for dismissal of action was waived. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(1)

Trial court had mandatory duty under statute to dismiss action for failure to bring

it to trial within five years after it was filed, in absence of any showing to bring case within statutory exception excluding from five-year period time during which defendant was absent from state. West's Ann.Code Civ.Proc. § 583.

William H. McPherson, Fairfield, for appellant.

Kilpatrick & O'Hara and J. Clinton Peterson, Vallejo, for respondent.

PEEK, Justice.

Plaintiff appeals from an order of the trial court granting defendant's motion to dismiss plaintiff's action pursuant to the provisions of section 583 of the Code of Civil Procedure.

On May 31, 1946, plaintiff was granted an interlocutory decree of divorce, which decree approved and incorporated therein a previous property settlement agreement purporting to divide all of the community property of the parties. On May 31, 1947, plaintiff moved to modify the interlocutory decree on the ground that defendant falsely represented to plaintiff the extent and value of the community property of the parties at the time the agreement was executed. Her motion was denied on August 6, 1947, and thereafter a final decree of divorce was entered. On the same day, May 31, 1947, she also filed this action for an accounting and other relief wherein she made the same allegations relative to defendant's false representation concerning the community property. Defendant demurred, and on December 27, 1948, the same was overruled. On January 11, 1949, defendant answered, and as a separate defense set up the order of August 6, 1947, denying plaintiff's motion to modify the interlocutory decree. The cause was set for trial on February 4, 1949. When the case was called on that date, plaintiff's counsel withdrew and the matter was ordered off calendar, to be thereafter reset. On May 24, 1956, pursuant to plaintiff's motion, the case was set for trial on October 26, 1956. On June 1, 1956, Mr. Thomas F. O'Hara, who still appeared as the attorney of record for defendant, addressed a letter to plaintiff's counsel wherein he stated as follows:

> "I have not seen Willie Tew for many years. I request, therefore, that your Memorandum of Motion to Set Cause for Trial be mailed to him.
>
> "At the present time it is my understanding that the relationship of attorney and client no longer exists in the above entitled matter from my standpoint."

Thereafter a notice of trial was personally served on the defendant in Flathead County, Montana, on September 15, 1956. When the cause came on for trial defendant was represented by Mr. O'Hara. At the suggestion of the court Mr. O'Hara moved to dismiss the action on the ground that plaintiff had failed to prosecute the same within the five-year period as provided in section 583 of the Code of Civil Procedure. There is no question but that the cause had then been at issue for more than the statutory period. It was stipulated by counsel for both parties that the defendant had been out of the state during the greater portion of the statutory period. Defendant's motion was granted and this appeal followed.

It is plaintiff's first contention that the court erred in granting defendant's oral motion to dismiss on the ground that the same was made without due notice to her. In support thereof she urges that she was not given an opportunity to show defendant's absence from the state as well as the lack of attorney-client relationship between the defendant and Mr. O'Hara, and that such a factual showing would have made said section inapplicable to the facts in the present case.

The pertinent provisions of section 583 are as follows:

> "Any action heretofore or hereafter commenced shall be dismissed by the

court in which the same shall have been commenced * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, * * * except where it be shown that the defendant has been absent from the State * * * in which event said period of absence or concealment shall not be a part of said five-year period. When, however, such defendant has, or has had, an attorney of record for a sufficient time to enable the action to have been tried if the plaintiff had acted with due diligence, such period of absence or concealment shall be a part of said five-year period."

[1-4] As previously noted the record shows that plaintiff's motion to set the cause for trial was not filed until approximately seven years after the action was instituted. And since Mr. O'Hara remained as defendant's counsel of record throughout the entire period, it would appear that the requirements of said section had been amply complied with. While it is true, as plaintiff contends, no notice was given by defendant of his intention to move to dismiss, nevertheless it is also true that independent of statutory provisions, the trial court had inherent power to dismiss the action in a case where it had not been diligently prosecuted. Steen v. City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937; Gurst v. San Diego Transit System, 119 Cal.App.2d 51, 54, 258 P.2d 1109. Furthermore, the record shows without contradiction that plaintiff's counsel appeared at and participated in the hearing of the motion and raised no question of lack of notice. Nor was any request made for a continuance in order to make the factual showing as is now contended by plaintiff. Under the rule as enunciated in Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99, the plaintiff could well be held to have waived failure on the part of defendant to give notice. Finally it may be said that absent any showing on the part of plaintiff to bring the case within the statutory exemption, her failure to bring the cause to trial within the five-year period placed a mandatory duty upon the court to dismiss. Ellsworth v. United States Metals Corp., 110 Cal.App.2d 727, 728, 243 P.2d 575.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



159 Cal.App.2d 671

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert CORNISH and Jess McLaughlin, Defendants and Appellants.

Cr. 2815.

District Court of Appeal, Third District, California.

April 24, 1958.

Defendants were convicted in the Superior Court of Shasta County, Albert F. Ross, J., of second degree robbery, and they appealed. The District Court of Appeal, Van Dyke, P. J., held that cross-examination of defendant on whether defendant had told deputy district attorney that his attorney wanted him to plead guilty and he didn't want to was highly improper but not prejudicial in view of overwhelming evidence of guilt.

Affirmed.

Criminal Law ⇐706, 1171(1)

Cross-examination of defendant on whether defendant had told deputy district attorney that his attorney wanted him to

plead guilty and he didn't want to was highly improper but not prejudicial in view of overwhelming evidence of guilt.

Richard T. Tosaw, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., by Doris Maier and William O. Minor, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

These are appeals from a judgment entered upon the jury's verdicts finding appellants guilty of robbery in the second degree.

The sole assignment of error on this appeal is the prejudicial misconduct of the deputy district attorney in asking appellant Cornish upon cross-examination: "Didn't you tell me your stupid attorney wanted you to plead guilty and you didn't want to?"

The question was highly improper but not prejudicial in view of the overwhelming evidence of appellants' guilt.

Appellants denied commission of the robbery but admitted taking the victim thereof, Trible P. Odom, to an isolated spot on the outskirts of Redding and there severely beating him. Appellants further admitted that there was no cause or provocation for the beating which was administered by appellant McLaughlin, at the instigation of appellant Cornish. Appellants had become acquainted with Mr. Odom earlier in the day and the three had spent considerable time drinking together. There had been no quarreling or ill-feeling prior to the uncalled for assault. Mr. Odom testified that after the beating, and while he was lying on the ground, he felt appellant Cornish go through his pockets, in which he had five dollars and a bus ticket. Shortly thereafter Mr. Odom found his money and bus ticket were gone. The missing bus ticket was found upon appellant Cornish's person when he was arrested.

As stated in People v. Scott, 24 Cal.App. 440, 447, 141 P. 945, 948:

"* * * The evidence of defendant's guilt is so strong and persuasive that it is incredible that the verdict would have been otherwise if the declared misconduct of the district attorney had not occurred."

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.



J. W. BERNARD et al., as Trustees of the Carpenters Health and Welfare Trust for Southern California, Plaintiffs, Appellants, and Cross-Respondents,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Hudson Construction Company, Defendants, Respondents, and Cross-Appellants.*

Civ. 22241.

District Court of Appeal, Second District, Division 1, California.

April 28, 1958.

Rehearing Granted May 28, 1958.

Trustees of health and welfare trust brought action against public works contractor and its surety to recover health and welfare payments which public works contractor was required to make into trust fund. The contractor was not served and did not appear in the action. The Superior Court of Los Angeles County, Leon T. David, J., entered judgment dismissing the action as against the surety and an order granting motion of trustees to strike item of attorney's fees from surety's memorandum of costs, and the trustees appealed from the judgment, and the surety cross appealed from the order. The District Court of Appeal, Drapeau, J. pro tem., held that payment bonds furnished by contractor under section of the Government Code pro-

* Opinion vacated 329 P.2d 57.

viding that contractor's bond shall provide that if person or his subcontractors fail to pay for any materials, provisions, provender, or other supplies, or teams, used in, on, for, or about performance of work contracted to be done, or for any work or labor thereon of any kind, or for amounts due under Unemployment Insurance Act with respect to such work or labor, surety or sureties will pay for the same, in amount not exceeding sum specified in bond, did not make contractor's surety liable for unpaid contributions to health and welfare fund.

Judgment and order affirmed.

1. Schools and School Districts ⇐81(2)

Payment bonds furnished by public works contractor under section of the Government Code providing that contractor's bond shall provide that if person or his subcontractors fail to pay for any materials, provisions, provender, or other supplies, or teams, used in, on, for, or about performance of work contracted to be done, or for any work or labor thereon of any kind, or for amounts due under Unemployment Insurance Act with respect to such work or labor, surety or sureties will pay for the same, in amount not exceeding sum specified in bond, did not make contractor's surety liable for unpaid contributions to health and welfare fund established pursuant to agreement between association of contractors and union. West's Ann.Gov.Code, §§ 4200–4208, 4204.

2. Statutes ⇐212.6

Court must always presume that language of statute was chosen with care and that if Legislators desired a more extensive inclusion in statute, such intention would be found mirrored in phraseology employed.

3. States ⇐101

Though statutes and payment bonds furnished by public works contractors pursuant to statutes should be given such a liberal interpretation as will effect purpose of Legislature, they should not be construed to extend coverage of bonds beyond intent of Legislature, and it is essential that claimant thereunder bring his claims squarely within requisites of statutes and bonds. West's Ann.Gov.Code, §§ 4200–4208.

4. States ⇐101

The maxim "expressio unius est exclusio alterius" is applicable to section of the Government Code providing that contractor's bond shall provide that if person or his subcontractors fail to pay for any materials, provisions, provender, or other supplies, or teams, used in, on, for, or about performance of work contracted to be done, or for any work or labor thereon of any kind, or for "amounts due under the Unemployment Insurance Act with respect to such work or labor," that surety or sureties will pay for the same, in an amount not exceeding sum specified in the bond, and the Legislature by inclusion of the one additional obligation "amounts due under the Unemployment Insurance Act with respect to such work or labor" would be deemed to have intended to exclude any other obligation. West's Ann.Gov.Code, § 4204.

5. Schools and School Districts ⇐81(2)

Trustees of health and welfare fund created for benefit of employees of contractor had no authority to bring action against contractor to recover health and welfare payments which contractor was required to make into the fund administered by the trustees. West's Ann.Gov.Code, §§ 4204, 4205.

6. Appeal and Error ⇐1074

Where, in unsuccessful action by trustees of health and welfare trust against public works contractor and surety on payment bonds furnished by contractor to recover health and welfare payments which contractor was required to make to trust fund administered by trustees, no evidence was introduced by surety as to reasonableness of attorney's fee claimed by surety, there was no reversible error on part of Superior Court in striking such item. West's Ann.Gov.Code, § 4207.

7. Costs ⇐207

Burden of proof is on party claiming attorney fees.

George M. Cox, Los Angeles, Charles P. Scully, San Francisco, for appellants.

Johnson & Stanton, Gardiner Johnson, Thomas E. Stanton, Jr., San Francisco, amici curiae in support of appellants.

Anderson, McPharlin & Conners, Los Angeles, for respondent Indemnity Ins. Co.

DRAPEAU, Justice pro tem.

The plaintiffs herein have appealed from a judgment sustaining demurrers to the complaint and dismissing the action as against respondent surety. Defendants appeal from an order granting plaintiffs' motion to strike from defendants' memorandum of costs. The case involves the question of extent of the surety's liability on certain payment bonds furnished by a public works contractor, pursuant to sections 4200–4208 of the Government Code.

Plaintiffs, as trustees of the Carpenters Health and Welfare Trust for Southern California filed this action to recover the so-called health and welfare payments which the contractor, Hudson Construction Company was required to make into the trust fund administered by plaintiffs. The contractor was not served and did not appear in the action.

Involved herein is Article XXI of a Master Labor Agreement, negotiated in May, 1954, under which the Associated General Contractors, et al., and the United Brotherhood of Carpenters and Joiners, "agree to establish a joint Health and Welfare Trust Agreement." This agreement provides that effective September 1, 1954, "the Contractors shall make payment to the Health and Welfare Fund of 5¢ per hour worked per employee under this agreement," and that effective May 1, 1955, such payment "shall be increased 5¢ per hour."

On or about August 27, 1954, the contractor Hudson executed a collateral bargaining agreement agreeing to be bound by the Master Labor Agreement. Hudson employed construction carpenters on four projects for various school districts, and thereafter defaulted in payment of the specified health and welfare contributions. Four separate payment bonds covering the different projects were furnished by Hudson, on which the respondent company was surety.

Section 4204 of the Government Code provides that "the contractor's bond shall provide that if the person or his subcontractors, fail to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, *or for any work or labor thereon of any kind,* or for amounts due under the Unemployment Insurance Act with respect to such work or labor, that the surety or sureties will pay for the same, in an amount not exceeding the sum specified in the bond, * * * a reasonable attorney's fee, to be fixed by the court." (Italics added.)

It is appellants' contention that "The health and welfare contributions agreed to be paid are a part of the compensation of the carpenters with respect to whose work and labor they are payable, and until such contributions have been made such persons have not been completely paid for their work and labor."

Appellants also call attention to the fact that section 4205 of the Government Code provides that, "the bond must be liable to claimants or their assigns," and argue that the trustees of the health and welfare fund are persons entitled to recover thereunder since they are the assignees of, or the general agents of, the carpenters who worked on the jobs in question. It is asserted that at least there is an "equitable assignment," making the trustees proper parties plaintiff.

Respondents, however, insist that there is no liability since "Statutory bonds in-

corporate the statutes under which they are executed and are limited in their coverage to the intended purposes of the legislature;" that there can be no recovery since "such bonds did not cover health and welfare contributions;" and that appellants are not persons entitled to bring the present action.

[1] The position taken by the trial judge to the effect that the statutory bond in question did not, by its terms, make the surety company liable for the unpaid contributions to the health and welfare fund, appears to be correct. As stated in respondent's brief, "Unless some intent of the California Legislature can be found to demonstrate that the statutes and bonds in the within case were intended at the time the legislation was enacted to cover such health and welfare contributions, the bonds sued on in this case should not be interpreted to include such * * * payments." Such intent has not been made apparent either by briefs filed or by the cases cited.

In the instant case the language used in the bond statute hereinbefore cited is plain enough. It makes the sureties liable, so far as the present case is concerned, in respect to "any work or labor thereon of any kind." As pointed out in respondent's brief these contributions are made payable directly by the employer to the welfare fund and are not deducted from the employee's wages; and they "do not create specific funds for the benefit of specific employees, which such employee could collect or withdraw upon terminating his employment or withdrawing from membership in the union."

[2] The difficulties and dangers of indulging in a loose interpretation of statutory provisions are obvious. The result is judicial legislation—amending or rewriting a statute to suit the exigencies of the particular occasion. In no case can such dangers be greater than in reference to a statute which prescribes the conditions of a bond; the result being the imposition of liability for some obligation not stated in the statute or bond, and not contemplated by the legislature. It must always be presumed that the language of a statute was chosen with care, and that had the legislators desired a more extensive inclusion such intention would be found mirrored in the phraseology employed.

[3] While it is undoubtedly true that such statutes and bonds should be given such a liberal interpretation as will effect the purpose of the legislature, it has been repeatedly held that they should not be construed to extend the coverage of the bonds beyond the intent of the legislature. It is essential that a claimant thereunder bring his claim squarely within the requisites of the statute and bond. See Miles v. Baley, 170 Cal. 151, 149 P. 45; Lamson Co. v. Jones, 134 Cal.App. 89, 24 P.2d 845.

[4] Moreover, the instant statute furnishes internal evidence that the legislative intent was strictly limited to the situations therein mentioned. In addition to the liability imposed in respect to labor and materials, the surety's obligation is specifically extended to one other case, that of "amounts due under the Unemployment Insurance Act with respect to such work or labor." By the inclusion of this one additional obligation it is only reasonable to conclude that the legislature intended to exclude any other. *Expressio unius est exclusio alterius.*

There are apparently no decisions of the Supreme Court or the District Courts of Appeal of this state, dealing with the precise question here involved. Appellants, however, strongly rely upon the case of Sherman v. Achterman, 1955, in the Appellate Department of the Superior Court of San Francisco County, 36 L.R.R.M., included in the Appendix to appellants' opening brief. In that case the contractor also defaulted in payments to the Health and Welfare Fund. In an opinion concurred in by two judges of that court with a dissent by the other judge, it was held that the bond statute in question covering payment "for any

work or labor" could be deemed to include the Welfare Fund payments, and that the surety would therefore be liable for the contractor's default.

The holding of the Appellate Department of the Superior Court in the Sherman case is not deemed persuasive or controlling, and seems to unduly extend the meaning of the language used. Adherence thereto would judicially rewrite the statute in question—a function not within the jurisdiction of any court. Also, as pointed out in the respondent's brief, the employee has no right, title, interest or control in respect to payments to the welfare fund under the specific provisions of the original agreement and declaration of trust. Such payments are, in fact, in a class by themselves; they are exactly what they are called—"contributions" required as a condition of supplying workmen to a contractor. If it is the desire of the legislature to add this liability to the surety's obligation, an amendment is in order, and is the only proper way of effecting such a change.

Other cases cited by appellants, such as United States for Benefit and on Behalf of Sherman v. Carter, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed.2d 776, interpreting a federal statute known as the Miller Act, 40 U.S.C.A. § 270a et seq., cannot be deemed controlling in respect to the California statute. Likewise, the question whether such contributions are entitled to priority in bankruptcy does not shed any light on the present question of legislative intent, which in the final analysis must be deemed the controlling and essential feature.

[5] An examination of section 4205 of the Government Code discloses that the bonds in question inure to the benefit of any and all persons entitled to file claims or their assigns. Appellants' contention that the trustees of the health and welfare fund are the equitable assignees of the employees, and hence entitled to bring this action is not persuasive. Since the employees never had any right, title or interest in or to the contributions, and since such payments were not taken from their wages, it is difficult to see how there can be any assignment, equitable or otherwise. One cannot assign something in which he has no interest; something which is exacted by and fully controlled by some other person or persons. Such is the situation in the present case. Again it may be said that if such change in the law is desired, this is a matter within legislative and not judicial authority.

The Indemnity Insurance Company, as cross-appellant, claims that it is entitled to attorney fees under section 4207 of the Government Code, providing that "Upon the trial of the action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered." The amount of $1,500 was claimed in the defendant's memorandum of costs; plaintiffs challenged this item, no evidence was introduced to sustain the challenged item, and a motion to strike was granted.

[6, 7] In view of the language of the statute, and there being no evidence as to the reasonableness of the stated amount, there appears to have been no reversible error in the court's striking of such item. As said in City of Los Angeles v. Abbott, 129 Cal.App. 144, 153, 18 P.2d 785, the burden of proof is upon the party claiming the attorney fees.

The judgment and order are, and each is, affirmed.

WHITE, P. J., and FOURT, J., concur.

159 Cal.App.2d 820

Andrew SHEVELAND and Elfrada F. Sheveland, Plaintiffs, Cross-Defendants and Respondents,

v.

Fred E. REED et al., Defendants,

Fred E. Reed and Leota C. Reed, Defendants, Cross-Complainants and Appellants.

Civ. 9368.

District Court of Appeal, Third District, California.

April 30, 1958.

Rehearing Denied May 29, 1958.

Action by vendors to quiet title to property and to have option to purchase cancelled. The Superior Court, Napa County, Ben R. Ragain, J., rendered judgment for vendors, and purchasers appealed. The District Court of Appeal, Warne, J. pro tem., held that where purchasers received option and extensions of option to purchase land upon payment of amounts to vendors, purchasers received full equivalent of price paid, prior payments were not consideration for additional extension of option, which was complete within itself and expressly cancelled all prior options, and purchaser was not entitled to refund of money paid pursuant to prior option agreements because of fact that additional option agreement was void.

Affirmed.

Vendor and Purchaser ⇐334(1)

Where purchasers received option and extensions of option to purchase land upon payment of amounts to vendors, purchasers received full equivalent of price paid, such payments were not consideration for additional extension of option, which was complete within itself and expressly cancelled all prior options, and purchaser was not entitled to refund of money paid pursuant to prior option agreements because of fact that additional option agreement was void.

Riggins, Rossi & Kongsgaard, Napa, for appellants.

Dwyer, King, Price & Mering, Sacramento, and James D. Boitano, Napa, for respondents.

WARNE, Justice pro tem.

This is an appeal from a judgment quieting respondents' title to a tract of land in Napa County.

The material facts, as found by the trial court, are that on March 18, 1953, the respondents, in consideration of $1,000, gave appellant a thirty day option to purchase the subject property at $1,000 an acre, to be paid as follows: $1,500 at the time of the exercise of the option, $37,500 within 90 days thereafter, and the balance of $190,000 at the rate of $40,000 a year. The option provided that appellant would obtain title insurance at his expense and that respondents should have 60 days within which to cure any defect in the title. The option was not exercised within the time specified, but appellant did pay respondents an additional $5,500 and on February 4, 1954, respondents agreed to extend the option to July 31, 1954, if appellant paid $3,000 by March 5, 1954. Upon the payment of $2,000 on March 1, 1954, the option was further extended to April 1, 1954. On March 27, 1954, respondents executed an agreement which recited that, in consideration of the $8,500 theretofore paid, respondents would extend the option if appellant paid $1,000 on or before April 1, 1954, and $24,500 on or before July 31, 1954.

The called for payments were not made and respondents brought the present action to quiet their title to the property and to have the option cancelled. Appellants, by way of cross-complaint, sought specific performance of the agreement to convey, claiming that the option had not terminated because respondents failed to clear title as required in the extension agreement of March 27, 1954. They also asked for declaratory relief.

The March 27, 1954, option contained the following provision:

"* * * If at the time for exercise of option * * * July 31, 1954, the title to the property covered in this agreement is not free and clear of all liens and encumbrances including those specifically listed as exceptions Number Two (2) to nine (9) inclusive in that certain preliminary report for a policy of title insurance, Order Number 48724, dated February 4, 1954, and issued by the Napa County Title Company, then *the time for exercise of said option is extended until said liens and encumbrances have been removed,* and Vendee shall have ten (10) days thereafter to exercise the first purchase right over said property as provided in this agreement." (Emphasis added.)

In addition to the facts heretofore stated, the trial court found that on March 27, 1954, appellant waived any objection to the condition of the title, that the selling price as of March 27, 1954 and as of July 31, 1954, was inadequate, and that the offer to sell was not accepted prior to July 31, 1954, and expired on that date.

Appellants do not challenge the court's findings, but contend that since the court found that the option was void they are entitled to the return of the $8,500 they paid to the respondents, and that the parties should be restored to status quo.

We do not agree with appellant. The trial court did not find that the original option, as extended on March 1, 1954, was void. It did find that the option of March 27, 1954, was void. Further, the entire $8,500 had been paid as the consideration for the original option and its prior extensions. Appellants had received the full equivalent of the price paid, hence there was no consideration for the March 27, 1954, option (which was complete within itself and expressly cancelled all prior options) and as no payments were made pursuant thereto there was nothing to be returned to the appellants. It is said in 1 Corbin on Contracts, section 273, page 914:

"* * * When that time expires, the option holder has received the full agreed equivalent of the price he paid for his option; and a refusal to give effect to an acceptance that is one minute late results in no forfeiture."

The findings and the record fully support the judgment.

Other points discussed in the briefs do not require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



159 Cal.App.2d 649

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation, Plaintiff and Appellant,

v.

Howard M. KESSLER, State Mutual Building & Loan Association, a California corporation, State Mutual Building & Loan Association, a California corporation, doing business as State Mutual Savings & Loan Association and Title Insurance and Trust Company, a corporation, Defendants,

Howard M. Kessler, State Mutual Savings & Loan Association and Title Insurance And Trust Company, Respondents.

Civ. 22532.

District Court of Appeal, Second District, Division 2, California.

April 24, 1958.

Hearing Denied June 17, 1958.

Suit to have sale under deed of trust declared invalid and to have plaintiff's title quieted. From judgment and orders of the Superior Court of Los Angeles County, Arnold Praeger, J., plaintiff appealed. The District Court of Appeal, Herndon, J., held that the facts alleged in the complaint afforded no legal ground upon which to hold the trustee's sale invalid.

Affirmed.

1. Mortgages ⇐353

Only requirements of notice of sale essential to validity of sale under power contained in deed of trust are those expressly and specifically prescribed by terms of instrument and by provisions of applicable statutes. West's Ann.Civ.Code, § 2924b.

2. Mortgages ⇐355

Even though deed of trust contained request of trustors that copy of any notice of default and copy of any notice of sale be mailed to them at their given address, and even though beneficiary had been notified of third party's acquisition of property from trustor and of third party's address, it was not necessary that personal notice of foreclosure sale be given to third party. West's Ann.Civ.Code, §§ 2924, 2924b; West's Ann.Code Civ.Proc. § 692.

3. Mortgages ⇐356

Publication of notice, of sale under deed of trust, once a week during a period of 20 days was adequate. West's Ann.Civ. Code, § 2924b; West's Ann.Code Civ.Proc. § 692.

4. Mortgages ⇐356

There was no occasion for any publication of notice of default where address of trustors was set forth in deed of trust and their request for a copy of notice was contained therein. West's Ann.Civ.Code, § 2924b; West's Ann.Code Civ.Proc. § 692.

5. Mortgages ⇐355

In absence of specific provision therefor, notice to subsequent purchaser of exercise of power of sale under trust deed is not necessary, and the "due process" clauses of the state and federal constitutions do not entitle purchaser to special or personal notice of trustee's sale. West's Ann.Civ.Code, § 2924b; U.S.C.A.Const. Amend. 14.

6. Mortgages ⇐369(3)

Inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a sale legally made under deed of trust.

7. Mortgages ⇐8

An ordinary trust deed is little more than a mortgage with power to convey.

8. Mortgages ⇐209

A trustee under a deed of trust does not assume the important obligations which are, in some instances, cast upon other trustees by operation of law.

9. Mortgages ⇐209

Trustee under trust deed is not a trustee in the strict sense of the word, and his role is more nearly that of common agent of parties to instrument.

10. Mortgages ⇐354

Trustee was not, merely by virtue of its position, under duty to give purchaser special notice of sale under trust deed.

11. Appeal and Error ⇐419(1)

Quoted portion of notice of appeal, from judgment refusing to declare sale under trust deed void and "from the orders after judgment," was wholly ineffective for failure to identify any "specified" order, as required by Rule. West's Ann.Rules on Appeal, rule 1(a).

12. Appeal and Error ⇐82(1)

Order denying motion amounting to nothing more than request that trial court reconsider its original action, in suit to have sale under deed of trust declared invalid, was non-appealable.

Morris Lavine, Los Angeles, for appellant Lancaster Security Inv. Corp.

Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., George R. Pfeiffer, Los Angeles, for respondents, Howard M. Kessler and Title Ins. & Trust Co.

John J. Guerin, Los Angeles, for respondent, Howard M. Kessler.

HERNDON, Justice.

The sole issue presented by this appeal concerns the validity of a foreclosure sale conducted by the trustee under the power of sale contained in a deed of trust. The judgment under review was rendered after a ruling which sustained defendants' objection to the introduction of any evidence. Therefore, we are called upon to decide the purely legal question whether the com-

plaint stated a cause of action, that is to say, whether the facts alleged afforded any legal ground upon which to hold the trustee's sale invalid. Accordingly, the facts will be stated largely in the language of the complaint.

The deed of trust in question, which is conventional in form, was executed on January 19, 1950, by Mr. and Mrs. Eilers, plaintiff's predecessors in interest, to secure their obligation to repay a loan made by defendant State Mutual Building and Loan Association. The parties to the instrument were: (1) the Eilers as borrowers and "trustors", (2) defendant State Mutual as lender and "beneficiary", and (3) defendant Title Insurance and Trust Company as "trustee."

On April 27, 1953, appellant (plaintiff below) purchased the encumbered real property from the trustors and assumed the obligation secured by the trust deed. According to the complaint, State Mutual "was notified that said property was transferred to plaintiff and that plaintiff assumed the payment of the obligation under said deed of trust, and was further notified that plaintiff's address was Box 987, Lancaster, California."

Thereafter, a default occurred whereupon State Mutual executed a declaration of default and election to sell. Pursuant thereto the trustee proceeded to exercise the power of sale. At the trustee's sale held on April 18, 1956, defendant Kessler purchased the property for $3,000. It is alleged that on the date of sale "there was due and unpaid under said deed of trust * * * a sum less than $2,000" and that "the reasonable value of said * * * property is between $50,000 and $60,000." Apart from allegations concerning plaintiff's offers fully to reimburse the purchaser and to pay any and all additional sums that might be deemed equitable, the following is the only other consequential allegation of fact to be found in the complaint: "That neither the plaintiff, nor any of its officers, received notice of the trustee's sale." The prayer of the complaint sought a judgment declaring the trustee's sale to be null and void and quieting appellant's title.

It is recited in the judgment that "counsel for plaintiff having stated no additional facts could be alleged in an amended pleading" defendants' objection to the introduction of any evidence was sustained.

Appellant's major contention appears to be that since the original trustors were entitled to have notice of sale mailed to them at their address as given in the trust deed, and since the beneficiary had been notified of appellant's acquisition of the property, and of appellant's address, appellant, as successor in interest to the original trustors, was entitled "to specific notice under section 2924b of the Civil Code."

[1, 2] This contention is untenable. The only requirements of notice of sale essential to the validity of a sale under a power contained in a deed of trust are those expressly and specifically prescribed by the terms of the instrument and by the provisions of the applicable statutes. Ley v. Babcock, 118 Cal.App. 525, 528–529, 5 P.2d 620; Billings v. Farm Development Co., 74 Cal.App. 254, 264, 240 P. 298; Meyer v. Zuber, 92 Cal.App. 767, 772–773, 268 P. 954; Sargent v. Shumaker, 193 Cal. 122–130, 223 P. 464.

As stated in 34 Cal.Jur.2d, § 454, p. 128: "Not less than 3 months after notice of default is given, the trustee, mortgagee, or beneficiary must give notice of sale, stating the time and place thereof in the manner required for sales of real property on execution. A notice that does not meet the statutory requirements is invalid. *But no additional notice need be given. Except where he formally requests notice, the fact that the debtor is not personally notified is immaterial, so long as there is compliance with the conditions prescribed in the statute.*" (Emphasis added.)

The same contention as that made by appellant here was rejected in Ley v. Babcock, supra, 118 Cal.App. 525, 528, 5 P.2d 620, 622, in the following language: "The trial court found that notice was given in

full compliance with the terms of the deed of trust and with the provisions of section 692, of the Code of Civil Procedure. It was *not at any time necessary that personal notice be served upon the appellants;* it is sufficient if the statute and the terms of the trust deed are followed. Witter v. Bank of Milpitas, 204 Cal. 570, 573, 269 P. 614, and cases cited." (Emphasis added.)

Section 2924 of the Civil Code provides that after other specified procedural steps have been taken in the exercise of a power of sale, the trustee "shall given notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution." Section 692 of the Code of Civil Procedure specifically prescribes the notice which must be given before the sale of property under execution or under a power contained in a deed of trust. The deed of trust involved in the present case contains the request of the trustors that a copy of any notice of default and a copy of any notice of sale be mailed to them at their given address as provided for in Civil Code, section 2924b. The latter section contains provisions whereby any person desiring a copy of any notice of default and of any notice of sale under a trust deed may file with the County Recorder a request therefor containing certain data as prescribed by the statute.

Appellant expressly concedes that it filed no request for notice under the provisions of section 2924b. The instrument here involved contains no other provisions for notice which would add to the requirements of the statutes. Appellant did not allege, nor does appellant assert on this appeal that it could allege, that there was any failure to give any notice required by the applicable statutes.

[3, 4] Appellant's opening brief betrays a gross misunderstanding of the procedural provisions for the foreclosure of trust deeds by exercise of the power of sale. After calling attention to the fact that the trustee's deed (attached as an exhibit to the complaint) recited publication of the *notice of sale* once a week during a period of *twenty days,* appellant quotes a portion of section 2924b requiring (under conditions not present here) publication of the *notice of default* once a week for at least *four weeks.* Appellant thereupon draws the obviously false conclusion that the publication of the notice of sale once a week during a period of twenty days was inadequate. The plain language of section 692 of the Code of Civil Procedure is a clear refutation. Furthermore, there was no occasion for any publication of the notice of default in this case because the address of the trustors was set forth in the deed of trust and their request for a copy of the notice was contained therein.

[5] Equally unsound is the contention that the "due process" clauses of the State and Federal Constitutions entitled appellant to special or personal notice of the trustee's sale. In Scott v. Paisley, 271 U.S. 632, 46 S.Ct. 591, 70 L.Ed. 1123, the appealing plaintiff challenged the validity of a Georgia statute providing for summary enforcement of an instrument in the nature of a trust deed, but known in Georgia as a "security deed." Plaintiff in that case, like the appellant here, was successor in interest to the grantor under the security deed. The United States Supreme Court rejected plaintiff's contention that the statute providing for a foreclosure of the plaintiff's interest in the land through a proceeding to which she was not a party, and without notice, was in conflict with the due process and equal protection clauses of the Fourteenth Amendment. The following excerpts from the opinion appear to be particularly pertinent (271 U.S. at pages 635 and 636, 46 S.Ct. at page 592):

"In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice

is not given. * * * So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And section 6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws."

The United States Court of Appeals for the Ninth Circuit has specifically held that the provisions of section 2924 of our Civil Code are not in conflict with the due process clause of the Federal Constitution. Davidow v. Lachman Bros. Inv. Co., 9 Cir., 76 F.2d 186, 188; Curti v. Pacific Mortgage Guaranty Co., 9 Cir., 87 F.2d 42, 43. Appellant has cited no decision, state or federal, which tends to support its position in this regard.

Appellant further contends that under the facts here alleged, it would be violative of the due process clause of the Fourteenth Amendment to apply the rule that all facts recited in the trustee's deed affecting the regularity of the sale are conclusivly presumed to be true. This rule has been applied in a legion of California cases. It is sufficient to cite Central Nat. Bank of Oakland v. Bell, 5 Cal.2d 324, 326, 54 P.2d 1107; Cobb v. California Bank, 6 Cal.2d 389, 390, 57 P.2d 924; Karrell v. First Thrift of Los Angeles, 104 Cal.App.2d 536, 539, 232 P.2d 1; Abrahamer v. Parks, 141 Cal.App.2d 82, 84, 296 P.2d 341.

However, the short answer to this contention is that it is not necessary to invoke any conclusive presumption in order to sustain the present judgment. Appellant has not alleged the existence of any fact which indicates the slightest irregularity in the sale at which defendant Kessler was the purchaser. There is no allegation that Kessler had any relationship to the transaction other than that of being a purchaser. There is no allegation of any fact which would place Kessler in any position other than that of a bona fide purchaser for value without notice. Karrell v. First Thrift of Los Angeles, supra, 104 Cal.App. 2d 536, 539, 232 P.2d 1.

[6] Appellant's allegations to the effect that there was great disparity between the value of the property and the amount for which it was sold are unavailing. It has been held repeatedly that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a sale legally made. Sargent v. Shumaker, supra, 193 Cal. 122, 129, 223 P. 464; Bank of America etc. v. Century, etc., Co., 19 Cal. App.2d 194, 196, 65 P.2d 109; Crofoot v. Tarman, 147 Cal.App.2d 443, 446, 447, 305 P.2d 56, 59. It can be stated positively that in this case, as in the case last cited, "there is nothing in the record to the effect that anything done or left undone by the trustee prevented the public from attending at the sale or in anywise discouraged bidding."

[7–10] Finally, appellant contends that the defendant Title Insurance and Trust Company, trustee under the trust deed, had notice of appellant's interest in the property securing the debt. Appellant argues that the trustee was under a duty to give notice of the sale to the appellant on the basis of the trustee's relationship with appellant's predecessors in interest under general principles of trust law. The argument misconceives the legal incidents of a trust deed. An ordinary trust deed is little more than a mortgage with power to convey. Bank of Italy etc. Ass'n v. Bentley, 217 Cal. 644, 654, 20 P.2d 940. "A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law." Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510, 163 P. 898, 900, and cases cited. The trustee of a trust deed is not a trustee in the strict sense of the word. The role of such a trustee is more nearly that of a common agent of the parties to the instrument. Pacific States Savings & Loan Co. v. North American etc. Co., 37

Cal.App.2d 307, 310, 99 P.2d 355. Merely by virtue of its position as trustee, defendant was under no duty to give appellant special notice of the sale.

[11, 12] Appellant's notice of appeal indicates that the appeal is taken from the judgment and "from the orders after judgment." The quoted portion of the notice of appeal is wholly ineffective for at least two reasons: (1) It does not identify any "specified" order as required by Rule 1(a) of the Rules on Appeal. Colden v. Broadway State Bank, 11 Cal.App.2d 428, 53 P.2d 983. (2) The only order after judgment contained in the record on appeal is a minute order dated March 1, 1957, which recites that plaintiff's motion for a new trial was abandoned and which denies a motion to set aside the judgment. The motion to set aside the judgment recites that it was made "on the ground that the Court in its judgment made a mistake of fact in stating that there were no additional facts that could be alleged in an amended pleading, and upon the further ground that the court erred in holding that the complaint failed to state a cause of action and in sustaining an objection to the introduction of any evidence." Said motion further recites that it would be based upon the records and files and upon the affidavit of one of plaintiff's attorneys. The record before us does not contain either the affidavit or any other evidentiary matter offered in support of this motion, which, apparently, amounted to nothing more than a request that the trial court reconsider its original action. The order denying it therefore is non-appealable. McKenna v. Elliott & Horne Co., 118 Cal. App.2d 551, 258 P.2d 528.

The judgment is affirmed and the purported appeal from the "orders after judgment" is dismissed.

FOX, P. J., concurs.

ASHBURN, J., being disqualified, did not participate therein.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

159 Cal.App.2d 708

James E. JONES, Jr., Duane Andrews, George L. Deck, J. F. Durr, Roger Esteves, Edward R. Johnson, Lee E. Knox, Ira Dean Phillips, Harry E. Solen, Lee O. Tore, III, W. C. Trowbridge, Theodora Van Laghen, Burt W. Viesselman, John S. Watson, individually and as electors of the Seventh Assembly District of the State of California, and as members of and comprising a majority of the Democratic Central Committee of Sonoma County, California, Plaintiffs and Appellants,

v.

Richard H. McCOLLISTER, Carl Youngberg, et al., Defendants and Respondents.

Civ. 17718.

District Court of Appeal, First District, Division 2, California.

April 28, 1958.

Rehearing May 28, 1958.

Hearing Denied June 25, 1958.

Action to restrain use of certain advertising material by candidate for election to office. The Superior Court, County of Marin, Jordan L. Martinelli, J., sustained general demurrer to complaint, and plaintiffs appealed from the judgment. The District Court of Appeal, Draper, J., held that under the California system of elections there is no requirement that candidate's advertising material specify the party with which the candidate is affiliated.

Affirmed.

1. Appeal and Error ⇐781(4)

In action, instituted after primary election and before general election of 1956, to restrain use of certain advertising material by assemblyman seeking re-election, appeal would not be dismissed as moot even though the general election of 1956 had passed, where complaint further alleged that assemblyman had been in office for many years and had used similar advertising in previous campaigns and would use such advertising in primary and general elections of 1958.

2. Elections ⇐228

Under the California system of elections, there is no requirement that candi-

date's advertising material specify the party with which candidate is affiliated. West's Ann.Const. art. 2, § 2½; West's Ann.Elections Code, §§ 41, 2541, 2742, 2828, 2893, 3814, 3928.1, 5005, 5005.5, 5301, 5302.

3. Elections ⇐126(4)

A candidate registered in one party may seek the nomination of all parties at the primary.

4. Elections ⇐18, 21

The constitution, in removing from political parties the right to determine the test and conditions upon which electors, political parties, or organizations of electors may participate in state elections, has vested that power in the legislature and not in the judiciary. West's Ann.Const. art. 2, § 2½.

Samuel W. Gardiner, Thomas P. Boyd, San Rafael, Harold A. Galloway, James E. Jones, Jr., Lee V. Holman, San Francisco, Leonard A. Thomas, Joseph G. Wilson, San Rafael, for appellants.

Robert P. Brorby, Oakland, for amicus curiae in support of appellants.

John G. Buresh, San Rafael, for respondent McCollister.

Elliot W. Seymour, San Francisco, for respondent Youngberg.

DRAPER, Justice.

General demurrer to plaintiffs' complaint for injunction was sustained and leave to amend was granted. Plaintiffs filed their written "Election to Stand upon Complaint." Judgment was thereupon entered in favor of defendants, and plaintiffs appeal.

The complaint was filed eleven days before the general election of 1956. It alleges that shortly before the June primary election defendants had mailed postcards and published newspaper advertisements in support of the candidacy of defendant McCollister for assemblyman from the Seventh Assembly District, consisting of the counties of Sonoma and Marin (Gov.Code, § 491). Card and advertisement were headed "Fellow Democrats:", urged support for McCollister, stated, in part: "Dick McCollister is fully endorsed and recommended by labor, welfare, pension, farm, and other democratic groups. We should re-elect him.", and were signed by "Marin-Sonoma Democratic Committee for McCollister." The advertisement also bore, immediately below the name of the committee, the words "Carl Youngberg, Chairman." Plaintiffs allege that they constitute a majority of the members of the Democratic Central Committee of Sonoma County; that defendant McCollister is and for 20 years has been a registered Republican; and (upon information and belief) that "one Loyal Skillman" won the Democratic nomination for assemblyman at the 1956 primary election. There are no specific allegations as to defendant Youngberg, and his party affiliation does not appear.

[1] It is then alleged, upon information and belief, that the postcard and advertisement "inevitably and naturally tended to and were intended by defendants to persuade or convince" registered Democrats that "McCollister was then a registered Democrat," was a "fellow Democrat," was "endorsed by and was the official candidate of the Democratic Party," and was endorsed for the office of assemblyman "by the official Democratic County Central Committee" of Marin County or of Sonoma County; none of which is true. It is asserted that, unless restrained, defendants will again mail and publish the same or similar postcard and advertisement before the general election of November 6, 1956. If no more were alleged, the issues would be moot, and the appeal would be dismissed, as was done in the companion case of Morgan v. McCollister, No. 17417, filed by residents of Marin County. Here, however, plaintiffs have further alleged that McCollister has been a registered Republican and the elected assemblyman for many years; that he has used similar advertising in previous campaigns; that in the primary and general election of 1958 he will use postcards and advertisements substantially

similar to those here complained of; and that the representations of such advertising will continue to be false in 1958. The prayer is that defendants be restrained from using such advertising material.

[2] Plaintiffs do not allege unauthorized use of the name of a county central committee. Obviously "Marin-Sonoma Democratic Committee for McCollister" is not the title of the Democratic County Central Committee of Marin County or of the like committee of Sonoma County. Nor is there any allegation that the advertised committee is non-existent, or that its members are not Democrats. The essence of the complaint is that defendants threaten to advertise that a committee of Democrats supports a Republican, and to do so under circumstances which will mislead the voter as to the party affiliation of the candidate. Plaintiffs' brief asserts that "There is no way in which the word 'Democratic' and the word 'committee' can be used in any combination which is legitimate and which in this situation will convey the truth to the average registered voter." This statement is palpably inaccurate. The title "Democratic Committee for Republican McCollister" clearly would be both legitimate and truthful. It is apparent that the real basis of complaint is that the advertising fails to specify the party with which defendant candidate is affiliated. But appellants point to no authority requiring such identification.

A brief review of the development of the election system of California will aid in understanding the scope, purpose and extent of the present election laws of this state. At the time of the constitutional convention of 1879, as when our first Constitution was adopted in 1849, a candidate's name could be placed on the ballot only if he was nominated by a political party meeting in convention. For many years, the Legislature exercised but little authority in this field, and the selection of delegates to, and the conduct of, the nominating conventions were usually left to party organizations. In 1897 (Stats.1897, p. 115) the Legislature provided for nomination by petition of electors. This legislation was held unconstitutional. Spier v. Baker, 120 Cal. 370, 52 P. 659, 41 L.R.A. 196. A further legislative effort to modify and control the machinery of elections (Stats.1899, p. 47) was also held unconstitutional. Britton v. Board of Election Com'rs, 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115. To remove these constitutional restrictions, and to give the Legislature a free hand in dealing with the evils which had been prevalent in primary elections, the Constitution was amended in 1900 by adding Section 2½ to Article II. This section was amended in 1908 to provide that "the Legislature shall enact laws providing for the direct nomination of candidates * * * without conventions." Under this provision, the Legislature adopted the Primary Election Law of 1909 (Stats. 1909, p. 691). The constitutionality of this statute was sustained (Socialist Party v. Uhl, 155 Cal. 776, 103 P. 181) and the nomination of candidates directly by the voters became a reality in California (for the foregoing review, see 17 Cal.Jur.2d 310, 311, and cases there collected). The primary election law of 1913 (Stats.1913, pp. 1379, 1389) specifically provided that a person could "become the candidate of more than one political party for the same office." This provision was held constitutional. Hart v. Jordan, 168 Cal. 321, 143 P. 537. Although this provision was not retained when the Elections Code was adopted, it remains the rule. Shaffer v. Jordan, 9 Cir., 213 F.2d 393.

The Constitution (Art. II, sec. 2½) expressly authorizes the Legislature to determine the "tests and conditions upon which electors, political parties, or organizations of electors" may participate in primary elections (see also Hart v. Jordan, supra). "[T]he question as to what provisions are essential to attain the objects contemplated by section 2½, article II, * * * is one peculiarly within the domain of the legislative department * * *." Heney v. Jordan, 179 Cal. 24, 27, 175 P. 402, 404.

Thus it is highly significant that no statute prohibits the acts here sought to be enjoined. The Legislature has indicated an awareness of the problems arising in the

conduct of campaigns, and has occupied the field to an extent sufficient to indicate, particularly in the light of the broad constitutional grant of legislative power, that it would be judicial legislation for us to extend the controls set forth in the code.

Elections Code, section 5005, which has long been in force and which was amended and strengthened by 1957 amendment, makes it a misdemeanor to write or cause to be written, printed, posted or distributed any circular designed to injure any candidate for public office by reflecting upon his personal character or political action, without publication of the names and addresses of those responsible for the publication. Section 5005.5 provides that any circular in violation of the section shall be conclusively presumed not to be privileged in a libel action. Section 5301 requires that any person using the name of a political party in soliciting funds must have the written consent of specified officers of that party, and section 5302 makes a violation of the preceding section a misdemeanor. Finally, as to the office here in issue, the Assembly is the sole and exclusive judge of the "qualifications, elections, and returns of its members." Cal.Const., Art. IV, sec. 7; In re McGee, 36 Cal.2d 592, 226 P.2d 1. Thus it has power ultimately to determine the propriety of such campaign procedures as those here in question.

[3] The California statutes do not prohibit formation of a committee of members of one party to further the candidacy of a member of another party. In our system of elections, such a prohibition would be anomalous. A candidate registered in one party may seek the nomination of all parties at the primary. If he fails to secure the nomination of his own party, he cannot be the candidate of any party at the general election (Elec.Code, §§ 2742, 2893), but his right to seek the nomination of a party other than his own clearly implies the right to campaign among the members of such opposite party. At the general election it is common practice, consistent with the voters' freedom of choice, for each candidate to appeal for the votes of members of all parties. Until the Legislature amended the statute (Elec.Code, § 2828) in 1951, a member of a county central committee could not be removed from that committee because he advocated the nomination of a member of an opposing party (7 Op.Atty.Gen. 347).

The possibility of confusion as to party affiliation of candidates for partisan office has been recognized and guarded against. The party affiliation of each candidate is printed upon the ballot itself in the primary election. Elec.Code, § 3928.1. At the general election, the party affiliation of each candidate is similarly shown on the ballot and, if he has been nominated by more than one party, the name of the party with which he is affiliated is the first shown. Elec. Code, § 3814. Thus the voter sees, upon the very ballot upon which he marks his vote, as well as upon the sample ballot mailed to him before election day, the true party affiliation of the candidate. This appears a substantial safeguard against confusion or deception of the sort which plaintiffs claim is intended by the defendants here. In view of this recognition of the problem, significance must be attached to the absence of any requirement that party affiliation must be stated in campaign advertising.

[4] In any event, the Legislature has not sought to impose upon the courts the labyrinthine task of supervising the conduct of individual election campaigns, and, in the absence of clear allegations of facts convincingly showing fraudulent misrepresentation, we see no reason to arrogate to the judiciary a task so fraught with the danger of infringement upon the rights of the electorate and its free exercise of the right to choose for itself. Judicial office in this state is officially (Elec.Code, §§ 41, 2541) and traditionally nonpartisan. Yet to establish the precedent here sought would require the courts to assume an active role in the supervision and regulation of party campaigns, to an extent limited only by the ingenuity of candidates and their supporters. The Constitution, in removing from political parties the right to determine the "tests and conditions upon which electors,

political parties, or organizations of electors" may participate in state elections, has vested that power in the Legislature, and not in the judiciary.

The California decisions cited by plaintiffs concededly do not directly support grant of the relief here sought. The dicta quoted from them are not helpful. The New York cases relied upon by plaintiffs not only arise under wholly different statutes than those of California, but are premised upon a system in which political parties play a major role in determining the tests and conditions upon which electors and groups of electors may participate.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.



160 Cal.App.2d 167

Raymond Francis JACKSON, Plaintiff and Appellant,

v.

George H. BARNETT, doing business as Superior Tire Company, Defendant and Respondent.

Civ. 5667.

District Court of Appeal, Fourth District, California.

May 6, 1958.

Rehearing Denied May 26, 1958.

Hearing Denied July 2, 1958.

Action for injuries sustained by plaintiff, who, while serving himself in defendant's store, fell from balcony from which he was dropping merchandise to floor below. The Superior Court, Kern County, Gordon L. Howden, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that defendant should not have remarked to jurors, on occasion when judge and counsel left courtroom to discuss matter in chambers, "I guess they want to talk about something they don't want us to hear", but held that trial court had been justified in overruling new trial motion because objection to misconduct first made at that time came too late.

Affirmed.

1. New Trial ⇐31
Trial ⇐305

Defendant should not have remarked to jurors, on occasion when judge and counsel left courtroom to discuss matter in chambers, "I guess they want to talk about something they don't want us to hear"; but trial court was justified in overruling new trial motion because objection to misconduct first made at that time came too late.

2. Negligence ⇐136(25, 26), 141(1)

In action for injuries sustained by plaintiff, who, while serving himself in defendant's store, fell from balcony from which he was dropping merchandise to floor below, evidence raised fact questions, with regard to whether construction and maintenance of balcony railing had constituted negligence proximately causing plaintiff's injuries and as to whether plaintiff had been contributorily negligent in leaning over railing to drop merchandise to floor below, and it was not error to instruct on subject of contributory negligence.

3. Appeal and Error ⇐1067

In action for injuries sustained by plaintiff, who, while serving himself in defendant's store, fell from balcony from which he was dropping merchandise to floor below, it was not, on record presented, prejudicial error to refuse to give requested instruction on civil procedure code subdivision requiring weaker evidence to be viewed with distrust where it was within power of party to produce stronger evidence, notwithstanding defendant's failure to produce balcony railing at trial. West's Ann.Code Civ.Proc. § 2061, subd. 7.

4. Appeal and Error ⇐1067

In action for injuries sustained by plaintiff, who, while serving himself in

defendant's store, fell from balcony from which he was dropping merchandise to floor below, no prejudicial error resulted from court's refusal to give proffered instruction, on doctrine of res ipsa loquitur, in form offered.

Thomas H. Werdel, Conron, Heard & James, Bakersfield, for appellant.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff-appellant brought this action for damages for personal injuries suffered in a fall from the balcony in defendant-respondent's store. It resulted in a judgment for defendant.

Defendant, a distributor for Goodyear tires, engaged a licensed general contractor to construct a store building for him in 1945. An interior balcony, about 12 ft. high, extended across the south portion. A stairway to it, equipped with handrails, was located on the west side of it. The north side of the balcony was open to the remainder of the shop. A 2 x 3 inch wooden railing, about 32 inches in height, crossed it. It was supported by 2 x 3 inch wooden posts set 6 to 8 feet on centers. At the bottom was located a 1 x 6 inch toe board on edge. This balcony was used to store tires, tubes, etc. Plaintiff had been an employee of defendant in this store for about two years and had on many occasions used said stairway and balcony. He later went into a business for himself. He retained a key and was allowed access to defendant's store thereafter and waited upon himself. On March 17th he came to defendant's store to pick up several boxes of tubes packed in cardboard boxes about 24 x 14 x 14 inches, weighing about 20 pounds. He climbed the stairs to the balcony, selected the boxes and decided to drop them over the balcony to the floor below, as he had on many occasions, rather than make unnecessary trips up and down the stairs, it being more convenient. Apparently there was a passageway underneath the balcony. On this occasion he picked up the boxes of tubes, packed them with both hands in front of him and walked to the railing. He said he stopped still a few inches from the toe plate; that he was standing flatfooted and not leaning against the railing; that when he reached the edge of the balcony it was necessary for him to look over and under the balcony floor to see if it was safe to drop the boxes; that he bent from the hips to see and that at first he thought he saw the flash of a white shirt; that while holding the boxes and leaning he lost his balance and fell to the bottom floor, inflicting injuries to his upper body; and that he had no recollection of touching the rail before he fell. He said that as he lay on the floor looking up he saw a portion of the railing extending about 4 feet into space, and the nails had been bent outward; that someone took a tire iron and nailed the balcony railing back together.

A city building inspector who examined the premises about six months thereafter testified the railing was 30 inches high and supported by 2 x 3 inch posts with 6 to 8 feet centers, but they were not sufficient to support a 20-pound live load per lineal foot; and that such railing did not comply with the requirements of section 3502 of the Uniform Building Code of the City of Bakersfield in force at the time of the accident. It reads in part:

> *"Exterior balconies attached to or supported by masonry shall have brackets or beams constructed of incombustible material.* Railings for balconies or porches shall not be less than three feet (3') in height above the floor of such balcony or porch.
>
> *"Porches and exterior balconies may be constructed of the materials allowed for the building to which they are attached, but structural steel or iron members need not be fire protected* * * *
>
> "All balcony railings shall be designed to withstand a horizontal force

of 20 pounds per lineal foot, applied at the top of the railing. * * *"

In giving the instructions to the jury the court struck out the portions italicized. It is the contention of defendant that the balcony railing referred to in said code, by its terms, applied only to exterior and not to interior balconies. The inspector was of the opinion it applied to both. An order of the Division of Industrial Safety of the State, in force at the time of the construction of the building and at the time of the accident in question was received in evidence. It provided in part:

(a) A standard railing shall consist of a top rail, mid-rail and posts having a vertical height of not less than 42 inches nor more than 45 inches from the upper surface of the top rail to floor * * *"

The court instructed the jury that if the defendant violated any of the provisions of the ordinance or orders above mentioned, a presumption of negligence arose, but a violation of law was of no consequence unless it was a proximate cause of the injuries.

Plaintiff now claims on appeal (1 & 2) Irregularity of the proceedings because, after objection made to a question propounded to the building inspector as to what, if any, changes were made after the accident, the judge left the courtroom with the jury present, to discuss in chambers the objection made. Respective counsel, the reporter and clerk followed. Defendant Barnett remained on the witness stand and apparently made some remark in front of or to the jury to the effect that "I guess they want to talk about something they don't want us to hear", and the jury laughed. Plaintiff claims this constituted fraternizing with the jury, was misconduct on the part of defendant, and it prejudiced plaintiff's case, citing such authority as O'Callaghan v. Bode, 84 Cal. 489, 24 P. 269; Caesar v. Wegner, 262 Wis. 429, 55 N.W.2d 371; Bramble v. McEwan, 40 Cal. App.2d 400, 104 P.2d 1054, and 36 Cal.Jur. 2d p. 193, sec. 43. This claimed error, however, was not called to the attention of the court or parties until after the return of a verdict and on a motion for new trial. Affidavits and counteraffidavits were filed. The foreman of the jury recalled the comment but said it was not mentioned in the jury deliberations, did not have any effect on his findings, and so far as he knew, on the other jurors' findings. Defendant admitted making the statement in complete ignorance, and said it was with no intent of influencing the jury or entertaining or fraternizing with any juror, and claims there was no laughter after the remark was made. After a full hearing the motion for a new trial was denied.

Defendant claims that the trial judge was aware of the fact that the temporary court occupied by him is a tin structure pending the completion of a new courthouse after damage by earthquake; that it is impossible, because of the acoustics, to hold any private conference at the bench, and accordingly it has been the custom for the judge to retire from the bench to his chambers and hear arguments of counsel; that the facts related were known to plaintiff's wife at the time and no objection was made as to this procedure or happening until after the return of the verdict when she filed her affidavit so indicating. This procedure, without duly admonishing the jury during such recess, has been criticized and has been held to be prejudicial error, under certain circumstances, if timely and proper objection is made. No objection was made when the judge retired to his chambers with counsel without admonishing the jury. Apparently plaintiff's counsel knew of, participated in, and consented to this procedure at the time. He should not for the first time, after awaiting the outcome of the case, on a motion for new trial, raise said question. See Gotsch v. Market Street Railway, 89 Cal.App. 477, 265 P. 268, and Shain v. Peterson, 99 Cal. 486, 33 P. 1085, where the trial of an action was irregular and it appeared on appeal that the appellant was as much responsible therefor as the respondent. The court there held that the judgment would

not be reversed because of objections to mere matters of procedure which were urged for the first time on appeal.

[1] Although the remark should not have been made, it was probably true. It affirmatively appears that the jurors did not participate in such conversation or consider it as having any effect upon them. Just why plaintiff did not raise the question before the verdict was reached so the court could properly dispose of it is not indicated. Plaintiff's wife is the one who noticed the irregularity at the time and no action was taken by plaintiff or his counsel in respect to this irregularity. The trial court was justified in denying the motion on this ground. People v. Quiel, 68 Cal.App.2d 674, 157 P.2d 446; People v. Murphy, 92 Cal.App. 729, 268 P. 927; People v. Lawler, 79 Cal.App. 207, 249 P. 18; People v. Brannigan, 21 Cal. 337; Saltzman v. Sunset Telephone & Telegraph Co., 125 Cal. 501, 58 P. 169.

Claims numbers 3 and 4 are that the undisputed evidence shows that plaintiff's injuries were due to defendant's negligence; that there was no evidence which would support a finding of contributory negligence on plaintiff's part; and that it was error to give an instruction on that subject.

[2] There is evidence respecting defendant's possible negligence in the construction and maintenance of the balcony railing. It was a question of fact for the jury to determine whether this claimed negligence was the proximate cause of plaintiff's injuries. There is also evidence that plaintiff previously worked in these premises, made many trips up the stairs to the balcony, and knew the condition of the railing. Whether plaintiff's election to attempt to lean over the railing and drop the tubes to the floor below, as indicated, instead of walking down the stairs provided may have constituted negligence on his part, it was, at least, a factual question for the jury. The evidence as to the method of dropping packages from the balcony being followed by the management, was disputed. The evidence would authorize a finding that the railing did not give way in the first instance but plaintiff's fall was due to the fact that he lost his balance because of the weight of the tubes, and fell over and onto the railing, causing it to break. The evidence would fully support a finding of contributory negligence and authorize an instruction on the subject.

[3] Complaint is made because the court refused plaintiff's proffered instruction given in reference to the presumption under section 2061, subdivision 7 of the Code of Civil Procedure. The argument is that defendant failed to produce the railing at the trial and to have certain persons present who may have been able to explain the accident. We see no merit to this argument. The dimensions and condition of the railing were fully covered by the testimony. There is no showing that any person knew more about the facts than plaintiff himself. He fully related them. Both plaintiff and defendant produced at the trial the strongest evidence available to them. There was no showing of suppression of any material evidence. No prejudicial error resulted in failing to give the proffered instruction. Holland v. Kerr, 116 Cal.App.2d 31, 37, 253 P.2d 88; In re Estate of Moore, 180 Cal. 570, 585, 182 P. 285; Rivera v. Goodenough, 71 Cal.App.2d 223, 234, 162 P.2d 498.

[4] The last claim is that the court erred in refusing plaintiff's proffered instruction on the doctrine of res ipsa loquitur in the general language of BAJI No. 206–B and 206–C, with some modifications. He cites such authority as Biondini v. Amship Corporation, 81 Cal.App.2d 751, 767, 185 P.2d 94; Baker v. B. F. Goodrich Company, 115 Cal.App.2d 221, 223, 252 P.2d 24, and New York Life Insurance Company v. Seighman, 6 Cir., 140 F.2d 930.

The authorities cited are factually dissimilar to the instant case. Here, it appears that plaintiff had used this balcony and was as familiar with the size, condition, height and appearance of the railing as was defendant. He knew more about

the cause of the accident and fully testified as to it. The condition of the railing was established by the evidence. No prejudicial error resulted from the court's refusal to give the proffered instruction in the form offered. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 442, 247 P.2d 344; Hendershott v. Macy's, 158 Cal.App.2d 324, 322 P.2d 596; Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 323 P.2d 391; Phillips v. Noble, 50 Cal.2d 163, 323 P.2d 385.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



160 Cal.App.2d 81

In the Matter of the ESTATE of C. E. HOUCHIN, also known as C. Elmer Houchin, also known as Clarence Elmer Houchin, Deceased.

Lester H. HOUCHIN, Okey W. Houchin, Sr., Ruby H. Godbey, Norma Johnson, and Verbie Burns, Objectors and Appellants,

v.

Kathryn HOUCHIN, Petitioner and Respondent.

Civ. 5655.

District Court of Appeal, Fourth District, California.

May 2, 1958.

Rehearing Denied May 26, 1958.

Hearing Denied June 25, 1958.

Proceedings in the matter of a decedent's estate. The Superior Court, Kern County, Gordon L. Howden, J., entered an order for continuance of family allowance, and an appeal was taken. The District Court of Appeal, Barnard, P. J., held that where application for continuance of family allowance was for a time not covered in previous modifications but within terms of original order which, in effect, provided for payment of allowance until estate was settled, unless court should order it terminated at an earlier date, application did not reopen all questions and issues which had been covered in previous final orders and objectors were not entitled to same full hearing as would have been required in connection with an original application for family allowance.

Affirmed.

1. Executors and Administrators ⇐196

Where application for continuance of family allowance was for a time not covered in previous modifications but within terms of original order which, in effect, provided for payment of allowance until estate was settled, unless court should order it terminated at an earlier date, application did not reopen all questions and issues which had been covered in previous final orders, and objectors were not entitled to same full hearing as would have been required in connection with an original application for family allowance. West's Ann.Prob.Code, §§ 680, 681.

2. Executors and Administrators ⇐194(1)

Court has wide discretion in making an order for family allowance, including such matters as its necessity, its amount, and its duration. West's Ann.Prob.Code, §§ 680, 681.

3. Executors and Administrators ⇐187

Family allowance may be made without regard to fact that widow has separate property sufficient for her support. West's Ann.Prob.Code, §§ 680, 681.

Kimble, Thomas, Snell, Jamison & Russell, Fresno, Deadrich, Bates & Stewart, Bakersfield, Thomas Elke, Fresno, and Kenneth H. Bates, Bakersfield, for appellants.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order for continuance of family allowance. C. E. Houchin died on November 23, 1953, leaving a

will providing that one-half of his estate should be placed in a trust to be used for the benefit of his widow, the respondent herein, and that the other half be placed in another trust in which these appellants were the lifetime beneficiaries. The will stated that all the property in which the testator had any interest was community property; that the widow should elect whether to take under her community rights or under the will; and that "in any event she shall be entitled to a * * * family allowance out of my estate."

On December 1, 1953, the widow filed a petition for family allowance alleging that the value of the estate was unknown; that its income would greatly exceed $30,000 per annum; that $2,500 per month was reasonably required for her support and maintenance during the administration of the estate, considering the value of the estate and the manner in which she and her home were maintained during the lifetime of the decedent; and reserving the right to request an increase if it was later found that this amount was insufficient. An order was entered on December 2 granting the petition and ordering the payment of this sum monthly during the settlement of the estate or until the further order of the court. On December 21, the widow filed a petition to increase the allowance to $5,000 per month, alleging that the income of the estate would exceed $200,000 per year, and that she had ascertained that this increased amount was necessary. On December 22, an order was made granting this petition and ordering the monthly allowance increased to $5,000 for a period not to exceed twenty-four months. On March 29, 1954, the widow filed a second petition for an increase alleging, among other things, that the inventory had not yet been completed or filed, and that it had then been ascertained that it would require $7,500 per month to maintain her home in the manner provided by the decedent. An order was made on March 29 granting this petition and ordering the payment of $7,500 per month until the further order of the court, but not to exceed twenty-fourth months from the death of the decedent.

On November 16, 1955, the widow filed a petition for a continuance of family allowance alleging, among other things, that an inventory was filed on October 21, 1954, showing $8,906,196.40 as the appraised value of the estate; that a preliminary distribution of about $208,000 had been made to the trustees of the trusts created under the will; that $776,373.91 had been paid on account of federal estate taxes; that $307,500 had been paid on account of attorneys' and executors' fees; that all claims filed had been paid except for one of $450 which had been rejected, and except for the "Miller & Lux claims" aggregating $30,000,000; that a compromise and covenant not to sue further had been agreed upon, providing for the payment of $2,138,669.14 in cash and the transfer of properties appraised at $1,345,932.82 in full settlement and compromise of said claims; that after the payments already made and the payments to be made on the Miller & Lux claims the estate would have on hand on October 31 cash and other properties of the total appraised value of $1,566,278.90; that it was not then possible to close the estate as, aside from the final settlement of the Miller & Lux claims, a final settlement had not yet been reached with respect to the federal and state inheritance tax matters, in which one of the required audits had not yet been commenced; and that a continuance of the $7,500 per month for family allowance was reasonable and necessary in view of the condition of the estate and the widow's manner of living before and after the death of the decedent. An order was made on November 28, 1955, finding that all of the allegations of the petition are true, and that all notices required by law and all special notices had been given, and ordering the executors to continue to pay the $7,500 per month to the widow for a further period not exceeding twelve months after November 24, 1955.

On October 17, 1956, the widow filed a petition for a continuance of family allow-

ance alleging, among other things, that $776,373.91 on account of federal estate taxes and $128,186.49 on account of state inheritance taxes had been paid; that $307,500 had been paid on account of attorneys' and executors' fees; that all claims had been paid except one for $450, which had been rejected; that on September 30, 1956, the executors still had on hand $2,425,384.50 in cash and other properties appraised at $3,420,178.24, making a total estate on hand at that time of $5,845,526.74; and that it was not possible to close the estate at that time since the federal and state tax matters had not been concluded and the audit not yet completed. The petition also contained the usual allegations about the reasonableness and necessity of $7,500 per month as family allowance, and further alleged that during the preceding six months the widow had necessarily been required to employ separate counsel and attorneys to represent her on various controversial matters then pending and to become pending in the estate, including among other things a petition to determine heirship which had been partly litigated but was still pending. On October 26, 1956, these appellants filed objections to this petition alleging, among other things, that a proceeding was pending to determine heirship in which the widow claims to have elected to take under her rights apart from the will; that when that was determined the accumulated income of the estate would be subject to distribution; that $7,500 per month family allowance is in excess of the amount reasonably required for her support; that since the court's last order the circumstances of the estate have materially changed, due to the payments made and the transfer of assets authorized by the court in approving the settlement of the Miller & Lux claims; and that the widow had already received as family allowance more than was reasonably necessary for that purpose.

On February 1, 1957, the court entered an order granting this petition and ordering the payment of $7,500 per month continued for a period of twelve months "and until further order of the court thereafter". In this order, after reciting that the matter had been regularly heard with all parties represented by counsel, the court found that notice of the hearing had been given as required by law; that all of the allegations of the petition are true and are sustained by competent proof; that the contrary allegations contained in the objections filed are not true; that the estate was not ready to be closed and will not be so ready for a substantial period of time; that $7,500 a month is a reasonable allowance, is not excessive, and will not decrease the corpus of the estate or the trusts to the detriment of any beneficiary; that since its last order for continuance of family allowance the estate has increased in value in the amount of $1,783,508.31; that since April 1, 1956, the widow has been compelled to expend an average of $2,956 a month on fees of attorneys and accountants in defending her individual rights, and will be required to expend said amounts until November, 1957; and that there have been no operating losses to the estate since the last order was made.

In this appeal from that order the appellants contend that the court erred in rejecting evidence as to the assets and property owned by the widow, and in rejecting evidence as to the living expenses of the decedent and his widow during the year preceding his death; that the finding that $7,500 per month is necessary is not supported by any evidence, and the granting of such an allowance was an abuse of discretion; and that the doctrine of "res judicata" or "collateral estoppel" will not support the finding as to necessity or sustain the order made. Briefly stated, the contention is that they were entitled to the same full hearing, involving all elements, as would be required in connection with an original application for such a family allowance; and that the court could not rely upon any of the previous proceedings and orders for family allowance as supplying any of the required proof.

[1] Under section 680 of the Probate Code this widow was entitled to such reasonable allowance as was necessary for her

maintenance in accordance with her circumstances during the settlement of the estate. Section 681 provides that where such an allowance is granted before the inventory is filed it shall continue until modified by the court. The original order here made provided for the payment of the monthly allowance "during the progress of the settlement of said estate, or until the further order of this court." This order, in effect, provided for the payment of such an allowance until the estate was settled unless the court should order it terminated at an earlier date. No such order has yet been made in this estate. The subsequent orders, modifying the original order by changing the amount and limiting the time during which such modification was to operate, did not change the basic effect of the original order or prevent the court from later extending that time. In each instance a new modification was sought before the prior one had ceased to operate. The application which resulted in the order here appealed from was for another continuance for a time not covered in previous modifications, but which was within the terms of the original order. Under such circumstances this application cannot properly be said to have reopened all questions and issues which had been covered in previous final orders, although they would have been material in passing upon an original request for family allowance. The question as to the necessity for the amounts allowed by the previous orders had been settled, and this proceeding involved the question as to whether the continued payment of that amount for a further period was justified by the conditions then existing.

[2, 3] The court has a wide discretion in making an order for a family allowance, including such matters as its necessity, its amount and its duration. Such an allowance may be made without regard to the fact that the widow may have separate property sufficient for her support. In re Estate of Secord, 84 Cal.App.2d 783, 192 P.2d 81; In re Estate of Cesare, 130 Cal.App.2d 557, 279 P.2d 607. We find nothing in Re Estate of Silver, 92 Cal.App.2d 173, 206 P.2d 895, and In re Estate of Kennedy, 64 Cal.App.2d 757, 149 P.2d 319, relied on by the appellants, which would support the conclusion that reversible error here appears. The In re Estate of Silver involved a question as to whether the widow had invested certain funds she had already received from the estate and was getting income from those investments. That was the first application for an allowance and it was there held that such a fact was material and should be considered by the court in determining her needs. The In re Estate of Kennedy involved a new request for an allowance after a previous order had expired. It was there held that the facts justifying an order for an allowance limited to one year would not necessarily compel the court to extend the allowance for a longer period, and that no abuse of discretion there appeared. A somewhat different situation is involved in considering an application for the extension of the period of payment of such an allowance which is made before that period has expired, and especially where the original order provides for a payment until the estate is settled unless otherwise ordered by the court. It has been held that changed conditions may be considered and that this, with the fact that the estate is not ready to be closed, will furnish a good reason for allowing a further family allowance since the matter is one resting largely in the discretion of the trial court. In re Estate of Dow, 91 Cal.App.2d 420, 205 P.2d 698; In re Estate of Coffin, 16 Cal.App.2d 532, 61 P.2d 81.

It is undisputed that this widow is the only person entitled to a family allowance, and one of the attorneys for the appellants conceded at the hearing that if an order for a family allowance was to be made it should be more than $2,500 a month but that they felt that $7,500 was too much. While the appellants offered to prove that the assets of the widow had increased, no offer was made to prove that she had invested any funds she had received from the estate, or that she was receiving any income from that source. The record of the offer of evidence of her financial transactions subse-

quent to the death of decedent, for the purpose of showing that her net worth had increased, is not sufficient to furnish any indication that any such evidence was improperly rejected. The offer of evidence with respect to the previous living expenses of the decedent and his widow was limited to an offer to show certain records which would not have been conclusive, especially in the face of the final orders already made. While this evidence would have been admissible upon an original application for a family allowance, it would here have involved an unnecessary reexamination of matters which had already been heard and decided several times. If a new hearing were to be ordered, and the offered evidence received, it is difficult to see how or why a different result could reasonably be expected. Four previous orders involving findings as to the necessary elements had theretofore been made and had become final. No objections to any of the matters there involved had previously been raised and the fourth order for continuance of family allowance, made on November 28, 1955, recited that the matter had come on regularly for hearing and that all notices required by law and all special notices had been given.

At the hearing which resulted in the order here appealed from the court called attention to the fact that the order entered on November 28, 1955, recited that all special notices had been given, and that it was therein found that $7,500 a month was a reasonable amount to be paid, taking into consideration the condition of the estate and the manner of living maintained both before and after the death of the decedent. The court went on to state that he would receive any evidence going to show any change of circumstances indicating that $7,500 a month was no longer reasonably required to maintain the widow, or tending to show that the estate was not currently in a position safely to pay that amount. It was stipulated at the hearing that the estate would not be ready to be closed for some months in the future, and that a certain witness, if called, would testify that the widow would continue to incur an expense of about $3,000 a month for attorneys' fees and accountant's fees. In addition, the court also pointed out that a substantial change appeared, with respect to the pending application of the widow to take in accordance with her community property right and not to take under the will, and that if her election was sustained the practical result would be that she would be paying half of the allowance out of her own pocket. It also appears that some litigation affecting the widow's rights was then pending, aside from the question of the continuation of the family allowance, and if it be assumed that a change of conditions was required to be taken into consideration the evidence was sufficient in that regard.

The assets of this estate had greatly increased during the year preceding the making of the order appealed from, there was evidence of changed circumstances and increased expenses necessarily to be incurred by the widow, and these litigation expenses would reduce the amount available for living expenses. The general situation strongly indicates that the discretion resting in the trial court was not abused unless it can be said, as a matter of law, that it could make no order for a continuance of the family allowance without the same full and complete hearing which would be required in connection with an original application for such an allowance. Since this application and hearing involved only a modification of the previous final order, the court was justified in limiting the hearing to the question of whether such a modification was justified by the circumstances then existing. Each further order of the court having been made before the previous order expired such modifications were made in accordance with the terms of the original order and as permitted by the statute, and no order had ever been entered definitely providing for a termination of the allowance prior to the closing of the estate. We have found no decision which would compel a different order

in this proceeding, and no abuse of discretion appears.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



159 Cal.App.2d 705

Anna ALVES, Plaintiff and Appellant,

v.

A. A. LOPEZ and Mrs. A. A. Lopez, husband and wife, City of San Jose, a body politic, A. P. Hammon, Harold Flannery, Harold Cunningham, John Katsinis and Mary Katsinis, husband and wife, Charles Dattilo and Jane Dattilo, husband and wife, and Andreas Tsagalakis, Defendants and Respondents.

Civ. 17694.

District Court of Appeal, First District, Division 2, California.

April 28, 1958.

Action for injuries sustained by a pedestrian who when proceeding around a barricade on a sidewalk fell on debris lying in the street. Judgment of nonsuit in the Superior Court, County of Santa Clara, Edwin J. Owens, J., and the pedestrian appealed. The District Court of Appeal, Dooling, J., held that evidence of negligence of the contractor or the city was insufficient for the jury.

Judgment affirmed.

1. Appeal and Error ⇐927(3)

On plaintiff's appeal from a judgment of nonsuit, the evidence produced by plaintiff must be construed most strongly in her favor and every reasonable inference indulged, which might be reasonably drawn therefrom.

2. Trial ⇐139(1)

In order to justify the submission of any question of fact to the jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged.

3. Municipal Corporations ⇐821(18)

In action for injuries sustained by pedestrian against a cement contractor repairing a sidewalk about which a barrier was erected requiring the pedestrian to walk into the street where her foot struck something hard and she fell and injured herself, evidence was insufficient to justify submission to the jury of issue whether the unidentified debris on which pedestrian fell was broken cement left in the street by the contractor.

4. Municipal Corporations ⇐808(1)

Any liability of property owners engaging a cement contractor to repair a sidewalk could only depend on their contractor's negligence resulting in injury to pedestrian which they should have foreseen and guarded against.

5. Municipal Corporations ⇐821(12)

In action for injuries sustained by pedestrian against a cement contractor repairing a sidewalk about which a barrier was erected requiring the pedestrian to walk into the street where her foot struck something hard and she fell and injured herself, evidence of city's liability for an unsafe condition in the street which it failed to correct for a reasonable time after notice thereof was insufficient for the jury. West's Ann.Gov.Code, § 53051.

Harret W. Mannina, San Jose, for appellant.

Ferdinand P. Palla, City Atty., Elmer D. Jensen, Associate Counsel, San Jose, for respondent City of San Jose.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit, claiming that as to defendants A. A. Lopez, John and Mary Katsinis and City of

San Jose sufficient evidence was introduced to take the case to the jury.

Lopez is a cement contractor who was engaged by Mr. and Mrs. Katsinis to repair the sidewalk in front of their property in the City of San Jose. On the night of September 29, 1953, plaintiff was walking along the sidewalk from her home adjoining that of the Katsinis' when she observed a barrier across the sidewalk which Lopez had repaired. It was dark and there is evidence that there were no warning lights of any kind in the vicinity. Plaintiff went into the street to walk around the barrier. Her foot struck something hard and she fell and injured herself. She could not tell what her foot struck but as she was attempting to get up she felt debris under her hands. She could not determine the nature or extent of this debris.

It is appellant's theory that sufficient evidence was produced before the jury to support a finding that this debris was broken cement from the old sidewalk which had been removed by Lopez and negligently left in the street.

Only two witnesses gave any evidence of seeing broken cement in the area. A Mrs. Texeira testified that on that evening, when there were no workmen about, she saw "cement broken up. * * * I just saw the broken pieces and I saw those barricades there." She did not testify specifically that any of the broken cement was in the roadway. On cross-examination this witness gave the following testimony:

"Q. So that when you came by and there wasn't anyone there, that area was fairly cleaned out, wasn't it? A. I—I couldn't swear to it, that it was cleaned or not,—all cleaned out.

"Q. But as you now recollection [sic], it was cleaned out? A. I wouldn't say for sure because I don't want to lie. There might have been a lot of rocks and little stones around there and pieces of cement, but I couldn't swear to it.

"Q. In other words then, you are not sure whether there was anything there or there wasn't, is that right? A. That is right."

An assistant City Engineer, Mr. Cunningham, testified that he inspected the area at 11 a. m. and again about 6:30 p. m. on the day of appellant's fall. He testified that at 11 a. m. he saw "broken pieces of cement" but at 6:30 p. m. the portion of the street opposite the barricades had been swept clean.

A witness who helped appellant to her home after the accident and appellant's sister who came later that evening did not see any broken pieces of cement in the street.

[1, 2] While the evidence produced by the plaintiff must be construed most strongly in her favor and every favorable inference indulged which might reasonably be drawn therefrom (Sanders v. Macfarlane's Candies, 119 Cal.App.2d 497, 500, 259 P.2d 1010) it still is incumbent upon a plaintiff to produce evidence sufficient to support a logical inference in her favor. "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged." O'Connor v. Mennie, 169 Cal. 217, 222, 146 P. 674, 676.

[3] The absence of warning lights on the barrier was not a proximate cause of appellant's injuries, since she saw the barrier and started to walk around it. There is no substantial evidence from which the jury could draw a logical inference that the unidentified debris on which appellant stumbled was broken cement left in the street by the contractor. We are satisfied from a reading of the record that the court properly granted the nonsuit as to the contractor.

[4] Any liability of Mr. and Mrs. Katsinis can only depend on their contractor's negligence which they should have foreseen and guarded against. Sawaya v. DeCou, 60 Cal.App.2d 146, 140 P.2d 98.

[5] The city's liability could only be for an unsafe condition in the public street

which it failed to correct for a reasonable time after notice thereof. Gov.Code, § 53051. The evidence failed to establish facts sufficient to impose this liability.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



160 Cal.App.2d 57

NOMELLINI CONSTRUCTION COMPANY, a corporation, Plaintiff and Appellant,

v.

C. E. DEANE, J. P. Phillips and George S. Kerr, Defendants,

J. P. Phillips and George S. Kerr, Defendants and Respondents.

Civ. 9236.

District Court of Appeal, Third District, California.

May 2, 1958.

Action to recover damages arising out of an automobile collision. From orders of the Superior Court, Humboldt County, Carl L. Christensen, Jr., J., setting aside defaults of defendants and judgments entered pursuant thereto, the plaintiff appealed. The District Court of Appeal, Peek, J., held that setting aside the defaults was not an abuse of discretion.

Order affirmed.

1. Appeal and Error ⇐935(2)

On appeal from an order setting aside defaults, it will be presumed that the trial judge believed the statement of facts as presented by the movant, and if any doubt exists, it should be resolved in favor of the application to set aside the order to the end of securing the trial on the merits. West's Ann.Code Civ.Proc. § 473.

2. Judgment ⇐143(3)

Order setting aside a default was not an abuse of discretion in an automobile accident case where defendant was led to believe, if not actually told, that insurance carrier of a codefendant would defend him, and in reliance thereon he took no further steps after being served with process by plaintiff.

3. Judgment ⇐143(3)

An order setting aside a default was not an abuse of discretion where defendant claimed he was not the owner of the truck involved in the accident, did not believe that he was a party defendant and relied upon the codefendant's statement that the codefendant's insurer would defend him.

Robert E. Lee, San Francisco, for appellant.

Hill & Hill, Clayton O. Rost and Clayton R. Janssen, Jr., Eureka, for respondents.

PEEK, Justice.

Plaintiff appeals from the orders of the trial court setting aside the defaults of the defendants Kerr and Phillips and the judgments which were entered pursuant thereto.

The facts and circumstances giving rise to this proceeding may be sumarized as follows: A truck owned by plaintiff was involved in an accident with a truck operated by the defendant George S. Kerr. Thereafter a complaint was filed by plaintiff in which C. E. Deane, J. P. Phillips and Kerr were named defendants. The complaint alleged that Kerr was the operator of the vehicle that collided with plaintiff's truck and that Deane and Phillips were the owners of the same. Deane answered and is not a party in this present proceeding. Neither Phillips nor Kerr answered or otherwise appeared in response to the complaint. Thereafter their defaults were taken and judgments in accordance therewith were entered against each. Subsequently a stay of execution was ordered, and shortly thereafter Kerr

and Phillips filed motions to set aside the default judgments. Following the hearing which was held upon the affidavits of the parties and the oral arguments of their counsel, the court entered its orders setting aside the defaults and the default judgments and this appeal followed.

The affidavit of Kerr in support of his motion showed that following the accident he was contacted by a Mr. O'Brien, an adjuster for the Colonial Insurance Company. Thereafter Kerr made a personal report to the company at its office in San Francisco. Kerr was informed by Colonial that in the event he was sued, or any other problem arose in connection with the accident, he should contact its representative, Mr. O'Brien. Within ten days from the time he was served, he gave the summons and complaint to O'Brien pursuant to Colonial's instructions. O'Brien advised him that he would attend to the matter. However Colonial did not in fact appear for nor defend Kerr. He heard nothing from anyone, including Colonial or any of its representatives, until after the default judgment had been taken against him. Immediately upon discussing the matter with Attorney Rost of Eureka, he signed an affidavit in support of his motion to set aside his default, which motion was thereafter filed.

It is undisputed that Kerr was led to believe, if not actually told, that Deane's insurance carrier would defend him. In fact the carrier and its agents contacted and instructed him both before and after he was served, and in reliance upon such advice he took no further steps in the matter.

[1] "On appeal from an order granting relief, under section 473 of the Code of Civil Procedure, it will be presumed that the trial judge believed the statement of facts as presented by the moving party and if any doubt exists it should be resolved in favor of the application to set aside the order to the end of securing a trial on the merits of the case." Raines v. Damon, 89 Cal.App.2d 812, 816, 201 P.2d 886, 888.

[2] Gauged by the quoted rule, it cannot be said that the facts set forth in Kerr's affidavit were insufficient to support the order of the court. See Newton v. De Armond, 60 Cal.App. 231, 212 P. 630. In the absence of a clear showing of an abuse of discretion, an order granting relief under said section will not be reversed on appeal.

[3] While it may be said that the case as presented by Phillips is not as strong as that of Kerr, nevertheless we are constrained to hold that in this instance the court likewise did not abuse its discretion in granting the motion to set aside the default. According to Phillips he was not the owner of the truck, did not believe he was a party defendant in the action, and relied upon Deane's statement that Deane's insurer would defend him. Prior to March 30, 1956, he believed his interests would be protected by Deane's insurer. He did not recall that Deane's attorney, Mr. Low, advised him that Deane's insurer would not defend him or that he should turn the matter over to his own insurer. Due to the fact that he was away from his home and office during February and March, except for a few hours each week, he did not open the letter of February 9 from Deane's attorney advising him that Deane's insurer would not defend him. Upon receipt of Mr. Low's letter of March 30 he immediately forwarded the letters and copies of the complaint to the insurer.

For the reasons heretofore set forth we cannot say that this court would be warranted in reversing the orders of the trial court.

The orders are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

160 Cal.App.2d 121

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leroy HOOD, Defendant and Appellant.

Cr. 3463.

District Court of Appeal, First District, Division 2, California.

May 6, 1958.

Defendant was convicted of first degree robbery. The Trial Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment, and defendant appealed. The District Court of Appeal, Draper, J., held that question whether bottle of whiskey, which was used by defendant as a weapon during robbery, was a "dangerous or deadly weapon" within meaning of section of Penal Code making robbery first degree robbery if defendant was armed with a "dangerous or deadly weapon" at time of perpetration of robbery was for trial court as trier of facts.

Judgment affrmed.

1. Robbery ⇐11

One who arms himself with a weapon taken from his victim during robbery is armed when he perpetrated the robbery, within meaning of section of the Penal Code making robbery first degree robbery if defendant was armed with a dangerous or deadly weapon when he perpetrated the robbery. West's Ann.Pen.Code, § 211a.

2. Robbery ⇐26

Question whether an object, not inherently a weapon, is a dangerous or deadly weapon within meaning of section of the Penal Code making robbery first degree robbery if defendant was armed with a dangerous or deadly weapon when he perpetrated the robbery, is to be determined by trier of the facts. West's Ann.Pen. Code, § 211a.

3. Robbery ⇐11

A kit of tools, an unloaded gun, or a toy gun may be a "dangerous weapon" within meaning of section of the Penal Code making robbery first degree robbery if defendant was armed with a "dangerous or deadly weapon" when he perpetrated the robbery, since they may be used as a bludgeon or club. West's Ann.Pen.Code, § 211a.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous Weapon".

4. Criminal Law ⇐260(11)

Question whether bottle of whiskey, which was used by defendant as a weapon during robbery, was a "dangerous or deadly weapon" within meaning of section of Penal Code making robbery first degree robbery if defendant was armed with a "dangerous or deadly weapon" at time of perpetration of robbery was for trial court as trier of facts. West's Ann.Pen.Code, § 211a.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous or Deadly Weapon".

Edward T. Mancuso, Public Defender, City & County of San Francisco, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Jack Urch, Deputy Dist. Atty., San Francisco, for respondent.

DRAPER, Justice.

Defendant waived jury trial, and was found guilty of robbery by the court, which also found that the robbery was of the first degree. Defendant appeals, asserting error only in the fixing of the degree. He contends that the evidence is insufficient to show that he was armed with a "dangerous or deadly weapon" (Pen.Code, § 211a).

Defendant entered a liquor store. Holding his right hand in his pocket to simulate a gun, he ordered the operator to open the till. Defendant removed his "gun" hand

from his pocket to scoop up the money. The operator, freed of the fear of being shot, grappled with defendant. The operator's father arrived, carrying a pistol, and defendant fled, carrying some stolen money. Enroute, he seized two bottles of whiskey and threw them at the father. Although neither struck its target, one went through the glass of a window. As defendant left the store, a policeman took up the chase, subdued and arrested him.

[1–4] One who arms himself with a weapon taken from his victim nonetheless was armed when he "perpetrated" the robbery, within the meaning of Penal Code, § 211a. People v. Wallace, 36 Cal.App.2d 1, 97 P.2d 256. Whether an object not inherently a weapon is a "dangerous or deadly weapon" is to be determined by the trier of the facts (People v. Copeland, 157 Cal. App.2d 185, 320 P.2d 531), and the rule applies in determination of degree of robbery (People v. Lopez, 118 Cal.App.2d 235, 257 P.2d 670). A kit of tools (People v. Crowl, 28 Cal.App.2d 299, 305, 82 P.2d 507); an unloaded gun (People v. Raleigh, 128 Cal.App. 105, 16 P.2d 752); or a toy gun (People v. Ward, 84 Cal.App2d 357, 190 P. 2d 972; People v. Coleman, 53 Cal.App.2d 18, 29, 127 P.2d 309) may be a "dangerous" weapon within the meaning of the statute because capable of being used as a bludgeon or club. A bottle of whiskey, similarly used, clearly may be equally dangerous. The trial court has determined the fact question, and it certainly cannot be said, as a matter of law, that the determination was erroneous.

In view of this conclusion, it is unnecessary to consider the effect of defendant's use of a pocket knife in resisting the arresting officer who had pursued him in his flight from the liquor store.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, concur.

160 Cal.App.2d 16

Joseph W. MAIA, Jr., Plaintiff and Appellant,

v.

SECURITY LUMBER AND CONCRETE CO., Inc., Defendant and Respondent.

Civ. 9188.

District Court of Appeal, Third District, California.

May 1, 1958.

Rehearing Denied May 26, 1958.

Hearing Denied June 25, 1958.

Action by repairman against owner of plant to which he had been sent for personal injuries sustained when owner's employee started machinery during repairman's inspection thereof. The Superior Court, Solano County, Joseph M. Raines, J., entered judgment for plant owner and repairman appealed. The District Court of Appeal, Peek, J., held that instruction of court to effect that responsibility for compliance with safety order of Division of Industrial Safety respecting precautions to be taken during machinery repair was on repairman's employer and not on plant owner, was prejudicially erroneous.

Reversed

1. Appeal and Error ⇐110

Order denying motion for new trial was not appealable and purported appeal therefrom must be dismissed.

2. Appeal and Error ⇐1064(1)
Negligence ⇐139(7)

In action by repairman against owner of plant to which he had been sent, for personal injuries sustained when owner's employee started machinery during repairman's inspection thereof, instruction of court to effect that responsibility of compliance with safety order of Division of Industrial Safety respecting precautions to be taken during machinery repair was on repairman's employer and not on plant owner, was prejudicially erroneous. West's Ann.Labor Code, §§ 6304, 6400–6402.

3. Negligence ⇐18, 105

Where repairman had been sent to plant for purpose of repairing its machinery

which was started in motion by one of owner's employees during repairman's inspection thereof, failure of plant owner to comply with safety order of Division of Industrial Safety respecting precautions to be taken during machinery repair, constituted negligence as a matter of law, but did not mean that plant owner was absolutely liable since defense of contributory negligence was available to it, and repairman could not have been said to have assumed the risk.

4. Negligence ⇐65, 105

Defenses of contributory negligence and assumption of risk are separate and distinct defenses.

5. Negligence ⇐105

In cases of violation of safety regulations defendant cannot defend on ground that plaintiff, for whose protection regulation was passed, assumed the risk.

6. Appeal and Error ⇐1064(1)
Negligence ⇐138(1)

In action by repairman against owner of plant to which he had been sent, for personal injuries sustained when owner's employee started machinery during repairman's inspection thereof, where evidence showed that there had been a failure to comply with safety regulation respecting precautions to be taken during machinery repair, instruction of court to effect that the jury consider whether or not repairman had assumed the risk, was prejudicially erroneous.

7. Evidence ⇐512

In repairman's action against owner of plant to which he had been sent to repair machinery, for personal injuries sustained when owner's employee started machinery during repairman's inspection thereof, admission of testimony by alleged experts to effect that burden of complying with safety regulation respecting precautions to be taken during machinery repair was on repairman's employer and not plant owner, was error since court was bound by the statute and not by individual opinions of its interpretation. West's Ann.Labor Code, §§ 6304, 6400–6402.

8. Negligence ⇐5

While failure to observe custom may be evidence of negligence, standard of due care is not fixed by custom or altered by its presence or absence.

Winters & Winters, Benicia, for appellant.

Dunnell, Herbert & Dunnell, Fairfield, for respondent.

PEEK, Justice.

[1] This is an appeal by plaintiff from a judgment in favor of defendant in an action for personal injuries suffered by plaintiff as the result of the alleged negligence of defendant. The order denying his motion for a new trial, not being appealable, his purported appeal therefrom must be dismissed.

The defendant corporation had experienced mechanical difficulties in the operation of a conveyor belt at its cement-mixing plant in Vallejo, and its president, David Paganini, communicated with the Yuba Manufacturing Company concerning the matter. Yuba, who was plaintiff's employer, suggested that defendant inform it when the plant could be shut down, and an examination would then be made of the machinery. Thereafter, pursuant to a phone call from Paganini, plaintiff, upon instructions, accompanied one Carmer, a salesman for Yuba, to defendant's plant. At the time of their arrival, approximately 4 p. m., there was no regular work activity, nor was there any movement of equipment such as trucks or machinery. Plaintiff was taken to an employee of defendant by the name of Beaver, who in turn took him to the cement mixer. An examination was made of the conveyor at the base of the mixer which was approximately 60 feet high. As a part of their examination they cleaned some sand from the pawls. While plaintiff was continuing his inspection, another employee of defendant, one Amos Jackson, turned on the switch, thereby starting the conveyor belt. Plaintiff, who at that moment was leaning against it, was thrown

headfirst into a chute and seriously injured. Beaver knew that it was the custom for Jackson to run the conveyor at the end of each day to remove any gravel remaining in the buckets, but he informed no one of the inspection which he and plaintiff were making at the top of the mixer, nor did he place any warning signs on the switchboard. Jackson, who was the regular operator, had been instructed not to start the machinery when anyone was around it or working on it. On the day of the accident he had not been informed that there was to be any repair work, and at the time he turned on the power he noticed no one. The switches were directly below a platform which obscured his view of the top of the mixer. Plaintiff made no inquiry as to whether the switches were pulled to a locked position, nor was he so advised by anyone at the plant. Since he had been informed the plant was shut down, he took it for granted that the switches were off.

Plaintiff makes two contentions on appeal: (1) That the court erred in giving certain instructions at defendant's request; and (2) that the court erred in admitting certain expert testimony.

The first instruction which plaintiff contends removed all duty from the defendant and owner of the machinery is as follows:

"There has been introduced into evidence and read to you in this case General Industry Safety Order No. 3276 of the Division of Industrial Safety.

"This safety order provides as follows:

"(b) Every prime mover or power driven machine equipped with lockable controls or readily adaptable to lockable controls shall be locked in the 'off' position during repair work. Machines or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with this order when positive means are taken such as by disconnecting the equipment from its source of power, sealing the controls or other action which will prevent the prime mover or machine from being started. In all cases, caution signs with adequate wording shall be placed on the controls of the machines and prime movers during repair work.

* * * * * *

"(c) *The employer shall provide a sufficient number of caution signs and padlocks, seals or other similarly effective means which may be required* by any foreseen repair emergency. Caution signs shall be equipped with a permanently attached means which can be readily secured to the control.

"You are instructed that the obligations and duties contained in this section in regard to locking machinery or disconnecting the same from its source of power before undertaking repairs, and the obligations in connection with the placement of caution signs *during repair work are the obligations of the employer of the repair man and not obligations of the owner of the premises on which the repairs are undertaken,* unless you find that repair work was undertaken by both the employee of the owner of the premises and of the repairer, in which case it would be the responsibility of both or all individuals working upon the repair of such machinery to comply with the provisions of the safety order which I have just read to you, and in such event, *a failure on the part of either or both to comply with said safety order would constitute negligence."* (Instruction No. 33; emphasis added.)

Defendant's instruction number 19 below was also given by the court in this regard:

"You are instructed that it was the *duty of plaintiff's employer,* and *not the duty of defendant,* to exercise reasonable and ordinary care to adopt safety rules and methods of work for such employees." (Emphasis added.)

Section 6304 of the Labor Code provides in part that the term "employer" includes "* * * every person having direction,

management, control, or custody of any employment, place of employment * * *" That definition, when applied to the facts in the present case, would appear to leave no doubt but that plaintiff, at the time of the accident, was an employee of defendant. Atherley v. MacDonald, Young & Nelson, 142 Cal.App.2d 575, 298 P.2d 700, 707. As such, defendant was obligated under the provisions of section 6400 to provide a "safe" place of employment. Additionally, under 6401, it was obligated to "* * * furnish and use safety devices and safeguards, and * * * adopt and use practices * * * [and] do every other thing reasonably necessary to protect the life and safety of employees." Nor could defendant even "* * * permit any employee to go or be in any employment or place of employment which is not safe." Sec. 6402. The obligations of defendant being so fixed by statute, they could not be delegated. Atherley v. MacDonald, Young & Nelson, supra.

[2] Necessarily therefore instruction number 33, which specifically placed upon Yuba the obligation of carrying out the safety order, was erroneous. Nowhere in the charge was the jury instructed that defendant had any duty whatever. In fact, by defendant's instruction number 19, the jury was instructed directly to the contrary.

[3] Although by reason of the facts disclosed, the conceded failure to comply with the safety order constituted negligence upon the part of defendant as a matter of law, that does not mean that defendant was absolutely liable since the defense of contributory negligence was available to it. Atherley v. MacDonald, Young & Nelson, supra. But neither did the failure of defendant to abide by such safety order mean that plaintiff thereby assumed the risk.

[4–6] The defenses of contributory negligence and assumption of risk are separate and distinct defenses. While the defense of contributory negligence was available to defendant, the same cannot be said as regards the doctrine of the assumption of risk. It is "elementary law" said the court in the Atherley case, that " 'in cases of violation of a safety regulation the defendant cannot defend on the ground that the plaintiff for whose protection the regulation was passed assumed the risk.' " Mula v. Meyer, 132 Cal.App.2d 279, 282 P. 2d 107; Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17. In view of the enunciated rule the court also erred prejudicially in giving to the jury defendant's instructions on the doctrine of assumption of risk.

[7, 8] Plaintiff contends further that the court erroneously admitted, over his objections, the opinion testimony of two witnesses called by the defendant as to the customs of the trade regarding proper safety precautions to be taken by repairmen doing work on power-driven machinery in the area. The first of these witnesses, Mr. Kehrlein, testified he was a lecturer, writer and consultant on safety and, as supervising safety engineer with the Division of Industrial Safety, had edited various rules and regulations including General Industrial Safety Order No. 3276. His testimony was that the duty imposed under said order, particularly in relation to the locking of machinery prior to repair work, was on the employer of the repairmen and not the owner of the premises where the machinery was located; that he was familiar with the customs and usages of repairmen in connection with moving machinery and safety measures, and that the same were uniform throughout the state; and that in this regard the repairman himself took the necessary precautions to see that the power was off and that warning signs were posted on the controls. Courts are bound by the statute, not by individual opinions of its interpretation. In re Lavine, 2 Cal.2d 324, 327, 41 P.2d 161, 42 P.2d 311. Additionally, while failure to observe custom may be evidence of negligence, the standard of due care is not fixed by custom or altered by its presence or absence. Pauly v. King, 44 Cal. 2d 649, 655, 284 P.2d 487. It necessarily

follows that the testimony given by Kehrlein relating to the interpretation of said safety order was clearly inadmissible.

By reason of what we have heretofore said it becomes unnecessary to answer the further contentions of plaintiff.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



159 Cal.App.2d 664

Odette WICKOFF and Warren G. Wickoff, Plaintiffs and Appellants,

v.

Harold E. JAMES, St. Helena Sanitarium and Hospital, a corporation, California Hospital Association, Defendants and Respondents.

Civ. 9204.

District Court of Appeal, Third District, California.

April 24, 1958.

Hearing Denied June 17, 1958.

Malpractice action against hospital and physician who tore patient's intestine during sigmoidoscopic examination to determine if entire rectosigmoid polyp had been removed from large intestine. The Superior Court, Napa County, Percy King, Jr., J., entered judgment on defendants' motion for nonsuit at conclusion of plaintiffs' evidence. The plaintiffs appealed from the judgment of nonsuit and from the order denying their motion to vacate the judgment. The District Court of Appeal, Schottky, J., held that evidence that physician came out of operating room and said "Boy, I sure made a mess of things" and that by inserting sigmoidoscope in patient's rectum he "busted" the intestine, raised question for jury as to whether physician, in inserting the sigmoidoscope, did not use the degree of care ordinarily exercised by other doctors of good standing in the community and as a result of the lack of care the bowel was torn.

Order denying motion to vacate judgment of nonsuit affirmed and judgment of nonsuit reversed.

1. Physicians and Surgeons ⇐18(9)

In malpractice action against physician who tore patient's intestine during sigmoidoscopic examination to determine if entire rectosigmoid polyp had been removed from large intestine, evidence that physician came out of operating room and said "Boy, I sure made a mess of things" and that by inserting sigmoidoscope in patient's rectum he "busted" the intestine, raised question for jury as to whether physician, in inserting the sigmoidoscope, did not use the degree of care ordinarily exercised by other doctors of good standing in the community and as a result the patient's bowel was torn.

2. Appeal and Error ⇐927(3)

In considering whether or not judgment of nonsuit was proper, appellate court must resolve every conflict in their testimonies in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence adduced, direct and indirect, which tends to sustain plaintiff's case.

3. Physicians and Surgeons ⇐18(6)

In any malpractice case, negligence on part of doctor will not be presumed; it must be proved except in those cases where res ipsa loquitur is applicable.

4. Physicians and Surgeons ⇐18(8)

In malpractice action, the expert testimony which will establish plaintiff's prima facie case may be that of the defendant, and an extrajudicial admission is sufficient to do this; however, in order for an extrajudicial admission to be sufficient it must be an admission of negligence or lack of skill ordinarily required for the performance of the work undertaken.

5. Physicians and Surgeons ⇐18(9)

In malpractice action against physician who tore patient's intestine during sigmoidoscopic examination to determine if entire rectosigmoid polyp had been removed from large intestine, physician's statement that a tear of the bowel is not an expected or anticipated thing during a sigmoidoscopy was not sufficient to require submission of case to jury on the res ipsa loquitur doctrine. West's Ann.Code Civ. Proc. § 2055.

6. Physicians and Surgeons ⇐18(6)

In malpractice action, doctrine of res ipsa loquitur is inapplicable unless it is shown that the occurrence is one that does not ordinarily occur in absence of negligence.

7. Evidence ⇐20(1)

The District Court of Appeal would not say that it is a matter of common experience that a rent in the intestine does not occur during a sigmoidoscopy in the absence of negligence.

8. Physicians and Surgeons ⇐18(6)

In malpractice action, the mere fact that the result is unexpected or not anticipated is not sufficient to invoke the res ipsa loquitur doctrine.

9. Judges ⇐39

No judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. West's Ann. Code Civ.Proc. § 170, subd. 4.

10. Judges ⇐51(1)

A party who makes a motion to declare a judge disqualified, and particularly a party who seeks to have a judgment declared void on the ground that the judge was disqualified, should allege and prove facts which clearly show that such disqualification existed. West's Ann.Code Civ.Proc. § 170, subd. 4.

11. Judgment ⇐343

In malpractice action against physician and hospital, that trial judge at one time may have advised physician and hospital in some manner relating to malpractice did not justify vacating judgment of nonsuit upon ground that trial judge was disqualified. West's Ann.Code Civ.Proc. § 170, subd. 4.

White & White, Arlington C. White, M. E. White and Leonard A. Worthington, San Francisco, for appellants.

Peart, Baraty & Hassard, by Robert D. Huber, San Francisco, Clark, Heafey & Martin, by Edwin A. Heafey, Oakland, for respondents.

SCHOTTKY, Justice.

Plaintiffs above named, husband and wife, commenced an action against defendants to recover damages for alleged malpractice. At the conclusion of plaintiffs' evidence the court granted defendants' motion for a nonsuit, and judgment was entered thereon. Plaintiffs made a motion for a new trial, which was denied, and plaintiffs then made a motion to vacate and set aside the judgment of nonsuit and to declare the judgment null and void. The latter motion was made upon the ground that Judge King was disqualified to sit and act in the case. Both the motion for a new trial and the motion to vacate the judgment were heard by a judge other than Judge King and were denied. Plaintiffs have appealed from the judgment of nonsuit and from the order denying their motion to vacate the judgment.

On January 6, 1954, Mrs. Wickoff, who at the time was 39 years of age entered the St. Helena Sanitarium and Hospital for the purpose of having a rectosigmoid polyp, a wartlike growth, removed from the lower portion of the large intestine adjacent to and immediately above the rectum. The operation was performed by Dr. James who, it is admitted, was an employee of the hospital. After an operation such as this it is customary to examine the situs of the polyp for the purpose of ascertaining whether or not the entire polyp has been removed. Accordingly, prior to leaving the hospital on January 15, 1954, Mrs. Wickoff was taken to Dr. James' office for

the purpose of undergoing the examination. To examine the situs Dr. James attempted to insert a sigmoidoscope, ¾ inch in diameter, up the patient's rectum. The examination was unsuccessful because Dr. James was unable to insert the scope without causing great pain to Mrs. Wickoff. It was then decided that the examination would be performed at a later date while Mrs. Wickoff was under an anesthetic. Mrs. Wickoff was then discharged from the hospital. On January 20, 1954, Mrs. Wickoff returned to the hospital for the purpose of undergoing the sigmoidoscopy. She was given a general anesthetic and then a sigmoidoscope was inserted up her rectum to the 15 centimeter level (5.90 inches) without difficulty. At this point the obdurator was removed because Dr. James desired to pass the scope under direct vision. In attempting to advance the sigmoidoscope under direct vision slight difficulty was encountered and upon visual examination it was noted through the scope that a loop of the small intestine was visible. A diagnosis of accidental perforation of the sigmoid wall was made. Mrs. Wickoff was immediately taken to surgery where an abdominal repair was performed. Immediate action was required because of the danger of peritonitis.

Mr. Wickoff testified: "When Dr. James and Dr. McGreane came out of the operating room, I watched them, because I was very anxious to know exactly what happened, and they walked up the hallway. Dr. James still had his apron on which was all full of blood, and he had his mask hanging down over his chin * * * and as he got within a matter of oh, ten, fifteen feet from me, he shrugged his shoulders and says, 'Boy, I sure made a mess out of things today, didn't I, Warren?' I said, 'Dr. James, what in the world happened?' He said, 'Well, by inserting' his scope 'in your wife's rectum, I busted the intestine.'"

Dr. James was called as a witness by plaintiffs under the provisions of Code of Civil Procedure, section 2055. He testified that in cases such as Mrs. Wickoff's the usual follow-up procedure is by sigmoidoscopic examination, if possible, or X-Ray; that at the time Mrs. Wickoff was to leave the hospital after the removal of the polyp an attempt to examine her by sigmoidoscopic process in Dr. James' office was unsuccessful due to pain; that he had performed many of such sigmoidoscopic examinations and that it was routine in his office; that it was then decided to perform the process under anesthesia; that sigmoidoscopy is usually an unpleasant procedure; that a tear of the bowel is not an expected or anticipated thing; that he was totally unaware that the bowel had been torn until "it was noted that a loop of the small bowel was visible"; and that unless there was a tear in the large bowel a portion of the small bowel could not come through and be visible while examining the large bowel; that it was a matter of a few minutes after the scope entered through the sphincter muscle before he was aware that he had torn the intestine; that thereafter he mentioned it to the persons in the operating room; that the tear was so unexpected that it was necessary to "verify this thing."

[1] Appellants contend that the evidence establishes a prima facie case of negligence on the part of respondent James and that the court erred in granting respondents' motion for a nonsuit. They contend further that upon the doctrine of res ipsa loquitur they were entitled to have the case submitted to the jury.

We have concluded that appellants did establish a prima facie case of negligence on the part of respondent James and that the judgment of nonsuit must be reversed.

[2-4] In considering whether or not a judgment of nonsuit was proper, an appellate court must "resolve every conflict in their testimonies in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence

adduced direct and indirect, which tends to sustain plaintiff's case." Lashley v. Koerber, 26 Cal.2d 83, 84, 156 P.2d 441, 442. In any malpractice case negligence on the part of the doctor will not be presumed, it must be proved except in those cases where res ipsa loquitur is applicable. The expert testimony which will establish plaintiff's prima facie case may be that of the defendant, and an extrajudicial admission is sufficient to do this. However, in order for an extrajudicial admission to be sufficient it must be an admission of negligence or lack of skill ordinarily required for the performance of the work undertaken. Lashley v. Koerber, supra.

The only statement of Dr. James' which could be construed as an admission of negligence is the statement, "Boy, I sure made a mess of things. * * *" Webster's New International Dictionary (2d Ed.) gives one of the definitions of the word mess as "A confused or disagreeable mixture of things; a hodgepodge. Hence, a situation resulting from blundering or from misunderstanding; a muddle; a botch." Roget's Thesaurus (Crowell Publishing Co., 1946), under the heading "unskillfulness," gives the phrase "make a mess of." Partridge, A Dictionary of Slang and Unconventional English (4th Ed., 1951), states the phrase "make a mess of" means bungle. The Oxford English Dictionary defines the phrase "to make a mess of" as bungle. All these definitions indicate that one of the meanings of the phrase is bungle or botch, which in turn connotates a job done in an unskillful manner.

Respondents argue that even if the admissions of Dr. James were significant they were not sufficient to prevent a nonsuit in the instant case, and that these admissions do not support an inference of negligence. They state further that even if they are wrong in this respect, appellant still cannot prevail because such evidence has been characterized as the most unreliable and uncertain evidence that can be produced. However, we are here concerned with the question of whether or not a nonsuit should have been granted, and in such a case a plaintiff is entitled to every favorable inference that may reasonably be drawn from the evidence. What inferences were to be drawn from said statements of Dr. James in the light of the facts and circumstances shown by the evidence was a question of fact to be determined by the jury and we believe that the court erred in determining as a matter of law that no inference of negligence could be drawn from the evidence. We think that the jury could infer from the statement of Dr. James that in inserting the scope he did not use the degree of care ordinarily exercised by other doctors of good standing in the community, and, as a result of the lack of care, Mrs. Wickoff's bowel was torn. Under such circumstances it was error to grant a nonsuit.

[5–8] We are unable to agree with appellants' contention that on the doctrine of res ipsa loquitur, standing alone, they were entitled to have the case submitted to the jury. The doctrine of res ipsa loquitur would not apply in the instant case unless it was shown that the occurrence was one that does not ordinarily occur in the absence of negligence. We cannot say that it is a matter of common experience that a rent in the intestine does not occur during a sigmoidoscopy in the absence of negligence. Expert testimony would be required. The only evidence introduced in this regard was the statement of Dr. James that a tear is not anticipated or expected. The mere fact that the result is unexpected or not anticipated is not sufficient to invoke the doctrine. Salgo v. Leland Stanford, etc., Board of Trustees, 154 Cal.App.2d 560, 317 P.2d 170; Dees v. Pace, 118 Cal.App.2d 284, 289, 257 P.2d 756; Note, 9 Stanford Law Rev., p. 731.

Appellants contend also that the court erred in admitting certain hospital records into evidence. However, in view of the fact that we have concluded that the judgment of nonsuit must be reversed it is unnecessary to discuss this contention.

Appeal from Order Denying Motion to Vacate the Judgment of Nonsuit.

It appears from the record that at the time plaintiffs filed their motion for a new trial they also filed a statement of grounds of disqualification of Judge King and objection to his hearing the motion for a new trial. The grounds stated were that Judge King was disqualified for the following reasons:

> "He is disqualified to sit or act on the ground that he was at one time retained and employed as attorney and counsel for the defendant St. Helena Sanitarium and Hospital, a corporation, in matters involving one or more of the same issues involved in the above-entitled cause."

Following the denial of the motion for a new trial, which motion was heard by Judge Homer Patterson, plaintiffs filed a motion to vacate and set aside the judgment of nonsuit and to declare the same null and void. The latter motion was made upon the ground that Judge King was disqualified to sit in the case for the reason:

> "That he was at one time retained and employed as attorney and counsel for the defendant St. Helena Sanitarium and Hospital, a corporation, in matters involving one or more of the same issues involved in the above-entitled cause."

Section 170 of the Code of Civil Procedure sets forth the grounds of disqualification of a judge to sit in any action or proceedings, and appellants rely upon subsection 4 which reads:

> "When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceedings; or when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding."

Appellants state that their motion to vacate the judgment of nonsuit "was not opposed by affidavit or other evidence of record denying the disqualification of said Judge." They state also that Judge King conceded his disqualification in the matter. However, the record merely shows that the clerk of the court informed appellants' counsel that Judge King had disqualified himself from hearing the motion for a new trial and the matter of his disqualification and that another judge was assigned to hear those matters.

[9–11] It is of course a fundamental rule that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. The various grounds of disqualification have been set out in great detail in our Code of Civil Procedure. A party who makes a motion to declare a judge disqualified, and particularly a party who seeks to have a judgment declared void on the ground that the judge was disqualified, should allege and prove facts which clearly show that such disqualification existed. The instant case was an action against defendants Dr. James and St. Helena Sanitarium and Hospital for damages for alleged malpractice. Appellants' only stated ground of disqualification is a statement that Judge King was *at one time* retained and employed as attorney for defendant St. Helena Sanitarium and Hospital in matters involving one or more of the same issues involved in the instant action. The only issues involved in the instant action would be the issues of whether or not defendants were liable in damages for malpractice, and we believe that appellants have neither alleged nor proved facts which show that any disqualification existed. The most that may be inferred from the very general allegations is that *at one time* (how far in the past does not appear) Judge King may have advised defendants in some matter relating to malpractice. We do not believe that appellants made a sufficient showing to justify the vacating of the judgment of nonsuit upon the ground that Judge King was disqualified.

The order denying the motion to vacate the judgment of nonsuit is affirmed. The judgment of nonsuit is reversed.

VAN DYKE, P. J., and PEEK, J., concur.



159 Cal.App.2d 833

Ardmore HORACE, Plaintiff and Appellant,

v.

Helen B. WEYRAUCH, M.D., et al., Defendants and Respondents.

Civ. 17613.

District Court of Appeal, First District, Division 1, California.

May 1, 1958.

Patient's action against physician for injuries consisting of ulcer which developed at site of subcutaneous injection of opaque iodine dye. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment for physician and patient appealed. The District Court of Appeal, Peters, P. J., held that evidence presented jury question as to physician's alleged negligence in giving injection without first taking history of prior allergic reactions and without giving of sensitivity tests.

Reversed.

1. Physicians and Surgeons ⇐18(6)

Where patient brought action against physician for injuries following injection, whether doctrine of res ipsa loquitur was applicable depended upon whether a layman could say, as a matter of common knowledge or observation or from the evidence could draw a reasonable inference, that the consequences of injection involved were not such as ordinarily would have followed if due care had been exercised.

2. Physicians and Surgeons ⇐18(6)

Where patient brought action for damages as result of ulcer which developed at site of physician's injection of opaque iodine dye, and testimony was to the effect that it was good and standard practice in community to give injections subcutaneously if, as in case of patient, it could not be given in the veins, there was no basis for assertion that there was an inference of negligence because injection was given subcutaneously, there was no basis for application of doctrine of res ipsa loquitur.

3. Physicians and Surgeons ⇐18(9)

In patient's action against doctor for injuries consisting of ulcer forming at site of subcutaneous injection of opaque iodine dye, evidence presented a jury question as to physician's alleged negligence in giving injection allegedly without first taking prior medical history with respect to allergic reactions and making of proper sensitivity tests.

Molly H. Minudri, San Francisco, for appellant.

Lamb & Hoge, San Francisco, for respondent.

PETERS, Presiding Justice.

Following a subcutaneous injection by Dr. Weyrauch plaintiff developed an ulcer at the site of the injection. This required surgery to remove. She brought this action against the doctor, a specialist in radiology, alleging that the negligence of the doctor caused the ulcer. At the close of the evidence the trial court granted defendant's motion for a directed verdict. Judgment was entered accordingly, and from that judgment plaintiff appeals.

On May 7, 1953, the plaintiff was referred by her regular physician to defendant for a pyelogram, which is an X ray study of the urinary tract. It is made by the injection of an opaque iodine dye that stops the X rays so that the inside of kidneys, ureter and bladder can be photographed.

Plaintiff testified that before making the injection the doctor did not ask whether

she had any reactions to injections, nor did the doctor ask if plaintiff was sensitive to any particular substance, nor did the doctor make any reaction tests. The doctor first attempted to make the injection into the veins of the patient's right arm, and, when this was not successful, tried to inject the fluid into another part of the arm and then into the wrist. No attempt was made to inject the fluid into the hand. Plaintiff told the doctor that other doctors had had difficulty giving her intravenous injections. After these unsuccessful attempts, the defendant told plaintiff that she could have the injection in the shoulder or in the hip. Plaintiff chose the hip, after first asking the doctor if the doctor had ever given others hip injections, and if so, whether anything had happened. The doctor answered, "Nothing." Then, according to plaintiff's testimony, the doctor stated that she was first going to inject novocaine to deaden the pain. The doctor first injected the novocaine and then made a second injection into the left hip. Severe pain started with the second injection. Defendant applied hot towels to the area, which eased the pain to some extent. Plaintiff visited defendant professionally for about two months for treatment of the swollen area. Defendant drained the area, put a bandage on it, treated it with X ray, and furnished some salve. The condition worsened, the flesh fell in, and the area continued to drain. When plaintiff asked defendant about the charges for the treatment the doctor told her there would be no charges "because she did it," and suggested that plaintiff go to another doctor for a possible operation. She did go first to the Stanford Clinic for treatment for several weeks and, when this was unsuccessful, was operated on at the Stanford Hospital. The hospital records state that the condition was there diagnosed as an "Ulcer secondary to injection of dye for py[e]lography." The surgical report shows that an incision was made about six inches in one direction and three inches in the other, and deeply into the left hip to excise the ulcer. The wound was then drawn together and has healed satisfactorily. Plaintiff was required to stay in the hospital for 15 or 16 days.

The defendant's testimony differs from that of plaintiff in several respects. The doctor testified that she did ask the plaintiff if she was allergic, whether she had ever had hay fever or asthma, and whether she knew if she was sensitive to any drugs. Then on the right arm of the patient she or her assistant made an intradermal test to ascertain whether the patient was allergic to the solution she intended to use, and the test was negative. Then she prepared to make the injection. The solution used was Neo-iopax, an iodine solution excreted by the kidneys. She tried to make an intravenous injection first into the right arm of the patient, then in the left, then into one of the wrists and finally into the veins of one of the hands of the patient. Some of the fluid went into the veins, but the area around the injections started to bleed because the patient had friable veins. The defendant decided that it was not desirable to use such veins because occasionally a thrombosis results. During these unsuccessful attempts the defendant used 10 c.c. of the solution, but not all of this went into the veins because some of it was on the table or in the needles. She observed no adverse reactions of the plaintiff to these unsuccessful attempts, and the plaintiff made no complaints. Defendant then suggested that a leg vein be tried, or that the injection be made in the buttocks. The patient preferred the buttocks. The doctor admitted that she did not tell the patient that there might be a reaction because she did not expect one. She denied that the plaintiff asked about the possibility of a bad reaction, stating that the patient simply asked her if it would hurt and that she replied that it would. The defendant did not tell the plaintiff that Neo-iopax was an irritant although, in sufficient concentration, it is an irritant to everyone. The doctor stated that she had injected Neo-iopax intravenously several thousand times, subcutaneously two or three dozen times, and intramuscularly on occasion. Between 1940 and 1956, on two or three dozen occasions,

the injection had been made in the buttocks. She had heard that sometimes such injections cause a reaction but had never observed one. It is not customary to explain to patients that there might be adverse reactions. The doctor also testified that she tested the patient for a reaction before making the injection, first in the arm and then on the buttock, but there was no reaction. The doctor did not think that such tests for sensitivity were very satisfactory. The only reason that she gave such tests "is for medio-legal reasons. It's the custom to give tests and we do it."

After the tests the injection was made subcutaneously about a quarter of an inch below the surface. About 30 c.c. or about two tablespoons of a 50 per cent solution were injected. The patient immediately complained of pain, and hot packs were put on the area. About a week later the patient came back. The area at the site of the injection was red, swollen and tender. No pus was found. Defendant diagnosed the condition as an iodine granuloma caused by a sensitive reaction to iodine. She treated the condition several times but it did not clear up. She told the patient that it would slowly heal but if the cure were to be hastened an operation was necessary. The patient decided on the operation.

A bottle of Neo-iopax and its box container were introduced into evidence. On the box in heavy letters appears "For Intravenous Urography," and in the enclosed directions the manufacturer states "for intravenous and retrograde urography." The manufacturer does not state anything about subcutaneous or intramuscular injections. The defendant testified, however, that it is common standard practice in this community to give Neo-iopax subcutaneously or intramuscularly if it cannot be given intravenously. She also testified that this was her first patient to develop a granuloma from such an injection, but she had heard of two such cases in San Francisco in the past six years. She said that a granuloma was caused by sensitivity of the patient.

A doctor Culiner, a specialist in chest and general surgery called by defendant, testified that he had examined plaintiff in June of 1953 and advised surgery. He testified that when Neo-iopax is injected subcutaneously "every now and then" a granuloma may result; that it "is a matter of low incidence, but nevertheless a possibility every time it's given." This doctor also testified that Neo-iopax is usually given intravenously, but where that is not possible, then intramuscularly or subcutaneously, and that there are many people with whom an intravenous injection is not possible.

Doctor Rodenbaugh, a specialist in radiology, was also called by defendant. He also testified that when the injection cannot be given in the veins it is good practice to give it subcutaneously. Granulomas caused by such injections are not rare. They are caused by sensitivity of the individual rather than to pressure or overinjection. About 10 to 12 per cent of the patients have reactions to an intravenous injection. In 1955 some 8½ million injections were given of dye substances for kidney difficulties, and there were 27 recorded fatalities—a risk inherent in taking such injections. Sensitivity tests are not very valuable.

This is a fair summary of the evidence. On this evidence the trial court took the case from the jury by directing a verdict for defendant.

Appellant's main contention is that it was error to direct a verdict because under the facts the doctrine of *res ipsa loquitur* was applicable. It is very doubtful that the doctrine of *res ipsa loquitur* is applicable to the facts here involved. The conditions necessary for the application of the doctrine have frequently been stated by the courts. Salgo v. Leland Stanford, etc, Bd. of Trustees, 154 Cal.App.2d 560, 317 P.2d 170; Bauer v. Otis, 133 Cal.App.2d 439, 284 P.2d 133, and cases cited.

[1] Whether the doctrine is applicable depends upon whether a layman can say, as a matter of common knowledge or observation, or from the evidence could draw a

reasonable inference, that the consequences of the injection here involved were not such as ordinarily would have followed if due care had been exercised. See Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520; Dees v. Pace, 118 Cal.App.2d 284, 257 P.2d 756.

[2] In the instant case the injury arose at the site of the injection. The testimony of the various doctors was all to the effect that it is good and standard practice in this community to give such injections subcutaneously if it cannot be given in the veins. Respondent testified as to why it was not possible or feasible to give this injection into appellant's veins. Thus, there is no basis at all for appellant's assertion that there was an inference of negligence because the injection was here given subcutaneously.

All the testimony is to the effect that the reaction here involved is one of the risks of such an injection. Such toxic effects are caused by the sensitivity of the individual to the dye solution. Thus, there would seem to be no basis for the doctrine of *res ipsa loquitur*.

[3] But there exists another reason why it was error to direct a verdict for respondent. Such a verdict should not be directed if there is any substantial evidence or any reasonable inference from the evidence to support a verdict for the plaintiff. In the instant case we think there is substantial evidence independent of the doctrine of *res ipsa loqitur* that would support a verdict for appellant. The respondent testified that she asked the appellant about her reactions to injections and made tests for sensitivity. Although respondent and Dr. Rodenbaugh were skeptical about the value of such tests, the fact remains that respondent claimed that she made such tests and asked the relevant questions. The jury could believe from this testimony that the respondent believed that such tests were reasonably necessary, and could disregard her testimony and that of Dr. Rodenbaugh that such tests were of little value. It is certainly a possible and reasonable inference from respondent's testimony that the giving of such tests and the asking of such questions were common and standard procedure in this area. In fact, respondent testified that it was the "custom to give tests." But appellant testified that no such tests were given and no such questions asked. Thus, there is a direct conflict in the evidence on the vital issue of negligence. It is a reasonable inference from the evidence, and the jury could have found, that ordinary care requires the giving of such tests and the asking of such questions. The jury could find that it is negligence not to give such tests or to fail to ask such questions. The jury could have found that no such tests were given and no such questions asked. Thus, there was a factual issue that should have been submitted to the jury. It was error to direct a verdict.

The judgment appealed from is reversed.

We concur:

BRAY and FRED B. WOOD, JJ., concur.



160 Cal.App.2d 22

Floy M. MIDDLECOFF, Plaintiff, Cross-Defendant and Respondent,

v.

Robert F. MIDDLECOFF, Defendant, Cross-Complainant and Appellant.

Civ. 17670.

District Court of Appeal, First District, Division 1, California.

May 2, 1958.

Action by wife for annulment of marriage on the ground of husband's alleged incompetency wherein the husband filed a cross-complaint. From those portions of a decree granting the husband an annulment that awarded the wife attorney's fees and property and cash for services in the Superior Court, City and County of San Francisco, Milton D. Sapiro, J., the hus-

band appealed. The District Court of Appeal, Peters, P. J., held that an award of cash for services and interest in property of the husband to the wife and cost and attorney's fees to the wife was improper under the evidence.

Portions of the judgment appealed from reversed.

1. Marriage ⇐62, 63

While a de facto wife under proper circumstances is entitled to a division of community property acquired during the marriage and to payment on a quantum meruit basis for services rendered during the marriage, there must in order to justify an award, be some evidence on such issue.

2. Marriage ⇐62, 63

In action for annulment of marriage on the ground that the husband at time of marriage was of unsound mind and incapable of contracting marriage and that wife entered the marriage in good faith, where no community property was acquired during the purported marriage, and there was no evidence that services were rendered by the wife during the 15½ years of marriage, awarding wife $7,500 for services plus the value of the joint tenancy interest of the husband in a residence was unauthorized.

3. Marriage ⇐63

In action to annul marriage on ground of husband's incompetency at time of marriage where there was no community property belonging to the parties, joint tenancy interest of the husband in a residence awarded the wife was husband's separate property and the award was improper.

4. Divorce ⇐249(3)
Marriage ⇐63

Generally, in a divorce proceeding the court has no power to transfer separate property from one spouse to the other, but the jurisdiction of the court over property rights, is limited to community property and the same rule applies to an annulment proceeding.

5. Marriage ⇐62, 63

In annulment proceedings the court may divide the property of the spouses acquired after marriage as if it were community property, and may on a quantum meruit basis, compensate the wife for services rendered, but such gives the court no power over the separate property of the parties, though the court may allow an equitable lien on such property to secure an award or an allowance properly granted.

6. Marriage ⇐62

Under code sections the trial court has power to award attorney's fees and cost for past services in annulment cases as well as for future services. West's Ann.Civ. Code, §§ 87, 137.3.

7. Marriage ⇐62

In wife's action for annulment of marriage on ground of husband's alleged incompetency at time of entering into the marriage where the trial court found good faith on the part of the wife but no evidence was offered on the issue, award of attorney's fees and costs to the wife was unauthorized. West's Ann.Civ.Code, §§ 87, 137.3.

8. Evidence ⇐15

In action to annul a marriage on the ground of husband's alleged incompetency at time of marriage, the trial court could not judicially know whether the wife was "innocent of fraud" within the statute in entering into the marriage. West's Ann. Civ.Code, §§ 87, 137.3.

9. Evidence ⇐15

In wife's action for annulment of marriage on ground of husband's alleged incompetency, the trial court could not judicially know whether the wife was in need of an award for costs or attorney's fees and that the husband was able to pay it. West's Ann.Civ.Code, §§ 87, 137.3.

Tudor Gairdner, Los Angeles, for appellant.

Molly H. Minudri, San Francisco, for respondent.

PETERS, Presiding Justice.

Robert F. Middlecoff appeals from those portions of a decree granting him an annulment that awarded Floy M. Middlecoff, his former wife, attorney's fees and certain property and some cash for services rendered by her during the period these parties lived together as husband and wife. Neither party challenges the annulment.

The facts of this case are as follows: On June 26, 1934, Robert Middlecoff was adjudged to be an incompetent person by the Los Angeles Superior Court. He has never been restored to competency. The court in the present proceeding found that after the adjudication he has never regained competency and that he is still incompetent. These findings are not challenged on this appeal. On February 25, 1939, Robert married the respondent. What the circumstances were surrounding this marriage does not appear. They apparently lived together for nearly fifteen and a half years, separating on August 10, 1954.

During the period of the marriage, and on August 5, 1940, the San Joaquin Superior Court authorized one Carroll Grunsky, guardian of appellant's person and the bank that was then guardian of his estate, to enter into a contract with the wife providing for a payment to her of $37,500 if appellant should predecease her and if they were married at the time of such death, in lieu of any interest she might have or acquire in his estate. In the instant case the trial court found that this court proceeding was "intended to give validity to the purported marriage of the parties hereto."

Respondent, on November 19, 1954, filed her complaint for separate maintenance, alleging cruelty in general terms. On February 15, 1955, Henry Middlecoff, a brother of appellant, was appointed guardian *ad litem* for the purpose of appearing and defending the action on behalf of his brother. Acting as guardian *ad litem,* on July 22, 1955, he filed an answer, demurrer and a cross-complaint for an annulment on behalf of appellant. Respondent filed her answer to this cross-complaint, generally denying its basic allegations and praying, *inter alia,* that if the annulment was granted, she be awarded certain real property then held in joint tenancy by the parties, and payment for her services as wife, nurse and housekeeper during the years of the marriage.

The trial was had on July 30, 1956. It was a short and somewhat unusual trial. Respondent did not personally appear, her counsel stating that she was now living in Oregon, and could not be located. Her counsel, however, made no request for a continuance and consented that the trial should then be held. The court determined to try the issues presented by the cross-complaint for annulment first. But three witnesses testified, two for appellant and one for respondent. Their testimony was almost entirely limited to a description of appellant's mental condition before, at, and after his marriage to respondent. This, together with certain documentary evidence, constitutes the entire record. There was not one word of evidence about the circumstances of the marriage, about whether respondent ever rendered any services for appellant and, if such were rendered, what their nature and extent may have been. There was no evidence of the value of such services. Other than that the property held in joint tenancy was a residence, there was no evidence of its value.

On this most incomplete record the trial court found that at the time of the marriage appellant was of unsound mind incapable of contracting marriage, and that an annulment should be granted. The portion of the judgment so providing is not challenged by either party to this appeal. The court also found that respondent entered into the marriage "in good faith, and has rendered services as a wife, nurse and housekeeper during the years of the marriage" and that "as reasonable compensation for the services * * * she should receive the interest of * * * [appellant] in the said real property so that * * [respondent] * * * shall be the sole

owner thereof, and that she should receive the additional sum of $7,500.00."

The court also found that respondent was without sufficient funds to pay counsel fees and costs "and that the sum of $2,500 should be awarded to her for counsel fees, and the sum of $50 be awarded to her as costs of court." Judgment was entered accordingly.

[1, 2] It is obvious that the award of the joint tenancy interest of the husband in the residence and $7,500 in cash as and for services rendered during the marriage cannot stand. While a *de facto* wife, under proper circumstances, is undoubtedly entitled to a division of "community" property acquired during the marriage, and while, under proper circumstances she is entitled to payment, on a *quantum meruit* basis, for services rendered during marriage (Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342), there must be some evidence on these issues. In the instant case the finding that no community property was acquired during the purported marriage is supported by the record, but there is not one word of evidence that services were rendered during the 15½ years of marriage, what those services may have been, and what their value on a *quantum meruit* over and above the value of support and maintenance furnished by the husband, if they were so furnished, may have been. The value of such services was fixed by the trial court at $7,500 plus the appellant's interest in a residence of undetermined and unknown value. It is probably true that, if there had been some evidence of the nature and extent of the services, the trial court could have taken judicial notice of their value. Kerrison v. Unger, 135 Cal.App. 607, 27 P.2d 927; Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374; Seedborg v. Lakewood Gardens Civic Ass'n, 105 Cal.App.2d 449, 233 P.2d 943; Meek v. Pacific Electric Ry. Co., 175 Cal. 53, 164 P. 1117. But in all of those cases there was some evidence of the nature and extent of the services to be evaluated. Even if the trial court could judicially notice the nature of the general services rendered by a wife to her husband, and these may radically differ dependent on the situation of the parties, there would have to be a finding of the value of such services. Here such value was fixed at $7,500 plus the value of the joint tenancy interest of the husband in a certain residence. What the value of that joint tenancy interest may be is not shown. Thus, this portion of the award must be reversed and the issue retried. This is unfortunate. The award in the instant case for 15½ years of services seems modest, particularly when it is asserted that appellant is now the recipient of a $350,000 trust fund. But both litigants are entitled to have this award fixed under appropriate rules of law. The appellant has the legal right to complain that the award, no matter how modest, is unsupported. It being unsupported by evidence, it must be reversed.

[3–5] There is another reason why the award must be reversed. The trial court found that there "is no community property belonging to the parties." That finding is supported. Therefore, the joint tenancy interest of the husband in the residence awarded to the wife, was the husband's separate property. This separate property was awarded to the wife. Appellant was ordered to transfer this property to the wife. Generally speaking, it is the law that in a divorce proceeding the court has no power to transfer the separate property of one spouse to the other. In such cases the jurisdiction of the court over property rights is limited to community property. Huber v. Huber, 27 Cal. 2d 784, 167 P.2d 708; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988; Robinson v. Robinson, 65 Cal.App.2d 118, 150 P.2d 7; Allen v. Allen, 159 Cal. 197, 113 P. 160; Reid v. Reid, 112 Cal. 274, 44 P. 564; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844; 16 Cal.Jur.2d p. 590, § 293, and cases cited; 37 Cal.L.Rev. 671. The same rule applies to annulment proceedings. As already pointed out, in such cases the court may divide the property

acquired after marriage as if it were community property and may, on a *quantum meruit,* compensate the wife for services rendered. But this gives the court no power over the separate property of the parties. The court may allow an equitable lien on such property to secure an award or an allowance properly granted (Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342), but it has no power to order separate property of either transferred to the other.

The other portion of the judgment appealed from relates to the award of attorney's fees and costs. Section 87 of the Civil Code provides as follows: "The court shall have power to grant attorneys fees and costs as provided by Section 137 in those annulment cases in which the party applying for such attorney's fees and costs shall, upon hearing, be found to be innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage sought to be annulled."

The trial court, in the instant case, found that respondent entered into the marriage in "good faith." That is equivalent to a finding that respondent was "innocent of fraud or wrongdoing in inducing or entering into the marriage." The court also found that the court proceeding of August 5, 1940, relating to the post nuptial agreement was intended to give validity to the marriage. Section 137.3 of the Civil Code provides: "Attorney's fees and costs within the provisions of this section may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any application or order of court therefor, including services rendered or costs incurred prior to the filing of the complaint. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary."

[6] Thus, under these code sections, the trial court had power to award attorney's fees and costs for past services as well as future services. Appellant's citations to the contrary are no longer the law since the amendments to the section last quoted. See Barker v. Barker, 139 Cal.App.2d 206, 293 P.2d 85; Griffin v. Griffin, 122 Cal.App.2d 92, 264 P.2d 167.

[7–9] The difficulty with the present case is that, although the trial court found "good faith" on the part of the respondent, there is no evidence on the issue at all. The respondent requested attorney's fees and costs in her complaint and in her answer to the cross-complaint. These allegations in her complaint were denied in the answer of appellant, and as to the allegations in her answer to the cross-complaint, were denied by operation of law. Thus, an issue was presented, an issue on which respondent had the burden of proof. No evidence was offered on the issue. While the award was not made until after the services were rendered so that the trial court without evidence of their value could evaluate them, the court could not judicially know whether respondent was "innocent of fraud" in entering into the marriage. Nor could the trial court judicially know whether respondent was in need of the award or that appellant was able to pay it. These are all issues that can be determined on the retrial. At that time if the trial court, based on the evidence, finds the respondent innocent of wrongdoing it may award respondent the value of her attorney's fees for all past and future services.

The portions of the judgment appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.

160 Cal.App.2d 1

Madelaine ADLESON, Plaintiff and Appellant,

v.

Frank ADLESON, Defendant and Respondent.

Civ. 17675.

District Court of Appeal, First District, Division 1, California.

May 1, 1958.

Proceedings to modify a prior award granting physical custody and control of two minor children to husband. The Superior Court, County of Santa Clara, W. W. Jacka, refused to modify prior order and ex-wife appealed. The District Court of Appeal, Peters, P. J., held that trial court did not abuse its discretion in refusing to modify custody order.

Affirmed.

Divorce ⇐303(3)

In proceedings on motion to modify trial court's interlocutory decree of divorce granting physical custody and control of two of four minor children to husband, evidence relating to best interests of children disclosed that trial court did not abuse its discretion in failing to modify order and grant ex-wife custody.

Robert J. Grossman, Los Angeles, for appellant.

Todd & Todd, Henry C. Todd, San Francisco, for respondent.

PETERS, Presiding Justice.

This is an appeal by Mrs. Adleson from an order of the Superior Court refusing to modify a prior order granting physical custody and control of two of the four minor children of the broken marriage to her husband, Mr. Adleson.

In September of 1955, Madelaine Adleson secured an interlocutory decree of divorce from Frank Adleson. This decree, among other things, provided that Mrs. Adleson should have the exclusive care, custody and control of the four minor children of the marriage, with the right of visitation granted to Mr. Adleson. The children are named Susan, Sydney, Steven and Stacey. On May 4, 1956, by stipulation of the parties, the interlocutory decree was modified by court order so as to grant physical possession of Sydney and Steven to the father, with legal custody of the four children remaining in the mother. In August of 1956, Mrs. Adleson instituted this present proceeding to secure a modification of the May 4, 1956, order to provide for a restoration of the right of physical custody of Sydney and Steven to her. After a hearing, the court issued the following order: "It is hereby ordered that there be no modification of the previous Order of Court of May 4, 1956, and that the defendant father, Frank Adleson, shall have physical care, custody and control of Sydney and Steven Adleson, as set forth in said Order of Court dated May 4, 1956;

"It is further ordered that in all ways said Order of May 4, 1956, is confirmed and made a part of this Order."

Mrs. Adleson appeals from this order. She makes several arguments in her briefs, but basically her contention is that the order of which complaint is made is based on insufficient evidence, in that, it is claimed, the evidence without conflict shows that the best interests of the children require the requested modification of the May 4th order. In other words, it is necessarily contended that the trial court abused its discretion in making the order.

The law applicable to such proceedings is well settled, and has recently been summarized in the case of Holsinger v. Holsinger, 44 Cal.2d 132, 279 P.2d 961. There a final decree gave the husband and wife joint legal custody of their two children, with physical custody in the mother and visitation rights in the father. On motion of the father the trial court modified this order by granting to the father physical custody of the 10-year old boy with visitation rights in the mother, and by granting to the father the exclusive authority to

make arrangements for the boarding and educational program of the 12-year old girl. The mother appealed, making substantially the same contentions that are made in the instant case. The trial court's order of modification was affirmed. The Supreme Court summarized the applicable law as follows (44 Cal.2d at page 135, 279 P.2d at page 962):

"Neither parent is entitled to the custody of a child as a matter of right. 'Under the statute (Civ.Code, § 138(2)) each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interests of the child.' Davis v. Davis, 41 Cal.2d 563, 565, 261 P.2d 729. 'It is the welfare of the child and not the shortcomings of the respective parties which is determinative.' Clarke v. Clarke, 35 Cal. 2d 259, 262, 217 P.2d 401.

"'It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce actions, a very broad discretion is vested in the trial courts. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal.' Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295, 296; accord: Gantner v. Gantner, 39 Cal.2d 272, 275, 246 P.2d 923; Clarke v. Clarke, 35 Cal.2d 259, 261, 217 P.2d 401. '[T]he correct rule for a trial court to follow when considering the modification of a custody decree, is: "The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child."' Prouty v. Prouty, 16 Cal.2d 190, 195, 105 P.2d 295; accord: Davis v. Davis, 41 Cal.2d 563, 565, 261 P.2d 729."

The present case falls directly within the rules above set forth. At the time of trial in September, 1956, Susan and Sydney, twins, were eight years old, Steven was six and a half, and Stacey was four. The two children involved in the order of May 4, 1956, are Sydney and Steven. The respondent lives in Palo Alto, while the appellant lives in Monrovia. Appellant conceded that she agreed to the modification of May 4, 1956, but testified she did so because the twins were then having difficulty getting along together, and because, at that time, she and her four children were living with her sister who has three children. Appellant also testified that after May 4th, while Stacey was staying with her father, she was allowed to go barefoot and as a result got a crushed foot in an electric door. Respondent testified that this occurred on a hot summer day when the child was permitted to go barefoot and that the accident was unavoidable. Appellant also testified that while Susan was visiting her father she took an overdose of dexedrine. Respondent testified that the dexedrine is kept in an upper cabinet in the kitchen six feet from the floor, and that Susan climbed up on the kitchen sink to reach the pills. Susan suffered no ill effects from the experience. It is to be noted that, not only did respondent explain these two occurrences to the satisfaction of the trial court, but they involved the two children not affected by the order of May 4th.

Appellant claims that Sydney has acquired a hair condition while living with her father which she thinks was caused by lice. Mr. Adleson testified that both Sydney and Susan did have a scalp ailment, but that it was first discovered immediately after Mrs. Adleson returned with the four children from a four-month visit to Mexico. Mr. Adleson has had the condition successfully treated.

Appellant fears that Sydney and Steven are being alienated from her while they remain with respondent. There is no evidence that respondent has caused this con-

dition to exist, if it does exist. Appellant objects that during the day, after school, Sydney and Steven are under the supervision of respondent's mother who, according to appellant, is extremely nervous and neurotic and is unable to stand the noise created by the children. Respondent testified that during the summer, when the children were in his custody, he sent them to a private school, and hired a baby sitter, who is a high school girl, to assist his mother. He also testified that his mother is not nervous or neurotic and that, in any event, he plans to remarry a woman with two children of her own, one of whom will live with them, and that his mother has decided to move to Texas. Appellant also objects to the neighborhood where respondent lives, because the children across the street "play doctor, and various other sexual games." Respondent testified that the home had been selected by appellant during their marriage, and is adequate for him and the children and his new wife and her children, having four bedrooms. Appellant testified that her house has two bedrooms and is located on a large fenced lot. The evidence shows that Mr. Adleson is a Cub Scout leader, a member of the Palo Alto Stanford Council of Scouts, teaches Sunday School and is vice-president of the National Lay Group of the Unitarian Church.

There is no evidence that either parent is unfit to have physical custody of the two children involved. No doubt both love the children and would adequately care for them. But on May 4, 1956, the appellant consented that the prior order be modified so as to grant physical custody of the two children to respondent, because at that time she believed the best interests of these two children required that they be placed with respondent. During the time the children were with the respondent the visitation rights of the mother were not interfered with; in fact, the father only had physical custody of Sydney and Steven from May 4, 1956, to July 25, 1956, the children returning to visit appellant on that date. Appellant filed the present proceeding in August of 1956. There is nothing in the record to show that the respondent is not a proper person to have custody; in fact, the record indicates the contrary. Appellant has certainly failed to show that the welfare of the children, which is the basic consideration, requires that she be given custody. In such cases, as was pointed out in the Holsinger case, supra, the trial court is vested with a very broad discretion. To overrule that discretion appellant must show that it has been abused. This she has not done.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



Helen M. KELLEY, Plaintiff and Respondent,

v.

Sidney H. KELLEY, Defendant and Appellant.

Civ. 22460.

District Court of Appeal, Second District, Division 3, California.

April 29, 1958.

Rehearing Denied May 16, 1958.

Hearing Granted June 25, 1958. *

Proceeding on divorced husband's application for modification of provisions in divorce decree for wife's support. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., dismissed order to show cause, and husband appealed. The District Court of Appeal, Patrosso, J. pro tem., held that evidence sustained finding that parties intended by property settlement agreement executed prior to divorce to settle both division of their property and rights and duties with respect to support and maintenance, and that provisions for monthly payments constituted an inseparable part of consid-

* Dismissed as moot Aug. 14, 1958.

eration for agreement, and that support provisions were not subject to modification.

Affirmed.

1. Evidence ⇐442(1)

In hearing on application for modification of provision in divorce decree for support of divorced wife, evidence with respect to property settlement agreement of parties, as reflected not only by written agreement but by oral stipulations of parties upon trial of divorce action, was properly received, where writing did not purport to be complete agreement with respect to matter of support and maintenance or division of community property.

2. Divorce ⇐245(1, 3)

Where divorce decree provides that monthly payments for support shall continue until further order of court, upon the face of decree, court possesses power to modify award for support, but where question thereafter arises as to whether payments are alimony subject to modification, court may receive extrinsic evidence to establish that award was predicated upon agreement settling parties' property rights, and, if, from evidence as to agreement, court is warranted in concluding that award was made as part of adjustment of property rights and in accordance with agreement, judgment, when it becomes final, becomes unchangeable to the same extent as final judgment in any other action.

3. Divorce ⇐245(3)

In proceeding on divorced husband's application for modification of provision in divorce decree for wife's support, evidence sustained finding that parties intended by property settlement agreement executed prior to divorce to settle both division of their property and their rights and duties with respect to support and maintenance and that support provisions in decree represented either division of community property or constituted an inseparable part of consideration for the agreement.

4. Divorce ⇐245(2)

Fact that divorce decree made separate provisions for support and for division of community property, and that order for support made no reference to property settlement agreement, which was executed by parties prior to divorce, and expressly provided that monthly payments were to continue until further order of court, did not compel conclusion that monthly payments were alimony subject to future modification.

5. Divorce ⇐286

Even if provisions of divorce decree would have warranted trial court in reaching a different conclusion, its implied finding that provisions for support were part of an integral property settlement agreement and were not subject to modification was conclusive upon appeal where it was supported by evidence.

R. F. Neuman and Allan M. Carson, Los Angeles, for appellant.

Pacht, Ross, Warne & Bernhard, Leo Altshuler, Harvey M. Grossman, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by defendant from an order dismissing an order to show cause issued upon his application for modification of an order for support of plaintiff. The sole question presented is whether the trial court's implied finding that the provisions in the divorce decree for the wife's support was part of an integral property settlement agreement and hence not subject to modification, is supported by the evidence.

After the plaintiff had instituted an action for divorce against defendant, the parties attempted to effect a reconciliation. During this period the parties entered into a written property settlement agreement wherein they undertook to make provisions for a division of certain of their community property in the agreement specifically described. By the terms of this agreement, plaintiff (hereinafter referred to as wife) was given an automobile registered in her name and $33,500 in cash, and all other property described in the agreement was awarded to the husband as his separate

property. In addition, it was provided that semiannually, commencing February 1, 1953 "until permanent alimony is awarded" an accounting of the husband's earnings for personal services should be had "and the amount thereof that has been saved and accumulated as a result of not having been expended * * * for living and other expenses," should be equally divided between them. In addition, the husband agreed to continue to pay the wife the sum of $650 per month temporary alimony which he was then under order of the court to pay with the proviso that any amounts so paid to the wife while the parties were living together were to be "credited toward the division of future community earnings."

Following the execution of this agreement the wife filed a supplemental complaint for divorce. Therein she alleged that subsequent to the filing of her original complaint the parties had attempted a reconciliation but that it had failed and the parties had again separated. She further alleged that during the period that the parties were living together they executed the property settlement agreement hereinabove referred to, a copy of which was attached to the supplemental complaint; that the execution of said agreement was procured by fraud, threats and undue influence of the husband and she prayed that the agreement be set aside and declared void.

When the cause was called for trial, Judge Kincaid, to whose department it had been transferred for hearing, suggested to the parties and their counsel, that they endeavor to settle as many of their differences as possible. After some negotiation the parties reached an agreement, of which they thereupon advised the court, to the effect that the wife should retain the sum of $33,500 which she received under the property settlement agreement; that the agreement should be approved except that there should be reserved for the court's determination the question as to whether the husband's interest in Coast Western Advertising Agency was community property, and that in order to complete the settlement of community property between the parties, the defendant would pay to the plaintiff the additional sum of $4,500; that the wife should have the right to occupy the residence of the parties which was owned by them in joint tenancy until it was sold, at which time the net proceeds would be divided between them, and that the husband should pay to the wife as alimony the sum of $500 per month. With respect to the agreement as to alimony the transcript of the proceedings discloses the following:

> "Mr. Nichols: (Counsel for defendant-husband) Now, in addition, if your Honor pleases, I think counsel has omitted, inasmuch as the property settlement agreement of December 3rd, 1952 did not encompass the matter of alimony, it is a part of this stipulation that the amount of alimony payable by the defendant to the plaintiff shall be the sum of $500 per month until the plaintiff dies or remarries, or until further order of the Court in the premises; and incident to that is the further stipulation, your Honor, that that amount is to be fixed without regard to future modification on the part of either party.
>
> "The Court: Well, the provision, until the further order of the court of course takes care of that.
>
> "(Discussion off the record)
>
> "The Court: Alimony to be ordered at the rate of $500 per month until the plaintiff either dies or remarries, payable at the rate of $250 on the first and 15th days of each month, beginning April 15, 1953, and at the rate of $500 a month beginning August 1st, 1953, and payable thereafter on the first day of each month."

Thereafter, further proceedings were had with respect to the issue as to Coast Western Advertising Agency and the matter of the attorney's fee to be allowed to wife's counsel, following which the court announced its decision that Coast Western Advertising Agency was the separate prop-

erty of the husband in accordance with the terms of an antenuptial agreement executed between the parties and fixed the amount of attorney's fee payable by the husband. Following this, the issue as to plaintiff's right to a divorce was not contested by defendant.

Findings having been waived, an interlocutory decree was entered. This decree was prepared by counsel for the husband and in the main reflected the stipulations of the parties as hereinabove set forth. With respect to the matter of the support payments, however, it was not in accord therewith in that it was therein provided that "Such payments shall continue to be made by defendant to plaintiff until plaintiff dies or remarries or *until further order of this Court* or upon the demise of defendant. And in consonance with the stipulation made in open Court upon the subject, it is further ordered that plaintiff is and shall be chargeable with the waiver, release and relinquishment in favor of defendant of any and all right to seek or obtain any increase in the amount of such payments during any of said times." [Emphasis added.]

Upon the hearing of defendant's application for modification, which resulted in the order appealed from, evidence was received consisting of the testimony of Judge Kincaid as to his recollection of the proceedings had before him upon the trial of the divorce action as well as testimony of the then counsel for the plaintiff as to the negotiations which had resulted in the settlement reached and his understanding with respect thereto. In view of the conclusion which we have reached, however, we do not find it necessary to set forth here the details of this evidence.

Appellant contends (1) that in view of the language of the interlocutory decree, the only conclusion to be derived therefrom is that the support payments therein provided for constitute alimony and not an integral part of the settlement of the parties' property rights; (2) that the court erred in receiving extrinsic evidence as to the understanding and agreement of the parties other than the written property settlement agreement; and (3) that, in any event, such extrinsic evidence lends no support to the trial court's conclusion that the support payments were an inseparable part of the agreement of the parties to divide their property.

[1] We find it unnecessary to consider appellant's first contention in view of our conclusion that the trial court properly received and considered evidence with respect to the agreement of the parties as reflected not only by the written property settlement agreement, but the oral stipulation of the parties upon the trial. The writing does not purport to be a complete agreement with respect to the matter of support and maintenance or the division of their community property, other than that therein specifically described. The matters left undetermined thereby were resolved when the parties appeared for trial and then reached an agreement with respect thereto as reflected by the stipulations in open court. Only by considering the written agreement in connection with such oral stipulations could the court undertake to determine what the entire agreement of the parties was. And that it was authorized to do so may not be gainsaid. In Codorniz v Codorniz, 1950, 34 Cal.2d 811, 215 P.2d 32, 35, it was assumed without question that upon the hearing of an application for the modification of support payments contained in a divorce decree, the judge who had presided at the trial of the action could properly take into consideration the facts which induced him to make the order in the first instance in determining whether or not such payments were subject to modification. And this, in a case where the provisions for support in the decree of divorce was not based upon a property settlement agreement. The court there said:

> "It follows from the rules just stated that the trial court likewise has jurisdiction, in a proceeding such as this, to determine whether payments ordered under a decree concededly not

based (at least not directly or wholly) upon a property settlement agreement were intended to be in lieu of property rights and not subject to modification, or were meant wholly or partially as alimony and child support provisions and were therefore subject to modification, and that that court's findings based upon 'ample evidence to support' such findings are likewise binding upon an appellate court."

Appellant argues that in admitting extrinsic evidence as to the agreement of the parties except as reflected by the written agreement, the trial court in effect permitted the respondent to collaterally attack the decree in violation of the rule announced in Gosnell v. Webb, 60 Cal.App. 2d 1, 139 P.2d 985. Such is not the case.

In Tuttle v. Tuttle, 1952, 38 Cal.2d 419, 240 P.2d 587, 588, the divorce decree, which made no mention of a property settlement agreement, by its terms divided the community property between the parties and in addition provided that the plaintiff husband should pay to the defendant wife "as and for her support and maintenance" certain specified monthly payments over a period of years. Subsequently, the wife made a motion for an increase in the amount of the monthly payments based upon an alleged change of conditions. In support of the motion, she filed an affidavit in which she made certain statements of fact. The husband answered by a counteraffidavit, setting forth at length the discussions between the court and counsel upon the trial of the divorce action. He alleged that the provision of the decree for the payment of stated amounts for a limited period, was not an award of alimony but an integral part of a property settlement agreement referred to in these discussions. The wife, by a further affidavit, denied the making or existence of any property settlement agreement. The trial court denied the wife's motion on the ground that the provisions in the decree for monthly payments "was not permanent alimony, but was an unqualified disposition of property rights resulting in full satisfaction of any and all claims by the * * * wife for her support and maintenance." Upon the wife's appeal from the order, she contended, as does appellant here, that the husband's claim that the provision for support was based upon a property settlement agreement constituted a collateral attack upon the decree. In rejecting this contention the court said (38 Cal.2d at page 421, 240 P.2d at page 589):

"The decisive question presented by Lillie's motion is whether the payments awarded by the decree were alimony, or part of a settlement of property rights. In such a proceeding, 'the trial court has jurisdiction to determine whether the decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification or was based upon alimony or support allowance covenants and therefore subject to modification.' Codorniz v. Codorniz, 34 Cal.2d 811, 814, 215 P.2d 32, 34; Hough v. Hough, 26 Cal.2d 605, 615, 160 P.2d 15; Puckett v. Puckett, 21 Cal.2d 833, 841, 136 P.2d 1. A finding upon this issue, if supported by sufficient evidence, is binding upon an appellate court. Codorniz v. Codorniz, supra, 34 Cal.2d at pages 814–815, 215 P.2d 32; Hough v. Hough, supra, 26 Cal.2d at pages 615–616, 160 P.2d 15; Wallace v. Wallace, 136 Cal.App. 488, 493, 29 P.2d 314; Atlass v. Atlass, 112 Cal.App. 514, 517, 297 P. 53.

"Lillie argues that this rule is inapplicable where the decree, upon its face, clearly is one for alimony. However, the provision requiring the payment of stated amounts for a limited period is one of eight numbered paragraphs which specify in detail how 'the hereinafter designated property which is found to be community property * * * [is to be] divided and apportioned'. The use of the words 'support and maintenance' does not necessarily mean that the amount ordered to be paid in monthly installments was

an award of alimony and not a part of the settlement of the property rights of the parties. Puckett v. Puckett, supra, 21 Cal.2d at page 842, 136 P.2d 1. Under these circumstances, upon a motion to modify the terms of the decree, it was the duty of the trial court to determine whether or not alimony had been awarded.

"There is ample evidence to support the trial court's finding in the order denying modification that the provision for payments to Lillie was a disposition of property rights and not alimony. The decree, therefore, is not subject to modification. Puckett v. Puckett, supra, 21 Cal.2d at page 840, 136 P.2d 1; Leupe v. Leupe, 21 Cal. 2d 145, 148, 130 P.2d 697; Dupont v. Dupont, 4 Cal.2d 227, 228, 48 P.2d 677; Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540.

"In resisting the motion, Emmett is not making a collateral attack upon the decree. He is relying upon the decree and the record in the original proceeding which clarifies its provisions. He does not, as did the defendant in Gosnell v. Webb, 60 Cal.App.2d 1, 4, 139 P.2d 985, 987, upon which Lillie relies, 'attack the decree by evidence that it is not what it appears to be, or that it is not in accordance with the agreement of the parties.' "

And in Flynn v. Flynn, 1954, 42 Cal.2d 55, 60, 265 P.2d 865, 867:

"* * * We are concerned only with the provisions of the agreement providing for monthly payments in litigation between the parties themselves. Under these circumstances, the necessity of referring to an extrinsic document presents no insuperable barrier to giving effect to the decree, as is demonstrated by the many cases where the court in modification proceedings has taken extrinsic evidence to determine whether the provision for monthly payments was one for alimony subject to modification or part of a property settlement not subject to modification. See, e. g., Tuttle v. Tuttle, 38 Cal.2d 419, 420–422, 240 P.2d 587; Codorniz v. Codorniz, 34 Cal.2d 811, 815, 215 P.2d 32. Thus, in cases in which it is difficult or impossible accurately to determine from the permanent records of the court alone the intended character of the payments involved, courts do not hesitate to consider all of the admissible extrinsic evidence correctly to interpret their decrees."

[2] In the aspect with which we are here concerned, there is no difference, in legal effect, between a divorce decree providing for monthly payments for support and maintenance which is silent as to the court's power to modify such provision and one which, as here, provides that the payments shall continue until further order of the court. In either case, upon the face of the decree, the court would possess the power to modify the same. Where, however, the question thereafter arises as to whether the payments ordered to be made are alimony subject to modification, the court is not confined to a consideration of the terms of the decree but, as the foregoing authorities declare, may receive extrinsic evidence designed to establish that the award for support was in fact predicated upon an agreement of the parties settling their property rights. And, as pointed out in Kohl v. Kohl, 1944, 66 Cal.App.2d 535, 542, 152 P.2d 494, 497, if, from the evidence as to the agreement of the parties the court is warranted in concluding that "the award was made as a part of the adjustment of the property rights of the parties and in accordance with their agreement 'no reason appears why the judgment, when it became final, did not also become unchangeable to the same extent as a final judgment in any other action.' Parker v. Parker, 1921, 55 Cal.App. 458, 460, 203 P. 420, 421. Hence, as held in the Parker case, the inclusion in the interlocutory decree of the above quoted language [that the support payments should continue 'until further order of the court'

and 'until modified by the court'] does not have the effect of continuing the jurisdiction of the court so as to permit the modification of the decrees in the respect here sought."

[3] In view of the foregoing, little remains of appellant's contention that, conceding the admissibility of the extrinsic evidence with respect to the agreement of the parties, the trial court nonetheless erred in concluding that the monthly payments were not alimony subject to modification. From a consideration of the evidence of the agreement of the parties the trial court was warranted in finding that they thereby intended to settle both the division of their property and their rights and duties with respect to support and maintenance, the wife waiving any right to support except to the extent and in the amount specified in the agreement, and from this the trial court was likewise warranted in concluding that the provision for monthly payments represented either a division of the community property or constituted an inseparable part of the consideration for the agreement. As said in Dexter v. Dexter, 1954, 42 Cal.2d 36, 41, 265 P.2d 873, 876:

> "When, as in this case, however, the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. See, Puckett v. Puckett, 21 Cal. 2d 833, 838, 136 P.2d 1; Ettlinger v. Ettlinger, 3 Cal.2d 172, 174, 44 P.2d 540; Kohl v. Kohl, 66 Cal.App.2d 535, 537, 152 P.2d 494. On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties."

[4] Appellant lays much stress upon the fact that the decree makes separate provisions for support and for the division of the community property; that the order for support makes no reference to the settlement agreement and expressly provides that the monthly payments are to continue until the further order of the court. These facts considered singly or collectively, however, do not compel the conclusion, as he contends, that the monthly payments are alimony subject to future modification. Helvern v. Helvern, 1956, 139 Cal.App.2d 819, 827–828, 294 P.2d 482; Fox v. Fox, 1954, 42 Cal.2d 49, 53, 265 P.2d 881; Kohl v. Kohl, 1944, 66 Cal.App.2d 535, 542, 152 P.2d 494; Dexter v. Dexter, supra.

[5] If it were to be conceded that such provisions would have warranted the trial court in reaching a different conclusion, its finding to the contrary being supported by the evidence is conclusive upon appeal. Codorniz v. Codorniz, supra.

The order appealed from is affirmed.

SHINN, P. J., concurs.

VALLÉE, Justice.

I concur in the judgment. I am unable to understand why a decree of divorce should be treated differently from any other final judgment. In Hamilton v. Hamilton, 94 Cal.App.2d 293, 210 P.2d 750, this court held that extrinsic evidence is not admissible for the purpose of varying the terms of an unambiguous final interlocutory decree. There is no uncertainty or ambiguity in the decree at bar. It specifically provides that the payments to be made by defendant to plaintiff for her support and maintenance "shall continue to be made by defendant to plaintiff until plaintiff dies or remarries *or until further order of this court.*" (Emphasis added.) If there was fraud in causing the underscored language to be inserted in the decree, it was intrinsic fraud which will not justify departure from the terms of the decree. Burch v. Hiber-

nia Bank, 146 Cal.App.2d 422, 431–435, 304 P.2d 212. Thus on the face of the decree it appears that the court retained jurisdiction to modify it with respect to the wife's support. However, since this court in Kohl v. Kohl, 66 Cal.App.2d 535, 152 P.2d 494, expressly held that the above quoted language does not have the effect of continuing the jurisdiction of the court so as to permit modification of the decree with respect to the wife's support where that award was made in the decree as an integral part of division of the property of the parties—in other words, that the quoted language means nothing—and since Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881, indicates that is the rule, I am compelled to concur in the judgment.



160 Cal.App.2d 60

O'KELLEY-ECCLES COMPANY, a Corporation, Plaintiff and Appellant,

v.

The STATE of California, The State Board of Equalization of the State of California, The State Department of Finance of the State of California, George R. Reilly, James H. Quinn, Paul R. Leake and Robert McDavid, as members of the State Board of Equalization of the State of California, et al., Defendants and Respondents.

Civ. 9306.

District Court of Appeal, Third District, California.

May 2, 1958.

Action by retailer for recovery of sales taxes paid under protest. From adverse judgment of the Superior Court, Sacramento County, Gordon A. Fleury, J., retailer appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that retailer of cement blocks which quoted separate prices to buyers depending on whether buyer wished to pick up blocks at plant or wished them delivered, failed to establish that by custom or usage of trade or otherwise, title passed to buyer at sometime prior to delivery of blocks by retailer's trucks.

Affirmed.

1. Sales ⇐197

Under Uniform Sales Act, cardinal factor upon which the passing of title between a seller and a buyer depends is the intention of the parties. West's Ann.Civ. Code, § 1721 et seq.

2. Licenses ⇐34

In action by retailer to recover sales taxes paid under protest on portion of price which allegedly represented transportation costs to buyer, wishing goods delivered, evidence sustained finding that retailer which quoted separate prices depending on whether buyer wished to pick up blocks at plant or wished them delivered was, in case of request for delivery, obligated to deliver goods at point designated by customer. West's Ann.Civ.Code, §§ 1721 et seq., 1739, rule 5.

3. Licenses ⇐29

Where retailer of cement blocks quoted separate prices dependent upon whether buyer wished to pick up blocks himself at plant or wished them delivered, retailer was, in case buyer wished delivery, obligated to deliver goods at point designated by buyer, so that title did not pass until the goods had been delivered, and such fact rendered price charged for delivery subject to sales tax. West's Ann.Civ.Code, §§ 1721 et seq., 1739, rule 5.

4. Trial ⇐90, 105(6)

Trial court may exclude or strike out inadmissible evidence, even though it is not objected to by a party and even though no motion is made to strike the same.

5. Licenses ⇐34

In action by retailer to recover sales taxes paid under protest on what retailer claimed amounted to delivery charges, where imposition of tax depended upon

when title passed between buyer and seller, there was no error in striking testimony of retailer respecting his understanding of meaning of term "FOB" and when he considered title to have passed. West's Ann. Civ.Code, §§ 1721 et seq., 1739, rule 5.

6. Evidence ⇐472(1)

In retailer's action to recover sales taxes paid under protest on what was claimed to be delivery charges to buyer, where imposition of taxes depended upon time that title passed, there was no error by court in striking testimony of retailer's witness that transportation charge was in addition to sales price, since answering involved conclusion of witness upon very issue of law before the court, which was what the sales price was.

7. Estoppel ⇐107, 110, 114

Failure to plead an estoppel constitutes a waiver.

8. Estoppel ⇐62(2)

Where retailer decided to sell products "FOB" plant and charge fee for delivery after consultation with local office of Board of Equalization and obtained a license from Board for trucks and began paying transportation tax, fact that it paid a transportation tax based on both receipts of alleged delivery charges did not estop Board of Equalization from imposing sales tax based on retailer's gross receipts consisting of sales price of goods and alleged delivery charges. West's Ann.Rev. & Tax. Code, §§ 6001 et seq., 9601 et seq.

Hanna & Morton and James M. McRoberts, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., by James E. Sabine and Irving H. Perluss, Asst. Attys. Gen., Edward P. Hollingshead, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment denying recovery of taxes paid under protest. Appellant is a retailer within the meaning of the Sales and Use Tax Law, Revenue and Taxation Code, § 6001 et seq., and made retail sales in this state subject to sales taxes. It claimed that by virtue of its methods of doing business a part of its receipts which constituted charges for the delivery of items sold should be excluded from the computation of gross receipts from sales.

Appellant's methods of doing business which are pertinent here may be stated as follows: Appellant manufactures and sells concrete building blocks at "FOB Plant" prices. If delivery is made by appellant to a place designated by the buyer a specific delivery charge is made in addition to the "FOB Plant" price. About half of the blocks sold by appellant are so delivered. Appellant's price schedules set forth prices "FOB Plant" for various sizes and styles of blocks and separately stated set forth the charges for delivery within a radius of thirty miles. Appellant grants discounts from its published "FOB Plant" prices favoring customers such as contractors who buy large quantities, but discounts are not given on that part of the total cost to the customer which constitutes the delivery charge. In paying its sales taxes, appellant deducted from the gross amount received from sales, the amounts received for delivery. Respondents reassessed and demanded payment of the tax upon the excluded amounts. Appellant paid under protest.

The trial court made the following findings: That in all instances involved in the action the customers of plaintiff ordered that the concrete blocks be delivered to them at a designated place and that plaintiff delivered the blocks in its own trucks; that plaintiff made a transportation charge to offset the cost of transportation, which charges aggregated $39,610.91 during the period involved; that this amount constituted the measure of the sales taxes sued for; that plaintiff failed to show that in entering into any of the transactions involved any express agreement was made concerning the time and place where title to the blocks was to pass; that in order to inform its customers of the prices of the blocks and the delivery charges, plaintiff

prepared price lists which specified the sizes and styles of the blocks listed and stated an "FOB Plant" price and the charge for "Delivery 30 Miles"; that a total of those two prices was applicable to all instances where plaintiff delivered blocks; that plaintiff failed to establish that the terms "FOB Plant" and "Delivery 30 Miles" set forth in its price list designated anything other than a statement of prices and failed to establish that such terms were stated separately for any reason other than to differentiate between the plant price and the delivered price, so that customers would know the plant price where they arranged for delivery themselves, and would understand that plaintiff allowed a contractor's discount only upon the plant price and so that the amount of the discount could easily be determined; that plaintiff further failed to establish that the term "FOB Plant" in plaintiff's price lists had any reference to the time and place of the passage of title; that the term "FOB Plant" was merely a pricing term and had no other significance; that, in dealing with its customers plaintiff failed to show that it communicated to them any intention it may have had that title to the goods sold and delivered by it was to pass other than at the time the blocks were received by the buyer or were delivered at the place designated by the buyer; that buyers who saw plaintiff's price lists believed that said price lists indicated only that plaintiff maintained a plant price and a delivered price; that plaintiff failed to establish that custom or usage of the trade supports its theory that title passed at some time prior to the delivery of the goods by plaintiff's trucks.

Conceding, as it must, that these findings support the judgment, appellant attacks the findings upon the ground that the evidence does not support them.

Section 6051 of the Revenue and Taxation Code imposes a tax upon retailers for the privilege of selling tangible personal property at retail. The section measures the tax by the gross receipts of the retailer from sales at retail.

Section 6012 defines gross receipts and provides for certain exclusions. The term "gross receipts" mean the total amount of the sale price of the retail sales of retailers without deduction for the cost of the property sold or of the materials used, labor or service cost, interest paid, losses or any other expense and without deduction for the cost of transportation of the property *prior to its sale to the purchaser.* The total amount of the sale includes any services that are a part of the sale and all receipts, cash, credits and property of any kind. "Gross receipts" do not include "transportation charges" separately stated if the transportation occurs *after the sale of the property is made* to the purchaser. It was recognized by the parties hereto that the decision in this case must turn upon the question of when title passed in those instances of sale involved in the action. Appellant contends that the evidence conclusively proved that its only receipts from sales were made up from its FOB Plant prices; that its receipts from transportation formed no part of its sales receipts and were charges for transportation made after title had passed to the buyer, and that title passed at the moment the blocks were physically placed on board its trucks at the plant.

Appellants sought by testimony of its president and of some of its employees to show that title passed when the blocks were placed on its trucks for delivery to buyers by showing its general sales procedures. Thus its office manager and expediter, a Miss Frederickson, testified as follows:

"A. I take the order, and if they want a price quoted I quote them a price f. o. b. plant. Then I ask them if they want the order picked up at our plant or delivered. If they want it delivered, then I quote them a delivered price.

"Q. Do you break down the price, so much for your f. o. b. plant and so much for delivery and total? A. Absolutely, yes.

"Q. Is that a standard procedure of O'Kelley-Eccles? A. It always has been, yes. Our price list shows the unit price f. o. b. plant and in addition to that the delivery charge separate."

Appellant sent its price sheets to those customers who bought in quantity and where customers came to the plant. The price sheets displayed were explained. Said Mr. Chaffee, the president of appellant: "One thing we have to explain carefully is that, because we do quote a plant price plus delivery, their discounts, if a discount is applicable, is only applicable on the plant price, not on the delivery. We always take great pains to explain that * * *

"Q. What about an explanation of the difference between 'FOB Plant' price and 'Delivery' price? A. We tell them that the price is f. o. b. the plant and that we will be very happy if they would pick them up. If they want us to deliver them for them we will do that and it will cost them so much money."

There was much more along the same lines, but one significant feature of the testimony is that no witness testified there was ever any express stipulation between the parties to a sale as to when and where title should pass. A witness for respondent, who was a contractor and a quantity buyer, testified that he generally ordered over the telephone, that he had the appellant's price sheets before him; that he told them the kind and the quantity of blocks and where he wanted them delivered. He said also that nothing was ever said to him about where title should pass and that the matter never crossed his mind.

[1–3] The cardinal factor, according to the Uniform Sales Act, upon which the passing of title between a seller and a buyer depends, is the intention of the parties. The parties to a contract of sale may expressly stipulate as to when title shall pass and such a provision is ordinarily given full effect as between the parties, but since the parties do not always stipulate in such respect the courts have adopted, and the Uniform Sales Act has provided, certain rules for determining the intention of the parties. 46 Amer.Jur., Sales, Sec. 413. We think the court was fully justified, under the evidence, in concluding that the contract between the parties in fact cast upon the appellant an obligation to deliver the goods at the point designated by the customer, and that, therefore, the question of the intent of the parties as to the time and place where title should pass was governed by Section 1739 of the Civil Code, Rule 5, reading as follows:

> "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, * * * the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

[4–6] Appellant contends that the court erred in granting respondent's motions to strike certain testimony offered by appellant. Appellant does not so much attack the rulings of the court on the merits as it does upon a claim that the respondent, by its conduct during the trial, waived its right to move to strike. But a trial court may exclude or strike out inadmissible evidence, even though it is not objected to by a party and even though no motion is made to strike the same. People v. Wallace, 89 Cal. 158, 26 P. 650; Kimic v. San Jose etc. Ry. Co., 156 Cal. 379, 104 P. 986; Schubkegel v. Dunn, 31 Cal.App.2d 312, 87 P.2d 875; 24 Cal.Jur. pp. 775, 781. More specifically, appellant points to the following instances as showing the error of the trial court. A witness testified concerning his understanding as to the meaning of the term "FOB". He said: "We have always, ever since I was in grammar school I have understood that stands for 'free on board'. * * * We mean free on board truck. We consider that those blocks are our property until we set them on a truck." Clearly, the witness' statement as to what appellant considered concerning the passage of title, not communicated to customers, was testimony that should have been stricken or excluded upon objection or on the court's own mo-

tion. But appellant says that the witness' statement "We mean free on board truck" ought to have been left in. The ruling of the court was made after the cause had been submitted for decision and in the absence of proof that appellant's understanding was in any wise communicated, it was proper for the court to strike the testimony. Again, the court struck testimony of appellant's president that the transportation charge was in addition to the sales price. Here a specific objection was made that the answer involved a conclusion of the witness upon the very issue of law before the court, that is, what the sales price was. The ruling of the court was proper. We think it unnecessary to go into further detail upon the contentions as to the rulings on evidence. Speaking generally, the court struck out portions of the testimony of witnesses wherein the witness was testifying to the uncommunicated intention of the appellant in respect of sales made by it and touching the issue of passage of title.

[7, 8] Appellant contends that respondent was estopped from collecting the taxes in dispute here by reason of certain conduct of respondent's agents responsible for the administration of the Motor Vehicle License Transportation Tax Act, Revenue and Taxation Code, § 9601 et seq. Appellant's president testified that in adopting a policy for sales it was decided to sell FOB Plant and then charge a fee for delivering to those who wanted the blocks delivered; that the local office of the Board of Equalization was consulted about the plan and that after consultation, and acting on the advice of representatives of the board, appellant began and continued publication of FOB Plant prices plus delivery charges; that in order to be "in compliance" a license was obtained from the Board of Equalization for appellant's trucks and appellant began paying and has ever since paid a transportation tax. Assuming that the foregoing is true and that appellant has paid 3 per cent upon the gross receipts for hauling, it does not follow that estoppel was made out for the following reasons: Appellant did not plead estoppel and it is the rule that failure to plead an estoppel constitutes a waiver. Judelson v. American Metal Bearing Co., 89 Cal.App. 2d 256, 266, 200 P.2d 836; Fleishbein v. Western Auto Supply Agency, 19 Cal.App. 2d 424, 65 P.2d 928. Further, plaintiff has elected to exercise two franchises, each requiring the payment of a tax based on gross receipts from the exercise thereof and neither the Motor Vehicle Transportation Tax Act nor the Sales and Use Tax Act provides that the payment of a tax under one statute shall constitute an exemption from the liability to pay under the other.

No other points require discussion.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



159 Cal.App.2d 728

George W. NEWHOUSE, Petitioner and Appellant,

v.

BOARD OF OSTEOPATHIC EXAMINERS of the State of California, Charles E. Atkins, D. O., Its President, Glen D. Cayler, Its Secretary, Eugene C. Darnall, D. O., Russell M. Husted, D. O., and Vincent P. Carroll, D. O., Members of said Board of Osteopathic Examiners of the State of California, Defendants and Respondents.

Civ. 22359.

District Court of Appeal, Second District, Division 2, California.

April 28, 1958.

Rehearing Denied May 23, 1958.

Hearing Denied June 25, 1958.

Proceeding before State Board of Osteopathic Examiners against physician who was charged with unprofessional con-

duct in aiding and abetting of a nonlicensed person to practice mode of treating sick. From adverse judgment of the Superior Court, Los Angeles County, John J. Ford, J., denying physician's petition for peremptory writ annulling order of board, the physician appealed. The District Court of Appeal, Herndon, J., held that evidence supported conclusion that physician was guilty of unprofessional conduct in aiding and abetting unlicensed person in insertion of sutures into body of a patient.

Affirmed.

1. Physicians and Surgeons ⇐11(3)

In proceeding before State Board of Osteopathic Examiners against physician, who was charged with unprofessional conduct in aiding and abetting of a nonlicensed person to practice mode of treating sick, evidence supported conclusion that physician was guilty of unprofessional conduct in aiding and abetting unlicensed person in insertion of sutures into body of a patient. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Bus. & Prof.Code, §§ 2144, 2392.

2. Physicians and Surgeons ⇐11(3)

In proceeding before State Board of Osteopathic Examiners on charge against physician of unprofessional conduct in the aiding or abetting of an unlicensed person in practice of a mode of treating the sick, evidence sustained finding that no emergency existed during delivery of child requiring assistance of unlicensed person. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Bus. & Prof.Code, §§ 2144, 2392.

3. Physicians and Surgeons ⇐10

Under statute prohibiting employment of an unlicensed person in practice of any system or mode of treating the sick or afflicted, the "employment" of any person to perform any single act of medical or surgical procedure which person employed was not licensed to perform would constitute unprofessional conduct within meaning of statute. West's Ann.Bus. & Prof. Code, § 2392.

4. Physicians and Surgeons ⇐11(3)

Trial court is authorized by law to exercise its judgment on evidence before State Board of Osteopathic Examiners.

5. Physicians and Surgeons ⇐11(3)

On appeal from judgment of trial court affirming decision of State Board of Osteopathic Examiners suspending a physician's license, all conflicts must be resolved in Board's favor and all reasonable inferences indulged in to uphold findings and judgment of trial court.

6. Physicians and Surgeons ⇐11(3)

In proceeding before State Board of Osteopathic Examiners for suspension of physician for unprofessional conduct in aiding or abetting unlicensed person in practice of mode of treating sick or afflicted, power to determine whether an emergency existed rested first with Board and second with trial court. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Bus. & Prof.Code, §§ 2144, 2392.

7. Physicians and Surgeons ⇐11(3)

In proceeding before State Board of Osteopathic Examiners for suspension of physician for unprofessional conduct in aiding or abetting unlicensed person to practice mode of treating sick, questions as to whether unlicensed person was engaged in practice beyond scope of his license were immaterial and properly excluded. West's Ann.Code Civ.Proc. § 1094.5; West's Ann. Bus. & Prof.Code, §§ 2144, 2392.

8. Physicians and Surgeons ⇐11(3)

In proceeding before State Board of Osteopathic Examiners for suspension of physician for unprofessional conduct consisting of aiding or abetting of unlicensed person to practice mode of treating sick, it was not necessary that accusation allege that unlicensed person practiced or attempted to practice medicine as a business or calling or held himself out as so doing. West's Ann.Code Civ.Proc. § 1094.5;

West's Ann.Bus. & Prof.Code, §§ 2144, 2392.

Denison, Dietrich & Anderson, Los Angeles, for appellant.

J. Robert Meserve, Los Angeles, for respondents.

HERNDON, Justice.

[1] Petitioner and appellant, a physician and surgeon licensed by the State Board of Osteopathic Examiners, was found guilty of unprofessional conduct[1] in proceedings before the board and petitioner's license and certificate to practice was suspended for a period of thirty days. Pursuant to section 1094.5 of the Code of Civil Procedure, appellant petitioned the superior court for a writ of mandate annulling the order of the board. An alternative writ issued, and the matter was heard on the record of the proceedings before the respondent board, including the accusation and exhibits introduced in that proceeding. Petitioner appeals from the ensuing judgment dissolving the alternative writ and denying his petition for a peremptory writ.

[2] The charging portion of the accusation recites: "That on or about January 15, 1956, at Los Angeles, California, respondent [appellant here] did aid or abet William S. Hendricks in suturing the person of Patient Eva Batiste, a practice of a system or mode of treating the sick or afflicted for which the said William S. Hendricks was not licensed by the State of California, the said William S. Hendricks not having at the time of so doing, a valid unrevoked certificate or license to practice as a physician or surgeon issued by the Board of Medical Examiners of the State of California or issued by the Board of Osteopathic Examiners of the State of California."

Dr. Hendricks, a duly licensed chiropractor in the State of California, was a sophomore student at the Los Angeles College of Osteopathic Physicians and Surgeons where he had been sponsored by appellant, Dr. Newhouse. Hendricks had expressed to appellant his desire to attend the delivery of a baby to further his education.

Sometime in June, 1955, Eva Batiste consulted Hendricks for prenatal care for her pregnancy. In the early part of August she developed complications which required her hospitalization, in connection with which she contacted appellant. In November, 1955, she was again hospitalized under the care of appellant. During these hospitalizations, it was determined that appellant would deliver the baby, and that she should make arrangements for delivery with the University Hospital. Although Dr. Hendricks had referred Mrs. Batiste to appellant, separate financial arrangements were made by her with Hendricks and appellant for the services performed by each of them.

On January 15, 1956, at about 12:40 a. m., appellant was notified by the hospital that Mrs. Batiste was ready to deliver. He ordered medication for her, directed that she be prepared for delivery, and then telephoned Hendricks so that the latter could be present for the delivery. Appellant met Hendricks in the parking lot and they entered the hospital together.

In the labor room appellant examined Mrs. Batiste and found she was nearly ready to deliver. He told Mrs. Fries, the nurse in charge of the obstetrical section, that Mrs. Batiste should be taken to the delivery room. At that time the only delivery room in the hospital was occupied by another patient in a serious condition so that it was necessary for Mrs. Batiste

1. Section 2392 of the Business and Professions Code: "The employing, directly or indirectly, of any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted or the aiding or abetting of any unlicensed person to practice any system or mode of treating the sick or afflicted constitutes unprofessional conduct within the meaning of this chapter."

to be delivered in the labor room on a regular hospital bed.

Shortly thereafter Mrs. Fries notified appellant that Mrs. Batiste was ready to deliver. She explained that the patient in the delivery room required most of her attention and asked if it would be sufficient if she set up the labor room for the delivery in her absence. She then supplied clothing and equipment to the labor room, left the doctors and returned to the delivery room.

When the doctors returned to the labor room, Mrs. Batiste had commenced her delivery. Appellant and Dr. Hendricks testified that the delivery was completed without the assistance of Dr. Hendricks, who merely observed, or of either of the two nurses present in the hospital at that time, whose attentions were occupied by the emergency situation existing in the delivery room.

Following the delivery, the baby was given to Mrs. Fries to be taken to the nursery. Appellant testified that in proceeding with the treatment, he detected an excessive bleeding beyond the normal amount from a laceration about two centimeters long on the left side of the vestibule of the vagina extending to the region of the clitoris. Appellant testified that the area is one of heavy blood supply and the laceration was bleeding profusely. He testified that because of the position of the patient on the bed rather than a delivery table, the location of the laceration with regard to access, and the lack of aseptic conditions, he concluded that he needed assistance to stop the bleeding. Appellant further testified that he asked Mrs. Fries for assistance but was advised of the urgency of the situation in the delivery room and that he had concluded an emergency situation existed when he asked Dr. Hendricks for assistance. Dr. Hendricks testified that he had never had any instruction in his chiropractic school in the use of a suturing needle, and that he had never had one in his hand before.

Both appellant and Dr. Hendricks testified that appellant directed Hendricks to break the suture vial and instructed him as to placing the needle in a holder. According to appellant, he retracted the labia, proximated the edges of the laceration, and showed Dr. Hendricks where to place the needle for inserting a suture. Two sutures in all were taken by Dr. Hendricks, who testified as to the minute direction of his acts by appellant. Dr. Hendricks testified that he attended the delivery solely as an observer and received no fee or emolument for such attendance.

Kathryn M. Jaffke, night supervisor at the University Hospital, testified that she observed Dr. Hendricks insert a suture in the body of Eva Batiste. She testified that she was approximately five or six feet away from Dr. Hendricks at that time and that she observed the incident for approximately four minutes. She testified that appellant at that time was not doing anything and did not have his hands on the patient at the time of the suturing. This testimony was in direct conflict with that of appellant and Dr. Hendricks as to appellant's participation in the operation.

Appellant first contends that the evidence is insufficient to support the finding and conclusion that the appellant was guilty of unprofessional conduct as defined in section 2392 of the Business and Professions Code. Appellant's position is that proof of an isolated instance in which appellant requested and obtained the assistance of an unlicensed practitioner in a non-emergency situation is not and cannot be the aiding and abetting of such person "to *practice* any system or mode of treating the sick or afflicted." (Emphasis added.)

It is not disputed that Dr. Hendricks inserted needles and sutures in the body of a patient, penetrating or severing the tissues of the human body, a procedure for which he was not licensed. See People v. Fowler, 32 Cal.App.2d Supp. 737, 84 P.2d 326; In re Hartman, 10 Cal.App.2d 213, 217, 51 P.2d 1104; People v. Mangiagli, 97 Cal.

App.2d Supp. 935, 939, 218 P.2d 1025; People v. Nunn, 65 Cal.App.2d 188, 194, 150 P.2d 476. Nor is it disputed that appellant directed Hendricks in the performance of a procedure for which he was not licensed. It is clear that appellant aided and abetted the acts of Dr. Hendricks. See Anderson v. Board of Medical Examiners, 117 Cal. App. 113, 115, 3 P.2d 344.

But appellant argues that aiding and abetting certain acts does not constitute aiding and abetting the *practice* of these acts. Appellant supports his argument with a series of citations of cases in which the courts have narrowly construed the terms "practice" and "practitioner" where the issue was whether an unlicensed person was practicing medicine. See Chalmers-Francis v. Nelson, 6 Cal.2d 402, 404, 57 P.2d 1312; Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 256, 217 P.2d 630, 18 A.L.R.2d 593 (dissenting opinion); Pacific Mutual Life Ins. Co. v. Cunningham, D.C.S.D. Fla.1932, 54 F.2d 927. Appellant relies on the construction of the word "practice" expressed by the Supreme Court in Ex parte Greenall, 153 Cal. 767, 96 P. 804, 805. There the court in construing the statutory predecessor of the Business and Professions Code sections comprising the Medical Practice Act said:

"There was thus given by that act to the term 'practicing medicine or surgery' a definite meaning, corresponding substantially with the popular understanding of the term. When we say that one is practicing medicine or surgery or osteopathy, we ordinarily mean that he is engaged in that line of work as a business, holding himself out as being so engaged, or for a consideration treating those who will accept his professional services, and we would not apply the term to one who incidently and gratuitously suggests or puts into operation some method of treatment in the case of one who is 'sick or afflicted.'" Ex parte Greenall, supra, 153 Cal. 767, 769, 96 P. 804; see also, People v. T. Wah Hing, 79 Cal.App. 286, 249 P. 229.

If this were a criminal or disciplinary action against Dr. Hendricks, the citation of Ex parte Greenall, supra, and the argument advanced that an isolated act by an unlicensed person at the direction and under the minute supervision of a licensed practitioner cannot constitute the "practice" of medicine would be at the least persuasive. Cf. Chalmers-Francis v. Nelson, 6 Cal.2d 402, 57 P.2d 1312; Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593. However, in the present case the charge is unprofessional conduct on the part of appellant, Dr. Newhouse, and the precise question before us is whether the acts of Dr. Hendricks constitute "practice" within the terms of a different statute, section 2392 of the Business and Professions Code. It is to *this* section that we must apply appropriate rules of construction in order to determine whether or not the legislature intended the phrase "to practice any system or mode of treating the sick or afflicted" to include the performance of a single operational procedure by an unlicensed person. If the act of Hendricks in inserting the sutures constituted "practice" within the meaning of section 2392, then appellant was aiding and abetting within the meaning of the statute.

[3] Examining the statute we find that the first prohibition is against the employment of an unlicensed person in the "practice of any system or mode of treating the sick or afflicted * * *." Were we to accept appellant's argument that "practice" as used in section 2392 means engaging in a line of work as a business, and holding oneself out as being so engaged (see Ex parte Greenall, supra, 153 Cal. 767, 770, 96 P. 804), we would be constrained to hold that an employment for compensation of an unlicensed person to perform an appendectomy (if the performance of only one operation could be proved) would not fall within the strictures of the statute. Such a holding would largely nullify a statute whose manifest object is the protection of the public from certain forms of treatment by unli-

censed, and presumably unqualified persons. Thus, it seems clear that the *employment* of any person to perform any single act of medical or surgical procedure which the person employed was not licensed to perform would constitute unprofessional conduct within the meaning of the statute. Since the identical phraseology is repeated in the enunciation of the prohibition against *aiding and abetting* the same described "practice", every applicable canon of construction would dictate that the repeated phraseology should be given the same meaning and effect.

A similar construction of the statutory predecessor of section 2392 was applied in Howson v. Board of Medical Examiners, 128 Cal.App. 35, 16 P.2d 693. There the court affirmed a judgment approving an order of the Board of Medical Examiners by which the petitioner was suspended for unprofessional conduct in "employing directly or indirectly any suspended or unlicensed practitioner in the *practice* of any system or mode of treating the sick or afflicted, * * *." (Emphasis added.) In construing the wording of what is presently section 2392 of the Business and Professions Code, the court said, "The definition in the act is so all-embracing that there is no need for construction in order to bring any particular set of facts within its terms. Every person of common knowledge knows what 'treating the sick or afflicted' means. *The doing of any act,* in accordance with 'any system or mode' of treatment, would be within the terms of the definition." Howson v. Board of Medical Examiners, 128 Cal.App. 35, 36–37, 16 P.2d 693, 694. (Emphasis added.)

Thus the evidence is sufficient to support the conclusion that appellant was guilty of unprofessional conduct in aiding and abetting Dr. Hendricks' insertion of sutures into the body of Mrs. Batiste in violation of his license unless under the circumstances appellant was justified in calling on Dr. Hendricks for assistance by virtue of the existence of an emergency situation.

Section 2144 of the Business and Professions Code provides in part that nothing in the chapter relating to the practice of medicine "prohibits service in the case of [an] emergency," and appellant's second argument is that Dr. Hendricks was assisting him in an emergency situation and that the evidence does not support the finding that "[A]t the time the petitioner did direct said William S. Hendricks to insert said sutures the petitioner knew that said laceration did not endanger the life of said patient and that no emergency existed which required the assistance of a person to perform said acts on the body of the patient by a person who was not duly licensed so to do by the laws of the State of California, * * *."

It may be conceded that the circumstances, including the lack of an obstetrical nurse, a normal delivery room, and desirable lighting facilities made the situation unusual. But there is no evidence that Mrs. Batiste's life was in immediate danger. Appellant testified that the flow of blood could have been retarded by pressure on the laceration, and he thought there were bell cords around the bed with which he could have called for assistance. Although the Code does not define "emergency" as used in section 2144 of the Business and Professions Code, the cases have attempted a definition. In People v. Lee Wah, 71 Cal. 80, 82, 11 P. 851, cited and quoted in People v. Mangiagli, 97 Cal.App.2d Supp. 935, 941, 218 P.2d 1025, the court approved an instruction which told the jury that "an emergency 'means a case in which the ordinary medical practitioners of the schools provided for by the statute, who are provided with the proper diplomas, and have submitted themselves to the proper examination, are not readily obtainable. This is an emergency, as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured.'" The testimony of Nurse Jaffke, if believed, to the effect that Dr. Hendricks performed the operation without the participation of appellant is substantial evi-

dence to support the finding that no emergency existed.

[4–6] Moreover, the trial court is authorized by law to exercise its judgment on the evidence before the board. Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 795, 136 P.2d 304. On appeal all conflicts must be resolved in the respondent's favor and all reasonable inference indulged in to uphold the findings and judgment of the trial court. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P. 2d 20. In the instant case the board was not required to believe the testimony of appellant that an emergency existed within the purview of section 2144, even though such testimony had not been controverted by other witnesses. Kendall v. Board of Osteopathic Examiners, 105 Cal.App.2d 239, 246, 233 P.2d 107. The power to determine whether an emergency existed rested first with the board, and second with the trial court. "Assuming that the foregoing provision applies [Bus. & Prof.Code, sec. 2144], whether an emergency existed was for the board to determine in the first instance. If the determination of such question was supported by the evidence which in effect the trial court has decided, such decision by the trial court must be upheld on appeal." Rilcoff v. State Board of Medical Examiners, 90 Cal.App.2d 603, 606, 203 P.2d 844, 846.

[7] Appellant also contends that the hearing officer improperly sustained objections to questions asked of Mrs. Batiste by which appellant intended to establish that Dr. Hendricks was not engaged in a *practice* beyond the scope of his license. Since the issue was not whether Dr. Hendricks was improperly engaged in the practice of medicine, but whether his acts on the occasion in question fell within section 2392 of the Business and Professions Code, such questions were immaterial and therefore properly excluded.

[8] Finally, appellant contends that the accusation in the present case was not sufficient to give the board jurisdiction to proceed because it failed to allege a "practice" by Dr. Hendricks, citing Ex parte Greenall, 153 Cal. 767, 96 P. 804. This contention is based on the erroneous theory that the accusation must allege that Dr. Hendricks practiced or attempted to practice medicine as a business or calling, or held himself out as so doing, to bring appellant within section 2392 of the Business and Professions Code. See Stuck v. Board of Medical Examiners, 94 Cal.App.2d 751, 756, 211 P.2d 389.

The judgment is affirmed.

FOX, P. J., and KINCAID, J. pro tem., concur.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.



159 Cal.App.2d 686

ESTATE of Nellie PFADENHAUER, Deceased.

Marguerite O'REILLY, Petitioner and Respondent,

v.

Dora HECHT, Contestant and Appellant.

Civ. 5650.

District Court of Appeal, Fourth District, California.

April 25, 1958.

Will of testatrix was admitted to probate, and a petition was filed for determination as to persons entitled to distribution. The Superior Court of Tulare County, W. G. Machetanz, J., entered a decree, and an appeal was taken. The District Court of Appeal, Barnard, P. J., held that where will left one-third interest in estate of testatrix to first sister, one-third interest to second sister, one-sixth interest to first niece, and one-sixth interest to second niece, and first sister predeceased testatrix, provision of will that testatrix purposely made no provision for any other person, and that it was the will and wish of tes-

tatrix that no relatives, other than those specifically mentioned in will, should receive anything from her estate, did not disclose an intention on part of testatrix to provide against operation of section of the Probate Code providing that when any estate is devised or bequeathed to any kindred of testator, and devisee or legatee dies before testator, leaving lineal descendants, such descendants take estate so given by will in same manner devisee or legatee would have done had he survived testator, and that therefore court erred in holding that testatrix died intestate as to third interest that she bequeathed to first sister and in finding that first sister's lineal descendants were not entitled to take and receive her share in estate of testatrix.

Decree reversed with instructions.

Wills ⇐551

Where will left one-third interest in estate of testatrix to first sister, one-third interest to second sister, one-sixth interest to first niece, and one-sixth interest to second niece, and first sister predeceased testatrix, provision of will that testatrix purposely made no provision for any other person, and that it was the will and wish of testatrix that no relatives, other than those specifically mentioned in will, should receive anything from her estate, did not disclose an intention on part of testatrix to provide against operation of anti-lapse statute, and therefore court erred in holding that testatrix died intestate as to third interest bequeathed to first sister and that first sister's lineal descendants were not entitled to take her share in estate of testatrix. West's Ann.Prob.Code, § 92.

Burford, Hubler & Burford, Porterville, for appellant.

Guy Knupp, Jr., Porterville, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a decree establishing who are entitled to distribution under a will executed by the deceased in 1939. At that time her nearest kindred were two sisters, Susan Dennis and Kate Armstrong. In her will the testatrix left $100 to her church and provided that the remainder of her estate should go as follows: A one-third interest to her sister Susan Dennis, a one-third interest to her sister Kate Armstrong, a one-sixth interest to her niece Dora Kirby, and a one-sixth interest to her niece Marguerite O'Reilly.

The Fourth paragraph of this will reads:

> "I have purposely made no provision for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this will or not, or mentioned herein, shall contest this will or object to any of the provisions hereof, I give to such person so contesting or objecting the sum of one ($1.00) Dollar and no more, in lieu of the provisions which I have made, or which I might have made, for such person so contesting or objecting. In connection with this paragraph I specifically have in mind all of my relatives not herein specifically mentioned, and it is my will and wish that none of my said relatives other than those specifically herein mentioned receive anything from my estate."

The testatrix died on October 30, 1950, leaving no spouse and no issue and both Susan Dennis and Kate Armstrong had died before that date. Kate Armstrong was survived by her daughters Dora Kirby and Marguerite O'Reilly, who were both living when the testatrix died. The lineal descendants of Susan Dennis, who were living at the date of the testatrix, included a son, five daughters and four children of a deceased son.

The will was admitted to probate and in due course Marguerite O'Reilly filed a petition for a determination as to the persons entitled to distribution, alleging that she and Dora Kirby are entitled to have all of the estate, except the gift to the

church, distributed to them in equal shares. This claim was based on the contention that since the survivors of Susan Dennis were not mentioned in the will they were excluded by the Fourth paragraph from receiving any part of the estate. A claim of interest in the estate was filed by Dora Hecht, a daughter of Susan Dennis on the ground that the lineal descendants of Susan Dennis are entitled to her one-third of the residue of the property of said estate. After a hearing the court found and concluded that by virtue of the last sentence of the Fourth paragraph of the will the testatrix died intestate as to the one-third of the residue she had bequeathed to Susan Dennis; that the will had made no disposition of that one-third interest; that Dora Kirby and Marguerite O'Reilly were entitled to one-half of the one-third interest bequeathed to Susan Dennis in addition to the shares specifically bequeathed to them in the will; and that the other half of the one-third interest bequeathed to Susan Dennis should be distributed to her children and grandchildren in certain named proportions. A decree was entered accordingly from which Dora Hecht has appealed.

The facts are undisputed and the sole question presented is whether the lineal descendants of Susan Dennis are entitled to her share of the residue of this estate under section 92 of the Probate Code, or whether the last sentence of the Fourth paragraph of this will prevents the operation of section 92. That section provides in part: "* * * when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants * * * such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

In passing on the effect of section 92 the court said in Re Estate of Tibbetts, 48 Cal.App.2d 177, 119 P.2d 368, 369: "The anti-lapse statute of this state must be read into said will [Citations], and the persons acquiring rights under said statute acquire such rights as 'statute-made' devisees or legatees. [Citations.] Such rights are acquired regardless of whether such persons are or are not heirs of the testatrix." And in Re Estate of Pierce, 32 Cal.2d 265, 196 P.2d 1, 4, it is said: "Although a beneficiary takes directly under the will of the testator under such an anti-lapse statute, he does so because the statute substitutes him for the predeceased devisee or legatee. He takes, not by virtue of the expressed intentions of the testator, but solely by virtue of the statute."

It clearly appears that this testatrix intended to dispose of her entire estate and that she did not intend intestacy as to any part of it. Although she attempted to dispose of all of her estate by specific gifts she did not provide for any substitute in the event any such devisee or legatee should die during her lifetime. Section 92 of the Probate Code provides for such a substitute under the circumstances which here appear, and that section must be read into this will and is operative unless a contrary intention appears in the will itself. Although this testatrix could have provided against the operation of this statute (Larrabee v. Tracy, 21 Cal.2d 645, 134 P.2d 265) she did not expressly do so, and the language of her will does not indicate such an intention. In the last sentence of the Fourth paragraph of her will (the exclusion clause relied on by the respondent) she refers only to relatives who are not specifically mentioned in her will. Since the relatives thus referred to would be her remaining possible heirs at law the effect is the same as that of the disinheritance clause considered in the decision in Larrabee v. Tracy. While this testatrix expressed an intention to exclude the relatives not named, with respect to any claim they might have as such relatives, she expressed no intention to exclude them as lineal descendants of the named devisees and legatees, and no such intention is in any way indicated by the fact that she excluded any direct claim

that might be made by these unnamed relatives, claiming as such relatives or in opposition to the gifts specifically made.

Instead of disclosing an intention to provide against the operation of section 92, the clause in question indicates an intention merely to provide that no claim by one of these unnamed relatives should be allowed to interfere with the specific gifts to the named relatives which she had expressly made. While the intention clearly appears that these gifts were not to be interfered with by the claim of any unnamed relative, the very fact that she made no attempt to provide for a substitute in the event one of the named devisees or legatees predeceased her indicates an intention not to provide against the operation of section 92, rather than the contrary. Her expressed intention to exclude relatives claiming in opposition to the gifts made in the will in no way indicates an undisclosed intention to exclude the lineal descendants of a named devisee or legatee who might not be living at the time of her own death.

It would be unreasonable to interpret the expressed wish that none of her unnamed relatives receive anything from her estate as meaning that such a person should never receive any of her property, under any circumstances. If her sister Susan had outlived the testatrix, Susan's children could later have received their mother's share of this property without in any way violating any intention expressed by this testatrix, and the will does not indicate any desire on the part of the testatrix to prevent such a result. Section 92 brings about the same result under the circumstances which here appear. It was designed for that very purpose, in order to prevent an intestacy with respect to a devisee or legatee in such a situation where no contrary intention is expressed in the will. To hold that an intestacy here resulted, with respect to Susan Dennis' one-third share, would be contrary to the intention of this testatrix, as disclosed by the will as a whole. She clearly intended to dispose of all of her estate, and it seems equally clear that she intended to exclude her unnamed relatives merely as heirs at law and not as lineal descendants of one of the devisees or legatees to whom she had made a specific gift.

The Fourth paragraph of this will does not sufficiently disclose an intention to provide against the operation of section 92; that section is here applicable; and this will is to be read as if the lineal descendants of Susan had been named in her place. In re Estate of Esposito, 57 Cal. App.2d 859, 135 P.2d 167. It follows that the court erred in holding that the deceased died intestate as to the third interest she had bequeathed to Susan Dennis, and in finding that the lineal descendants of Susan Dennis are not entitled to take and receive her share in this estate.

The decree appealed from is reversed with instructions to enter a decree providing for a distribution, in due course, in accordance with the views herein expressed.

GRIFFIN and MUSSELL, JJ., concur.



159 Cal.App.2d 737

Florence Lowe BARNES, also known as Pancho Barnes, Plaintiff and Appellant,

v.

Horace M. DOBBINS, Defendant and Respondent.

Civ. 22429.

District Court of Appeal, Second District, Division 3, California.

April 28, 1958.

Action for damages for constructive fraud in connection with contract by which plaintiff conveyed her interest in hotel property and her stock in corporation operating hotel to defendant who conveyed certain property, securities and notes to plain-

tiff. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for defendant, and the plaintiff appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence sustained finding that the property the plaintiff transferred and the property the plaintiff received were substantially of equivalent value and that plaintiff sustained no damage by reason of the exchange.

Affirmed.

1. Principal and Agent ⇐79(5)

In action by owner of undivided one-fourth interest in hotel property and one-fourth of stock of corporation operating the hotel, against her agent who managed the property and who was president of corporation, for damages for constructive fraud in connection with contract by which owner conveyed her interest in hotel property and her stock to agent who conveyed certain property, securities and notes to owner, evidence supported finding that owner reposed no trust or confidence in agent and entered into contract in reliance on her own investigation made with aid and assistance of independent counsel.

2. Principal and Agent ⇐78(4)

There is a presumption that if the agent gains an advantage over the principal, the agent gained it through the influence of the fiduciary relationship. West's Ann.Civ.Code, § 2235.

3. Fraud ⇐13(2)

Without scienter, there can be no recovery based upon actual fraud.

4. Appeal and Error ⇐1010(1)

Even if there were a basis for recovery on constructive fraud, judgment disallowing recovery would be affirmed unless finding of trial court that plaintiff sustained no damage was unsupported by the evidence.

5. Fraud ⇐50

Where plaintiff does not seek to disaffirm her contract but affirms it and seeks to recover damages on the ground of constructive fraud, the burden of proof is on her to establish the amount of her damages.

6. Fraud ⇐58(1)

In action for damages for constructive fraud in connection with contract by which plaintiff conveyed her interest in hotel premises and her stock in corporation operating hotel to defendant who conveyed certain property, securities, and notes to plaintiff, evidence sustained finding that the property the plaintiff transferred and the property the plaintiff received were substantially of equivalent value and that the plaintiff sustained no damage by reason of the exchange.

7. Evidence ⇐113(4)

Evidence of net worth of closed corporation and proportionate share thereof attributable to stock may be relevant in fixing value of stock.

8. Evidence ⇐570

Trial court is not bound by testimony of expert and is entitled to examine the reasons given by witness to support his opinion and the facts affecting the value shown by the evidence.

9. Evidence ⇐571(7)

In determining what weight, if any, to give to opinion of expert witness as to the value of hotel property, the trial court was entitled to take into consideration the fact that witness had never seen the property, that he knew nothing as to sales of comparable property, that hotel building was not designed for hotel and was not economically suited for operation as hotel, that building was on edge of slum district and was away from district where first class hotels of the city were situated and the actual net income of operation of the property and the rent reserved under lease.

10. Evidence ⇐18

It is a matter of common knowledge that an undivided interest in real property seldom has a market value equal to its proportionate part of the value of the whole.

Beardsley, Hufstedler & Kemble, Los Angeles, for appellant.

Ekdale & Shallenberger, San Pedro, for respondent.

NOURSE, Justice pro tem.

Plaintiff appeals from an adverse judgment in an action brought by her to recover damages from the defendant because of alleged fraud practiced upon her.

The sole ground upon which appellant seeks to reverse the judgment of the trial court is the insufficiency of the evidence to support the findings of fact made by that court.

It would serve no useful purpose to here recite all of the conflicting evidence upon which the trial court based its findings of fact and judgment. The following facts which were proven by substantial evidence, show the basis for the controversy between the parties.

Plaintiff is one of the beneficiaries under a testamentary trust created by her grandfather in Pennsylvania. Defendant was a successor trustee of that trust and in 1942 and thereafter, was the sole trustee. In 1942, pursuant to an order made by the Orphans' Court of Montgomery county, Pennsylvania, the trust was terminated and the defendant was ordered to distribute to the beneficiaries their respective interest in the corpus of the trust. Pursuant to that order, defendant did, in 1942, distribute to the beneficiaries their respective interests in the trust property with the exception of certain parcels of real property of small value which are not involved in the present litigation.

Among the assets distributed, was certain improved real property in the city of Philadelphia, hereinafter called "Broadwood" property, and all of the stock of a corporation known as the Lanbar Hotel Company, hereinafter designated as "Lanbar." At that time, there was distributed to plaintiff an undivided one-fourth interest in the Broadwood property and 2½ shares of Lanbar (this constituted one-fourth of the issued and outstanding shares of that corporation).

The Broadwood property was acquired by the testamentary trustee through foreclosure proceedings in 1932. This property was improved with a building designed for use as a club, but which, after its acquisition by the trust, was operated as a hotel. After the acquisition of the Broadwood property, Lanbar was organized for the purpose of operating the property as a hotel and all its stock was issued in the name of the defendant. Upon the organization of Lanbar, the trustee executed a lease of Broadwood property to Lanbar. The record here does not show what term the lease covered, or what covenants or conditions were contained therein, but it is to be inferred that it reserved an annual net rent of $30,000. During the existence of the trust, the defendant as trustee and president of Lanbar, managed the property. After the distribution of the Broadwood property and the Lanbar stock, the defendant by agreement with the owners of the undivided interest, continued to manage the hotel as the agent of the beneficiaries and remained as president of Lanbar. He was acting in both these capacities at the time he entered into the contract with the plaintiff, which is the basis of this action.

Shortly after plaintiff became the owner of her undivided interest in the Broadwood property and the Lanbar stock, she instituted negotiations for the sale to defendant of her interests in these assets and continuously thereafter and until January 1945, when she entered into a contract of exchange with defendant, she sought by negotiation, cajolery and threats to induce defendant to enter into a contract with her. During these negotiations she sought and obtained the advice of independent counsel, and received semiannually profit and loss statements and balance sheets of the hotel and Lanbar. Throughout her attempts to have defendant acquire her interest in the properties, she expressed distrust of the defendant and her belief that he was attempting to take advantage of her through

offering her in exchange for the Pennsylvania property, among other things, real property in California upon which, she alleged, he had placed an inflated valuation. Among the properties as to which plaintiff asserted defendant had placed an inflated value, were a number of lots in a subdivision in Los Angeles county known as Rodela del Sol. During the period above mentioned, plaintiff also attempted to negotiate a sale of the entire Broadwood property and the Lanbar stock to third persons, and at one time secured from defendant an option to purchase an interest which he held in trust for his children in those properties, which interest was equal to her own, at a price of $200,000.

Late in 1944, plaintiff went to Philadelphia where she resided in the Broadwood Hotel. During her stay there, she was suffering from an infection and underwent treatment therefor. During her stay in Philadelphia she resumed negotiations with defendant for the acquisition by defendant of her interest in the Broadwood property and her stock in Lanbar. As a result of these negotiations, the parties executed a contract under date of January 3, 1945, whereby plaintiff agreed to convey and transfer the Broadwood property and her 2½ shares of Lanbar to defendant, and defendant agreed to transfer and convey to plaintiff certain real property in California, including the Rodela del Sol lots above mentioned, and certain securities, and to execute in favor of plaintiff certain promissory notes. The terms of the agreement were thereafter fully carried out by each party.

Plaintiff commenced the present action in October of 1951. By her amended complaint filed July 6, 1956, she alleged: that at the time of the execution of the agreement the defendant was her uncle and also was acting as trustee for her, and that she reposed complete confidence in the defendant because of said relationship. That defendant represented to her that the market value of the Rodela del Sol property was $105,600, whereas it had a value of not more than $10,000; that the defendant represented to her that her shares of Lanbar were valueless and that the corporation had no cash assets, while in truth and in fact, it had cash on hand in a sum not less than $30,000; that said representations were known by the defendant to be false and were made by him for the purpose of misleading and deceiving the plaintiff and inducing her to enter into the agreement in question. It further alleged that the actual value of the property with which plaintiff parted through the exchange, was not less than the sum of $250,000, and that the actual value of all of the property she received, was not more than $160,000, and that she was therefore damaged in the sum of $90,000.

While the allegations of the amended complaint are sufficient to state a cause of action on the ground of either actual or constructive fraud, and in the trial court the plaintiff stressed her right to recover because of actual fraud, she, on this appeal, only asserts her right to recover under the evidence, on the grounds of constructive fraud. We are, therefore, not concerned with the sufficiency of the evidence to support the trial court's findings that defendant did not intend to defraud or mislead the plaintiff.

The trial court found adversely to the plaintiff on all the ultimate facts pleaded in the complaint, and found affirmatively that plaintiff did not repose complete, or any confidence in the defendant; that she did not believe or rely upon any representations made by the defendant, but that on the contrary, plaintiff relied upon investigations of her own made with the advice and assistance of independent legal counsel; that the defendant did not misrepresent any fact to the plaintiff, or conceal any fact from the plaintiff. The court further found affirmatively that the agreement was fair and equitable; that the properties received by the plaintiff were substantially of "equivalent value" to the property transferred by her, and that plaintiff therefore sustained no damage.

A careful study of the entire record here, convinces us that while as to many of the issues, the evidence was conflicting, there was substantial evidence to support each of the findings that are attacked.

While in her brief, the plaintiff attacks each of the findings of the trial court that are adverse to her, we will not here follow her argument as to each finding, but confine ourselves to her attack on two findings; for if either of these findings is supported by the evidence, the judgment of the trial court must be affirmed.

[1,2] As we have pointed out, plaintiff now rests her case upon the grounds of a constructive fraud and does not attack the findings of the trial court which negative scienter. The entire basis for plaintiff's assertion that she is entitled to recover on the ground of a constructive fraud, is that a confidential relationship existed between her and the defendant, and that she entered into that contract with the defendant by reason of "the confidence reposed in the defendant because of such relationship." The trial court found, and the evidence clearly established, that at the time of the transaction in question, the defendant was acting as the agent of the plaintiff in the management of the Broadwood property and was president of the Lanbar. Standing alone, these facts would establish that defendant occupied a fiduciary relationship towards the plaintiff, and from that fact alone, it would be presumed that if he gained an advantage over her, that he gained it through the influence of the relationship. (Civil Code, § 2235.) Whether the plaintiff did repose trust and confidence in the defendant and was influenced to enter into the contract because of the relationship between them, was a question of fact (Buchmayer v. Buchmayer, 68 Cal.App.2d 462, 471, 157 P.2d 9; Sime v. Malouf, 95 Cal.App.2d 82, 99, 212 P.2d 946, 213 P.2d 788) and the court expressly found that the plaintiff did not repose any trust or confidence in the defendant, and did not act in entering into the agreement because of any such trust or confidence, but to the contrary, relied upon her own investigation made with the advice and assistance of independent counsel.

It is clear that there was substantial evidence to support these findings. Plaintiff had not only repeatedly expressed to the defendant her distrust of him, but had engaged in litigation charging him with breach of trust; she had received semi-annual accountings as to the operation of the hotel, and during the period that she was receiving these, and as a part of her attempts to induce defendant to acquire her interests in the Pennsylvania property, had secured independent legal advice and had repeatedly advised the defendant that if he did not acquire her interests or advance her monies on the security of them, that she would send the attorneys whom she had employed, to Pennsylvania to take action, although what action they would take is not clear. These facts amply support the findings of the trial court that there was no undue influence, that there was no breach of any confidential relationship by the defendant, and that the contract was not the result of any confidence reposed by the plaintiff in the defendant.

[3] These findings destroy any basis for recovery on the grounds of constructive fraud and as the finding of the lack of scienter, that is intent on the part of the defendant to deceive, is not attacked, it becomes immaterial as to whether the findings that there were no misrepresentations and no concealments are supported by the evidence and plaintiff's attack on the judgment must fail, for without scienter, there could be no recovery based upon actual fraud. Wishnick v. Frye, 111 Cal. App.2d 926, at page 931, 245 P.2d 532.

[4] Assuming arguendo a basis for recovery on constructive fraud, the judgment appealed from must be affirmed unless the finding of the trial court that plaintiff sustained no damage is unsupported by the evidence. Kisling v. Shaw, 33 Cal. 425, at page 446.

[5] If this were an action by which plaintiff sought to rescind her contract and to disaffirm it, she might establish her case by proof of the confidential relationship and proof that the defendant gained some advantage, or that she suffered some detriment under the contract. Civ.Code, § 2235; Bradner v. Vasquez, 43 Cal.2d 147, 272 P.2d 11. In the present case, however, plaintiff does not seek to disaffirm her contract, but affirms it, and seeks to recover damages, and the burden of proof was on her to establish the amount of those damages.

[6] As we have pointed out, the trial court found that the property she transferred and the property she received, were substantially of equivalent value, and that she sustained no damage by reason of the exchange. That the evidence is sufficient to establish a value of $197,700 for the properties received by the plaintiff in the exchange, is admitted by her. It is her contention, however, that the evidence compelled a finding that the properties which she transferred to the defendant had a value of not less than $256,352, and that she was therefore entitled to a judgment in the sum of $58,652.

The complaint did not allege separate values as to the Broadwood property and the shares of Lanbar, but alleged that combined, they had a value of not less than $250,000. The trial court did not make specific findings as to the value of these properties, or as to the value of the properties received by the plaintiff, but did find that the two sets of property were of "substantially equivalent value." Plaintiff bases her contention that this finding is unsupported by the evidence, upon the claim that the evidence shows without conflict that the Lanbar stock had a value of $6,352 and the Broadwood property a value of $250,000.

Plaintiff contends that the Lanbar stock had the value above stated as a matter of law. She bases this contention on the fact that the evidence, as interpreted by her, shows that Lanbar, as of the end of 1944, had cash on hand in the sum of $25,408; that that amount was its net worth, and that therefore, appellant's stock in that corporation was worth one-quarter of that amount.

[7] It is true that under some circumstances, stock in a closed corporation is to be valued at its proportionate share of the net worth of the corporation (County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard, 136 Cal.App.2d 205, 288 P.2d 880) but that rule does not apply in all cases. 13 Fletcher Cyclopedia Corporations § 5899.

In the present case there was substantial evidence that Lanbar was but a vehicle used by the owners of the hotel property to operate it; that the cash it had on hand was necessary operating capital for the hotel property, not subject to distribution among the stockholders, and that its net earnings for the year 1944 were less than $3,800. The evidence further showed that the only asset of Lanbar, other than its operating capital, was the lease on the hotel property and no evidence was offered as to the date upon which that lease would expire.

Under this evidence, the court was not, as a matter of law, bound to fix the value of plaintiff's stock in accordance with the arbitrary rule laid down in County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard, supra.

Assuming, however, that the plaintiff's stock in Lanbar had the value assigned to it by plaintiff, still, the court's finding that the property with which plaintiff parted was not greater than the value of the property which she received, must be sustained unless the evidence compelled a finding that the value of the hotel property substantially exceeded $191,000, for unless the value of all she gave did not exceed $197,700, she sustained no damage.

[8] Plaintiff bases her contention that the plaintiff's interest in the Broadwood property had a value of $250,000, upon the testimony of the witness Vaughan, who expressed the opinion that the entire property

had a value of $1,000,000 and contends that there was no competent evidence contrary to his testimony. The trial court was not, however, bound by the testimony of the expert (Ortzman v. Van Der Waal, 114 Cal.App.2d 167, at page 170, 249 P.2d 846, 252 P.2d 7; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, at page 766, 128 P.2d 665; Helbing v. Helbing, 89 Cal.App.2d 224, at page 228, 200 P.2d 560), but was entitled to examine the reasons given by the witness to support his opinion and the facts affecting value shown by the evidence.

Witness Vaughan had made no personal examination of the said property; he had no knowledge of any sales of any comparable property; his opinion was arrived at by applying to the gross income of the Broadwood property for the year 1944, a theoretical ratio of net profit to gross income, which he derived from a publication purporting to give the mean percentage of net profit earned by the 239 hotels reported on, and then capitalizing that net income at 10 per cent.

[9, 10] In determining what weight, if any, to give to the opinion of witness Vaughan, the trial court was entitled to take into consideration the fact that he had never seen the subject property; the fact that he knew nothing as to sales of any comparable property; that the hotel building was not designed for a hotel and was not economically suited for operation as a hotel; that the property was on the edge of a slum district of Philadelphia and away from the district where the first-class hotels of that city are situated, the actual net income of the operation of this particular property, and the rent reserved under its lease. Proctor v. Arakelian, 1929, 208 Cal. 82, 87, 280 P. 368. The trial court might well have adopted the valuation method (used by Vaughan) of capitalizing net profit but using the actual net profit from the operation of the hotel rather than an assumed one. If it did, it would have arrived at a value for the Broadwood property very substantially less than $900,000. The profit and loss statement for the year 1944 (Exhibit 25) discloses a net profit of the hotel, as a separate entity from Lanbar, of $30,775.28. Capitalizing this income at 10 per cent would give a value to the hotel of $307,752, or a value of plaintiff's one-fourth interest of less than $77,000. If however, we treat the hotel and Lanbar as a unit, its combined net profit amounted to $40,775, which capitalized at 10 percent gives a value for the entire property of approximately $407,000, and for plaintiff's interest $101,750. Further, it is a matter of common knowledge, which the court was entitled to take into consideration, that an undivided interest in real property seldom has a market value equal to its proportionate part of the value of the whole.

It is evident that the trial court was fully justified in finding that the plaintiff had failed to sustain the burden of proof that she had suffered damage in any amount.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

159 Cal.App.2d 690

Russell SCOTT, as Executor of the Last Will and Testament of Earl E. Van Emon, Deceased, Plaintiff and Respondent,

v.

Clare Belle MACKEY, Defendant and Appellant.

Civ. 17603.

District Court of Appeal, First District, Division 1, California.

April 28, 1958.

Rehearing Denied May 28, 1958.

Hearing Denied June 25, 1958.

Action for wrongful death of truck driver in collision with automobile driven by defendant. The Superior Court, Monterey County, Stanley Lawson, J., entered judgment on a verdict for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that instruction as to duty of driver of any vehicle to exercise ordinary care with respect to specified matters was not objectionable for failure to repeat ordinary care limitation in phrases of instruction stating requirements as to vigilance, lookout, and control of vehicle.

Judgment affirmed.

1. Trial ⇐295(6)

In action for wrongful death of truck driver in collision with oncoming automobile driven by defendant, which had swerved into traffic lane used by oncoming vehicles, charge as a whole was fair, complete and reasonable.

2. Automobiles ⇐246(22)

In action for wrongful death of truck driver in collision with oncoming automobile driven by defendant, which had swerved into traffic lane used by oncoming vehicles, instructions as to unavoidable accident should not have been given.

3. Appeal and Error ⇐1026
Automobiles ⇐244(36)

In action for wrongful death of truck driver in collision with oncoming automobile driven by defendant, which had swerved into traffic lane used by oncoming vehicles, evidence in support of implied finding that collision was proximately caused by negligent operation of automobile by defendant was substantial and practically overwhelming, and hence a most serious error would be required to compel reversal of judgment entered on verdict for plaintiff.

4. Automobiles ⇐246(8)

In action for wrongful death of truck driver in collision with oncoming automobile, instruction as to duty of any driver to exercise ordinary care with respect to specified matters was not erroneous for failure to repeat ordinary care limitation in phrases of instruction setting out duty as to vigilance, lookout and control, since such limitation would naturally be implied.

5. Trial ⇐241

In action for wrongful death of truck driver in collision with oncoming automobile which, after unsuccessful attempt to pass slow moving vehicle, had swerved onto right hand shoulder and then to the left into traffic lane used by oncoming vehicles, portions of statutes requiring that vehicles be driven on right half of roadway, giving oncoming vehicles at least one-half of roadway, and setting out limitations upon operation of vehicle in passing overtaken vehicle, were properly read to jury in view of the evidence. West's Ann.Vehicle Code, §§ 525, 527, 530, and subd. (a).

6. Trial ⇐296(7)

Instruction that a presumption is evidence and continues until and unless overcome by other evidence was not misleading as requiring more than that presumption be rebutted or balanced, in view of immediately preceding instruction as to manner in which presumption that all witnesses speak the truth may be repelled.

7. Automobiles ⇐246(60)

In action for wrongful death of truck driver in collision with oncoming automobile driven by defendant, which had swerved into traffic lane used by oncoming vehicles, instruction that conduct in violation of specified sections of Vehicle

Code, read to jury, would require a presumption of negligence, but that such presumption could be overcome by other evidence showing that such conduct was excusable, justifiable, and such as might reasonably have been expected from a person of ordinary prudence under the circumstances was not objectionable as placing upon defendant burden of proving that she was not negligent. West's Ann.Vehicle Code, §§ 525, 527, 530.

8. Automobiles ⇐170(2)

Violation of sections of Vehicle Code, requiring that vehicles be driven on right half of roadway, except under specified circumstances, giving oncoming vehicle at least one-half of roadway, and setting forth limitations upon operation of vehicle in passing overtaken vehicle, constitutes negligence per se. West's Ann. Vehicle Code, §§ 525, 527, 530.

9. Automobiles ⇐242(3), 244(21)

That automobile was on its left side of roadway at time of collision with oncoming truck established prima facie a violation of sections of Vehicle Code, and unless such violation occurred without fault of automobile driver by reason of something that would excuse or justify such conduct, driver must be presumed to be negligent. West's Ann.Vehicle Code, §§ 525, 527, 530.

10. Automobiles ⇐246(22)

In action for wrongful death of truck driver in collision with oncoming automobile driven by defendant, which had swerved into traffic lane used by oncoming vehicles, instructions which left to jury question of fact as to whether collision was proximately caused by negligence of defendant or was unavoidable disclosed no error. West's Ann.Vehicle Code, §§ 525, 527, 530.

11. Trial ⇐296(7)

In action for wrongful death from injuries sustained in automobile collision, general instruction that defendant had burden of proof as to all affirmative allegations of answer was technically wrong, if jury knew that defendant had affirmatively pleaded defense of unavoidable accident, but such instruction was not prejudicial to defendant, in view of other instructions as to proximate cause and burden of proof, particularly in absence of showing that jury knew that defendant had affirmatively pleaded unavoidable accident.

12. Trial ⇐243

In action for wrongful death resulting from injuries sustained in automobile collision, instructions were not objectionable as being contradictory.

13. Automobiles ⇐146

The care which ordinary prudent person must exercise varies with the circumstances, and the caution required when driving an automobile must be adequate to such responsibility as related to all surrounding circumstances.

14. Negligence ⇐3

As the possibility of danger and injury to others increases, though the degree of care required of the ordinary prudent person does not change, the amount of care which such person is required to exercise under such circumstances becomes greater.

15. Automobiles ⇐246(2)

In action for wrongful death resulting from injuries sustained in automobile collision, instruction, defining standard of care owed by ordinary prudent person and adding that the care which an ordinary prudent person must exercise in dealing with agencies which, because of power or momentum or for any other reason, are likely to do great injury, is very much greater than under other circumstances, was not objectionable as telling jury that the care required of persons who drive heavy and powerful automobiles is very much greater than under other circumstances.

16. Appeal and Error ⇐216(1)

Where trial court by general instruction in action for wrongful death from injuries sustained in automobile collision submitted to jury question of whether, under the evidence, defendant acted as an ordinary prudent person would act, defend-

ant was entitled on request to instruction as to presumption of innocence of crime or wrong, but in absence of such request, defendant could not complain for the first time on appeal of failure to give such instruction.

17. Appeal and Error ⇐216(2)

Where general instruction is correct as far as it goes, party, desiring that such instruction be limited or made specific, should so request, and, in absence of such request, may not complain on appeal of trial court's failure to do so.

18. Trial ⇐133(6)

In action for wrongful death from injuries sustained in automobile collision, improper reference to insurance adjuster by counsel for plaintiff in argument to jury and refusal to declare a mistrial on account of such impropriety did not constitute prejudicial error, in view of admonitions to jury to disregard all statements concerning insurance and insurance adjuster and fact that such improper remarks merely reiterated testimony concerning insurance adjuster admitted without objection.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, for appellant, W. R. Dunn, Burlingame, of counsel.

Bardin, Cunningham & Leach, Salinas, for respondent.

PETERS, Presiding Justice.

On Monday, March 12, 1956, at about 7:55 a. m., appellant Clare B. Mackey, driving a new Cadillac convertible towards Salinas on the two-lane Salinas-Monterey highway, drove into the traffic lane used by traffic traveling towards Monterey and collided with a Chevrolet pickup truck proceeding towards Monterey and operated by Earl Van Emon. Admittedly the Cadillac at the moment of impact was in its wrong lane, and admittedly the right side of the Cadillac collided with the front of the Chevrolet. As a result of the accident Van Emon was so seriously injured that he died two days later. Russell Scott, as the executor of Van Emon's estate, brought this action for the wrongful death of Van Emon. The jury brought in a verdict of $38,665.53 in favor of the plaintiff. Defendant appeals.

[1, 2] The major attack of appellant is upon the instructions. A microscopic analysis is made of many of the instructions, and then by resort to complicated, artificial and technical reasoning a possible construction of these instructions is arrived at which appellant claims is erroneous. It would be most unusual for a jury to engage in the mental gymnastics suggested by appellant. In fact, it is extremely difficult for this court to follow the mental processes by which appellant comes to the conclusion that the instructions are erroneous. We have read the entire charge. It is fair, complete and reasonable. Far from being erroneous or unfair to appellant there were many instructions given in her favor which should not have been given. Thus the court gave a whole series of instructions on the doctrine of unavoidable accident. These were, of course, in favor of appellant, and she, therefore, does not object to the giving of them. Such instructions should not have been given. In Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500, the Supreme Court held that instructions on unavoidable accident serve no useful purpose, are confusing and should not be given, and reversed a defendant's judgment on this ground alone.

[3] The decisive factual question presented to the jury was what caused appellant to cross into the wrong lane? Was it because of the negligent operation of her vehicle, or was it because she was bumped from the rear by another vehicle and so lost control of the car? There was evidence to support either theory, but a reading of the transcript discloses that the evidence in support of the implied finding of the jury that the accident was proximately caused by reason of appellant's negligent operation of her au-

tomobile is not only substantial but practically overwhelming. Under such circumstances it would take a most serious error to compel a reversal. No such error here appears.

Mrs. Mackey testified that she was driving the practically new Cadillac, which was equipped with power brakes and steering, towards Salinas at not over 50 miles per hour, when a couple of miles before reaching the scene of the accident, she was slowed down by traffic conditions to 20 to 25 miles per hour. She proceeded at that speed for about two miles. During most of this time she was behind a sedan which was following an old pickup truck. There was no passing because of a stream of traffic proceeding towards Monterey. Finally the sedan passed the pickup. Mrs. Mackey followed the pickup for a short distance and then swung partially to her left to see if she could pass. The approaching traffic was too close for her to pass the pickup so she swung back into her own lane and "probably" straightened out her car in her lane of traffic. She then testified that she felt a "bump" from the rear of her car. She was confused as to just when this bump occurred. She could not remember whether she was turning to the left or to the right when the bump occurred, but she did remember that she then lost control of her car and it swerved. The bump did not throw her out of her seat nor did it cause her to release the steering wheel. She does not know whether she applied her brakes, but remembers that when she swung to her right her car went over onto the shoulder and then veered to her left across the road. At one time she testified that it was either while she was on the shoulder or just as she was pulling back to her left that she felt the bump. At another point she testified that she did not know whether the bump came before or after she was on the shoulder, and at another that she thought she was in her proper lane when she felt the bump. She recollected that just before the accident a car was following her very closely, but she could not recollect the distance. At the trial she testified that she had told an investigating officer about this bump.

A traffic officer, Davenport by name, arrived at the scene of the accident shortly after it occurred. He fixed the point of impact as in the Monterey Lane and testified that Mrs. Mackey dictated a statement which he wrote into his report. Significantly, in that statement the bump is not mentioned. The report states that Mrs. Mackey declared that when she pulled to the right her car went onto the shoulder and "bounced on the shoulder." She then pulled to her left and her car "went out of control too far to the left" and the accident occurred. The officer testified that Mrs. Mackey did not complain to him about a car following her too closely, but suggested that perhaps something had gone wrong with the power steering. At the trial she testified that she was familiar with power steering and that nothing had gone wrong with it so far as she knew.

The officer also testified that while he was investigating this accident another occurred and he identified certain skid marks appearing in the photographs as being caused by the Cadillac and the Van Emon truck.

A Charles Tucker stopped at the scene of the accident and heard Mrs. Mackey tell the officer that her car "pulled to the right and it kind of scared her and she jerked it back to the left and it got away from her." He heard nothing about any bump.

Mr. Mackey, who arrived at the scene of the accident about five minutes after it occurred, testified that he was present when his wife gave the statement to the officer, and he heard her tell the officer about the bump. Nevertheless, both he and his wife signed the statement which contains no reference to the bump.

A witness who saw the accident and who was following the Cadillac just before it occurred, testified that there was a Chevrolet between her and the Cadillac that was following the Cadillac "closely," but she

could not state how closely. She did not observe any contact between this Chevrolet and the Cadillac.

Several experts testified that there were marks on the rear bumper of the Cadillac indicating that some force had there been applied.

On this evidence the jury brought in its unanimous verdict for the plaintiff, and defendant appeals.

As already pointed out, the main attack is upon the instructions, many of which are challenged by appellant. It would serve no useful purpose to set forth all of the instructions assailed. A few examples will demonstrate the nature of the attack. Thus, appellant challenges the following instruction: "It is the duty of the driver of any vehicle using a public street or highway to exercise ordinary care to avoid placing himself or another person in danger; to use like care to avoid an accident from which injury might result; to be vigilant at all times, keeping a lookout for traffic and other conditions to be reasonably anticipated; and to keep the vehicle under such control that, to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position."

[4] The contention made is that, while this instruction states the duty to exercise "ordinary care" as to some things, it erroneously fails to do so in reference as to being "viligant" and the things thereafter mentioned. Obviously, the words "ordinary care" did not have to be set forth in each phrase of the instruction. Such limitation would naturally be implied by any one reasonably interpreting the language used. The instruction has been approved in several cases. Duff v. Schaefer Ambulance Service, Inc., 132 Cal.App. 2d 655, 283 P.2d 91; Jeffs v. La Gore, 131 Cal.App.2d 181, 280 P.2d 140; Larson v. Holland, 118 Cal.App.2d 520, 257 P.2d 1014.

[5] Equally without merit is the contention that it was prejudicial error to read portions of sections 525, 527 and 530 of the Vehicle Code to the jury. Section 525 requires vehicles to be driven on the right half of the roadway, except under certain circumstances not here involved. Section 527 requires drivers proceeding in opposite directions to pass each other on the right and to give to the other driver at least one-half of the roadway. Section 530(a) specifies the limitations imposed when one vehicle overtakes and attempts to pass another, and requires the overtaking vehicle to return to the right-hand side of the roadway before coming within 100 feet of an approaching vehicle. It seems to be appellant's argument that these sections were inapplicable to the facts here involved because her car "crossed" the highway and was not "driving on or along" the highway when the accident happened. The contention is devoid of merit. In view of appellant's statement to the investigating officer that she pulled out to pass a slow moving vehicle, saw she could not make it, pulled the car to the right so far that it started to bounce on the shoulder, and then jerked it to her left, and that then her car went out of control, the code sections in question were clearly applicable. Admittedly, her automobile at the time of the collision was being driven on her left side of the highway. The sections are clearly applicable and were properly read to the jury.

[6] Appellant also objects to an instruction that properly defined the word "presumption," and then stated that a presumption is "evidence and continues until and unless overcome by contrary evidence." The objection is made that the word "overcome" was not defined, and that without a limiting definition, it means more than simply rebut or balance, and so imposed too great a burden on her. The challenged instruction was given immediately after one informing the jury that "all witnesses are presumed to speak the truth. This presumption, however, may be

repelled by the manner in which he or she may have testified, by the character of his or her testimony, by his or her motives or bias, or by satisfactory contradictory evidence, or by evidence that he or she has made at other times, statements inconsistent with his or her present testimony." In this context the challenged instruction could not have been misleading.

[7] The purpose of the attack on the "overcome" instruction is disclosed by the next instruction challenged. The court read the three Vehicle Code sections and then told the jury that: "Conduct which is in violation of California Vehicle Code 525, 527 and 530 just read to you constitutes, in itself, negligence. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that she was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence."

Appellant in her brief sets forth only the first two sentences of this instruction and omitted to mention the last two sentences. She contends that under the two sentences she quotes, and the "overcome" and statutory instructions above mentioned, the jury was told that the law directed a presumption that she had not exercised ordinary care unless she produced evidence of greater weight than the presumption. Thus, so it is contended, the jury was instructed, in effect, that she had the burden of proof of showing that she was not negligent. This argument is developed at some length.

[8, 9] There is no real basis for complaint in these instructions. The jury was told that the presumption created by the statutes was not conclusive. Of course, the violations of the statutes, if a proximate cause of the injury, constituted negligence *per se*. See cases collected 35 Cal. Jur.2d 510, § 22; see also Shehtanian v. Kenny, 156 Cal.App.2d 576, 319 P.2d 699. Admittedly, appellant was on the wrong side of the highway at the time of the collision. This established, prima facie, a violation of the pertinent sections of the Vehicle Code. The jury was simply told that, unless those violations occurred without the fault of appellant, that is, by something that would excuse or justify her conduct, she would be presumed to be negligent. That is sound law. It should also be mentioned that the instruction in question has been approved in many cases, including Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 177 P.2d 293; Kalfus v. Fraze, 136 Cal.App.2d 415, 288 P.2d 967; Rangel v. Badolato, 133 Cal.App.2d 254, 284 P.2d 138.

[10] Similar attacks are made on several other instructions. A reading of these and the other instructions indicates that the jury was fully and properly instructed on negligence and on the defendant's lack of liability if the accident occurred by a force beyond her control. The jury was told at length that whether the accident was or was not avoidable was a question of fact for the jury to determine. They were told several times that if they found the accident occurred without having been caused by appellant's negligence then the accident was unavoidable and their verdict must be for appellant. Thus, the vital question of fact involved was left to the jury. No error appears in these instructions.

[11] The court gave a general instruction to the effect that the plaintiff has the burden of proving the affirmative allegations of the complaint and that the defendant has the burden of proof as to all affirmative allegations of the answer, and then instructed on unavoidable accident, which instructions, as already pointed out, should not have been given. The clerk's transcript discloses that appellant had affirmatively pleaded the defense of unavoidable accident, which, of course, she did not have to do. Thus, this general in-

struction was technically wrong, if the jury had known that unavoidable accident was affirmatively pleaded. But there is no showing that the jury knew this was so. The jury was instructed at length on proximate cause and burden of proof. The challenged instruction could not possibly have been prejudicial.

[12] Certain instructions are challenged as being contradictory. We have read them. They are neither contradictory nor erroneous. No useful purpose would be served by setting them forth in this opinion. Appellant also attacks the instruction defining the standard of care owed by the ordinary prudent person. After giving the conventional statement defining ordinary care the court stated: "It should be specified that the care to be exercised by a person of ordinary prudence varies with the condition under which he is called upon to act. In other words, the care that an ordinary prudent person must use in the exercise of ordinary prudence in dealing with agencies that, because of power or momentum or for any other reason, are liable to do great injury, is very much greater than under other circumstances."

[13–15] The appellant's claim is that by this instruction the jury was told that the care required of persons who drive heavy and powerful Cadillacs is very much greater than under other circumstances. Of course, the rule is that the care which the ordinary prudent person must exercise varies with the circumstances, and that the caution required when driving an automobile "must be adequate to that responsibility as related to all surrounding circumstances." Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 76, 265 P.2d 513. The instruction so providing was upheld in that case, and many cases cited in support of the ruling. It is too elementary to require further discussion that, although the degree of care does not change, as the possibility of danger and injury to others increases, the amount of care which the ordinary prudent person is required to exercise becomes greater. That is all the challenged instruction states.

Appellant's last attack on the instructions is that the trial court committed error in not giving an instruction on the presumption of innocence of crime. The court properly instructed that the question before the jury was whether, under the evidence, did the appellant "act as an ordinary prudent man would act?" This instruction did not mention the presumption of innocence from crime or wrong.

[16, 17] Appellant would have been entitled to such an instruction had she asked for it, but she did not. This precludes her from now contending that it should have been given. The instruction that was given was a general instruction. It was correct as far as it went. If appellant wanted a limitation on it, or desired it to be specific, she should have so requested. Having failed to do so she may not now properly complain. See cases collected 24 Cal.Jur. 796, § 74.

The only other point necessary to mention is the contention that respondent's counsel improperly brought the subject of insurance into the case. She herself admits that the incidents about to be discussed by themselves "would be of no great moment," but when considered with the closeness of the case and the other serious errors "the misconduct becomes of serious gravity." App.Op.Br. p. 47. Since there were no other serious errors, and since the evidence strongly favors respondent, it would seem that appellant necessarily concedes that the incidents involved were "of no great moment." However this may be, an examination of the incidents discloses no reversible error.

Appellant in cross-examining Officer Davenport endeavored to bring out that Mr. Mackey on the afternoon of the accident or the day following had pointed out to some one certain skid marks. Plaintiff objected on the ground that such testimony was hearsay. The court then asked the witness whether the defendant was present at that time, and the witness answered that she was not. Counsel for respondent then asked, "Who was present?"

The witness answered, "Mr. Mackey and an insurance adjuster—investigator, I don't recall his name." No objection was made to this statement nor was a motion to strike made. The court sustained plaintiff's objection to the question involved on the ground that it was hearsay.

Subsequently, respondent raised an objection to evidence in connection with certain skid marks on a photograph. He stated in voicing his objection: "[T]here is no evidence before this Court that these marks were pointed out by anyone other than Mr. Mackey and an insurance adjuster that went out there with Mr. ———" Appellant's counsel then interrupted with an objection to these remarks, pointing out that the witness, Davenport, did not "know who the other people were and if anything was said to him it would be hearsay," and asked for an admonition. The court then admonished the jury to disregard the remarks about the insurance adjuster.

Then, in argument to the jury, counsel for respondent, in referring to the skid marks which Mr. Mackey had subsequently pointed out, stated that Mr. Mackey did not say anything to the officer right after the accident but "waited until the next day when the officer went out there with the insurance adjuster-investigator and was pointed out to the officer —" Counsel for appellant objected and cited this as misconduct, stating that there was "no evidence of such in this case," and moved for a mistrial. The court denied the motion for mistrial but admonished the jury to disregard all statements concerning insurance and instructed them that no insurance company was a party litigant in the case and insurance had nothing to do with the case.

[18] This does not show prejudicial error. The record contained a statement by Davenport that an insurance adjuster was present at the time, and no objection was made to this statement. Moreover, when respondent's counsel properly asked "Who was present?" there is no evidence that he knew or should have known that the witness would refer to the insurance adjuster. It is undoubtedly true that it was improper to refer to the insurance adjuster in the argument in view of the court's admonitions during the trial. But such impropriety was not prejudicial. After all, respondent's counsel did nothing more than to state what was already in the record, unobjected to. Moreover, in view of the careful admonitions and the instruction on the issue, the error was only of slight significance.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



159 Cal.App.2d 811

ANDERSON CROP DUSTERS, Inc., a California corporation, Plaintiff and Appellant,

v.

George K. MATLEY, Defendant and Respondent.

Civ. 9288.

District Court of Appeal, Third District, California.

April 30, 1958.

Hearing Denied June 25, 1958.

Suit for injunctive relief. The Superior Court, San Joaquin County, M. G. Woodward, J., denied the relief sought, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that agreement by selling partner not to engage in same type of business in any county wherein partnership had conducted its business was not enforceable.

Affirmed.

1. Courts ⇐91(1)

Where legislature, considering subject matter of Code sections in question, had left section specially dealing with the part-

ners as it stood with construction given it many years before by Supreme Court, Court of Appeal would follow Supreme Court decision (that territorial limits to which partner may by contract restrict himself is limited to a city or town), notwithstanding persuasive argument that Supreme Court decision was wrong. West's Ann. Bus. & Prof.Code, § 16602.

2. Contracts ⇐117(7)

Agreement by selling partner not to engage in same type of business in any county wherein partnership had conducted its business was not enforceable. West's Ann. Bus. & Prof.Code, §§ 16600–16602.

3. Injunction ⇐56

In absence of enforcement contract containing negative covenants to contrary, equity will not enjoin former business associate from soliciting business of former association, providing that competition is fairly and legally conducted.

4. Trade-Marks and Trade-Names and Unfair Competition ⇐97

Equity will never enjoin fair competition.

5. Injunction ⇐118(3)

Buying partner's complaint, to enjoin selling partner from soliciting former customers of partnership, was insufficient.

Richard E. Macey, and Casey C. Carr, Stockton, for appellant.

J. A. Montgomery, Jr., Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment of dismissal entered after the sustaining of a demurrer to the second amended complaint, which appellant, as plaintiff in the trial court, declined to amend. In 1952 appellant and respondent formed a partnership for the purpose of engaging in crop dusting in the County of San Joaquin. They dissolved the partnership in 1955 and appellant purchased the good will. The partnership agreement provided that upon dissolution of the partnership, and if appellant purchased the good will thereof, respondent would not "manage, own, operate, work as an employee, salesman, agent, or in any way carry on the business of crop dusting in the County of San Joaquin and in any other county wherein the partnership has conducted its business for a period of five years from the termination of this agreement, nor will he in any way enter into competition with the First Party [appellant] in any crop dusting venture in the County of San Joaquin for a period of five years from the termination of this agreement."

In violation of the restrictive covenant respondent continued to engage in crop dusting in the County of San Joaquin. Appellant brought the present action to enjoin him from so doing. The trial court sustained a general demurrer upon the ground that the quoted language of the contract violated the provisions of Section 16602 of the Business and Professions Code, basing its decision upon the ruling in DuBois v. Padgham, 18 Cal.App. 298, 300–301, 123 P. 207. When that case was decided the applicable statutes were found in Sections 1673, 1674 and 1675 of the Civil Code. They now appear as Sections 16600, 16601 and 16602 of the Business and Professions Code and, so far as pertinent here, were not changed when recodified. It was there held that under Section 1673 of the Civil Code every contract whereby one is restrained from exercising a lawful business is void unless made pursuant to Sections 1674 and 1675 of that code; that while under Section 1674 of the Civil Code one other than a partner may, where he sells the good will of a business, make a valid contract to refrain from carrying on a business similar to that sold within specified county or counties or specified city or cities, the territorial limits to which a partner may by contract restrict himself, is, under Section 1675 of that code, limited to a city or town. Thus Section 1675, which specially deals with partners, and now appears as Section 16602 of the Business and Professions Code, was construed as limiting a partner who sells the good will of the business more severely

than other persons were limited under Section 1674 of the Civil Code, now Section 16601. The decision cannot be distinguished on its facts from the present case and if it is to be followed supports the decision of the trial court. The court in a memorandum opinion expressed grave doubts that the decision correctly construed the section involved, but stated the court felt bound by the decision and compelled to apply it to the instant case.

[1, 2] Appellant earnestly contends that DuBois v. Padgham was erroneously decided and urges this court to so declare and to reverse the judgment appealed from. The argument appellant makes that the decision in DuBois v. Padgham is wrong is persuasive, but, like the trial court, we feel that the argument comes too late. DuBois v. Padgham was decided in 1912, and, although it did not come before the Supreme Court on petition for a hearing therein, it has stood as the only authoritative construction of the section for some 47 years. Peculiarly enough it has not been cited and appellant brings that fact to our attention in support of its arguments that we ought to here declare that we will not follow it. But many successive legislatures have met since the opinion in that case was written and undoubtedly the legal profession, familiar with its terms, has in many matters adjusted the contracts of partners to it. We note further that in 1945 the legislature had before it the code sections involved and amended the general section declaring restraining contracts void except as in the following sections expressly permitted by adding to those who could agree to such restraints, shareholders of corporations who sold their entire stockholdings. Notwithstanding it was considering the subject matter of the code sections with which we are here concerned, the legislature left Section 16602 as it stood with the construction given it so long before by the court in DuBois v. Padgham. Under the circumstances, we feel that we ought to consider the question here presented settled by that decision until and unless the legislature declares otherwise, and, accordingly, we affirm that part of the judgment appealed from which is based on that decision.

[3–5] The complaint herein contained a second count in addition to the one involving the code sections on restraint of trade and in that count appellant pleaded that after selling the good will of the business to appellant respondent had solicited former customers of the partnership for the purpose of obtaining crop dusting work. There was no pleading to the effect that respondent was using any information confidential in nature which had been obtained by him during the partnership operations nor that he was using knowledge of customer lists of the former partnership to his advantage or at all, nor that he in any wise represented to such former customers that the partnership business was still continuing as such. In short, the pleading merely asserts, as stated above, that, having sold the good will, he was going forward with the same business in the same general area which the partnership had conducted. In the absence of an enforcible contract containing negative covenants to the contrary equity will not enjoin a former business associate from soliciting business of the former association provided the competition is fairly and legally conducted. Aetna Building Maintenance Co. v. West, 39 Cal.2d 198, 203, 246 P.2d 11. Equity will never enjoin fair competition. In fact, agreements not to compete are banned by the law generally and by our code specially, save for the permitted exceptions stated in the code. Since the allegations of the second count go no further than to allege competition and allege no unfairness, other than the bare fact that, having sold the good will of the business, respondent entered into competition, it is obvious that the second count in the complaint stated no cause of action.

The judgment appealed from is affirmed.

WARNE and SCHOTTKY, JJ., concur.

Hearing denied; SHENK, J., dissenting.

160 Cal.App.2d 6

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gilbert R. CARROLL and Oscar E. Ault, Defendants and Appellants.

Cr. 3453.

District Court of Appeal, First District, Division 1, California.

May 1, 1958.

Defendants were convicted of grand theft of automobile. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment, and defendants appealed. The District Court of Appeal, Peters, P. J., held, in part, that where one defendant alleged that at time of theft he had been entertaining three friends, denial of his request for continuance, which was made when he was called as witness in his own behalf, to secure presence of two relatives who allegedly could verify his presence at home on night of theft was not an abuse of discretion, especially in view of fact that defendant had previously been granted three continuances to secure presence of relatives.

Affirmed.

1. Criminal Law ⇐614(1)

In prosecution for grand theft of automobile by defendant who alleged that at time of theft he had been entertaining three friends, denial of request for continuance, which was made when he was called as witness in his own behalf, to secure presence of two relatives who allegedly could verify his presence at home on night of theft, was not an abuse of discretion, especially in view of fact that defendant previously had been granted three continuances to secure presence of relatives.

2. Criminal Law ⇐586, 594(1)

A motion for continuance is addressed to sound discretion of trial court and there must be a showing that testimony of absent witness would be material, that diligence has been exercised in an attempt to procure his attendance, and that his attendance can be secured within a reasonable time.

3. Criminal Law ⇐1128(4)

Affidavit which was not made a part of record on appeal could not be considered by District Court of Appeal.

Lawrence W. Welch, Jr., San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Doris H. Maier, J. M. Sanderson, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

Carroll and Ault were charged with the grand theft of an automobile belonging to Mary Flores, with taking the vehicle without the consent of the owner, and with certain priors. They admitted the priors, but pleaded not guilty to the two charged offenses. They were found guilty of the grand theft charge and not guilty of taking the vehicle without the consent of the owner. From the judgment entered on this verdict they appeal.

The car was stolen in San Francisco between the hours of 6:30 p. m. on May 6, 1957, and 7:30 a. m. on May 7, 1957, from a lot adjoining the home of its owner, Mary Flores. The automobile was a 1953 Oldsmobile sedan with a California license. When parked, the ignition was locked, and the registration slip was on the steering post. The car was found in the possession of the two defendants at 3 a. m. on May 8, 1957, when they were stopped by an officer in the town of San Pablo. Carroll was driving. The officer noted that there was no registration certificate visible and that there was no key in the ignition. Carroll was asked for his driver's license but stated that he did not have one, and also told the officer that the car belonged to a cousin in Richmond. Ault corroborated Carroll. The officer issued Carroll a citation for failure to have a driver's license, and checked the license number by radio. He discovered that the license number then on the car was registered to a 1937 Chevrolet from

Port Chicago. Carroll and Ault both told the officer that they had been in Port Chicago that night. The officer then inspected the car. He discovered that the ignition had been cross-wired, and that the registration slip for the Oldsmobile in the name of Mary Flores was in the glove compartment. The back seat of the car had been torn out and a tire iron was found on the front floor boards. The trunk was dented in such a fashion that it indicated someone had tried to pry it open. The officer questioned defendants about the cross-wiring of the ignition. Then both defendants admitted that they had lied about the car belonging to Carroll's Richmond cousin. They both stated that early on the evening of May 7, 1957, they were loaned the car by a man in a bar in San Francisco. Later in the day the two defendants were separately questioned about this story. Carroll stated that this unidentified man was a 6-foot blond in his early twenties. Ault described him as a heavily built little fellow with black hair. When confronted with these different descriptions defendants refused further to discuss the matter.

At the trial Carroll testified that he met Ault at about 3 p. m. on May 7, 1957, and that they finally landed in a bar on either 3rd or 5th Street in San Francisco sometime after 7 p. m. There they met a stranger whose first name was Floyd, last name unknown. He was between 5½ and 6 feet tall, and his hair was darker than blond. They talked for awhile, and defendants told Floyd that they were going to borrow a car to drive to Port Chicago. Carroll testified that Floyd generously offered to lend them his car on their promise to bring it back by 2 p. m. of the next day. Carroll did not pay Floyd a deposit nor did he even give him his name and address. They told Floyd that they wanted to go to Port Chicago to see if Ault could find his children who were living there with his estranged wife.

Floyd brought the Oldsmobile to the bar. When Carroll commented on the fact that the ignition had been cross-wired Floyd explained that his wife, who drank to excess, had the key. Neither appellant noticed the condition of the back seat, saw the tire iron, nor did they observe the lack of a registration certificate. Carroll and Ault both denied having the conversation with the officer in which they described, differently, the man who loaned them the car.

Both defendants tried to account for their time during the hours in which the vehicle was stolen. Carroll testified that he was out alone walking a dog between 6:30 and 11 p. m. on May 6, 1957, and was home in bed thereafter until the next morning. Carroll's mother, stepfather and stepbrother testified that Carroll was home after 11 p. m. Ault testified that he was home entertaining some friends until nearly midnight on May 6, 1957, and then retired.

The appellants do not challenge the sufficiency of the evidence. They contend that it was prejudicial to deny their request for a recess during the trial, and Ault contends that it was prejudicial error to deny his request for a continuance to procure the presence of several witnesses. Neither contention has merit.

While the arresting officer was testifying, appellants requested a recess so that their counsel could review the officer's testimony at the preliminary to ascertain whether it was inconsistent with his testimony at the trial. The record shows that before appellants' counsel commenced his cross-examination of the officer he requested a five-minute recess for the purpose indicated, but the record does not show that the request was denied. The record shows that when the request was made the trial judge stated: "You go ahead and review it. Read it right now. We will wait." Far from indicating that counsel was deprived of any opportunity to study the transcript, the record affirmatively shows that time was given to him for this very purpose.

Appellants also complain that they did not have an opportunity to consult with their counsel after the officer had testified about the differing descriptions given by appellants of the man who had supposedly

loaned them the car. The record does not disclose any request for a recess or for time for such a purpose.

[1] The next major contention of appellants is that error was committed in denying appellant Ault's request for a continuance made when he was called as a witness on his own behalf. At that time he asked for a continuance to secure the presence of his mother and brother who, it is contended, would have verified Ault's presence at home on the night of May 6, 1957. The appellant told the court that these two witnesses had to go to the bedside of a dying sister and that he had had "no chance whatsoever to secure their presence since then." The trial court denied the request.

The denial was not erroneous, but was well within the discretion of the court. The record shows that the case was first set for trial on July 16, 1957. Thereafter three continuances, until July 26th, until August 12th and finally until August 22nd, were granted so that Ault could secure the presence of these witnesses. The court was thus quite liberal to Ault in granting continuances. It should also be pointed out that Ault testified that he was entertaining three friends until nearly midnight on May 6th, and that none of these supposed visitors was called.

[2, 3] A motion for a continuance is, of course, addressed to the sound discretion of the trial court. People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; People v. Wade, 118 Cal. 672, 50 P. 841. There must be a showing that the testimony of the absent witness would be material, that diligence has been exercised in an attempt to procure his attendance (People v. Sherman, 139 Cal.App.2d 429, 293 P.2d 809), and that his attendance can be secured within a reasonable time. People v. Wade, 118 Cal. 672, 50 P. 841; People v. Sanders, 114 Cal. 216, 46 P. 153. Here the proper showing was not made. Appellants' brief refers to an affidavit supposedly dated the day of the trial in which a showing on some of these points was purportedly made. This affidavit was not made a part of the record on appeal and so may not be considered by us. People v. Villarico, 140 Cal.App.2d 233, 295 P.2d 76; People v. Ashcraft, 138 Cal.App.2d 820, 292 P.2d 676.

Thus, not only was there not a proper showing made that would have required a continuance, but the record affirmatively shows that ample time was granted to Ault to secure the presence of these witnesses, and that there were at least three other persons who could have testified where Ault was on the night of May 6th.

The judgment appealed from is affirmed.

BRAY, and FRED B. WOOD, JJ., concur.



159 Cal.App.2d 752

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank TAYLOR, Defendant and Appellant.

Cr. 3406.

District Court of Appeal, First District, Division 2, California.

April 29, 1958.

Rehearing Denied May 29, 1958.

Hearing Denied June 25, 1958.

Prosecution on information charging defendant with unlawful transportation of heroin and unlawful sale of heroin and two prior convictions for narcotic offenses. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that fact that state did not call informant, who allegedly purchased heroin from defendant as a witness for prosecution, did not deny defendant's right to be confronted with witnesses; however, since possession and transportation were necessarily incident to

sale of heroin, separate convictions could not be had.

Judgment reversed as to Count I charging transportation, affirmed as to Count II charging sale, and order denying motion for new trial affirmed.

1. Criminal Law ⇐661, 662(1)
Witnesses ⇐266

An accused has right to be confronted with witnesses and to have them testify in his presence, and has right to cross-examine them; however, it is not required that all witnesses or persons who may have knowledge of crime be produced in court or called to testify.

2. Criminal Law ⇐662(1)

In prosecution on information charging defendant with unlawful transportation of heroin and unlawful sale of heroin, fact that state did not call informant, who allegedly purchased heroin from defendant, as a witness for prosecution, did not deny defendant's right to be confronted with witnesses.

3. Witnesses ⇐216

Where police officer, on cross-examination, disclosed name and nickname of informant, his last known San Francisco address and further stated that he had not seen informant for several weeks and believed him to be living in Los Angeles, and also gave a physical description of informant, identity of informant was properly revealed to defendant, who was accused of transporting and selling heroin.

4. Criminal Law ⇐1034

Where defendant was granted a continuance to locate an informant over weekend, and on Monday morning, defendant's attorney stated to court he had been unable to locate informant and defendant did not request a further continuance, on appeal defendant could not complain that trial court failed to grant sufficient time to locate informant.

5. Poisons ⇐9

Evidence established that defendant made a sale of heroin in violation of Health and Safety Code. West's Ann. Health and Safety Code, §§ 11500, 11721.

6. Criminal Law ⇐741(2)

In prosecution on information charging defendant with unlawful transportation of heroin and unlawful sale of heroin, question whether defendant was person observed by police officers with informant, who allegedly purchased heroin from defendant, and question of identity were for jury. West's Ann.Health and Safety Code, § 11500.

7. Witnesses ⇐337(5)

Generally, evidence of other crimes or of general propensity toward crime is not admissible; however, where defendant takes stand in his own behalf, evidence of other crimes may be admitted to impeach his credibility as a witness. West's Ann. Code Civ.Proc. § 2051.

8. Witnesses ⇐337(5)

In prosecution on information charging defendant with unlawful transportation of heroin and unlawful sale of heroin and with two prior convictions of narcotic offenses, where defendant denied prior narcotics convictions in his plea and testified, evidence relating to defendant's prior crimes and prior use of heroin was admissible for impeachment purposes. West's Ann.Health and Safety Code, §§ 11500, 11721; West's Ann.Code Civ.Proc. § 2051.

9. Criminal Law ⇐1037(1, 2)

In prosecution on information charging defendant with unlawful transportation of heroin and unlawful sale of heroin, where there was no objection and no request made for an admonition to jury, prosecution's argument to jury to effect that people who use heroin, and who were addicted to narcotics were unable to tell the truth was not prejudicial. West's Ann.Health and Safety Code, §§ 11500, 11721.

10. Criminal Law ⇐822(13)

In prosecution on information charging defendant with unlawful transportation and sale of heroin, instruction to effect that if jury believed that defendant made

sale and police officers observed transaction, jury should find defendant guilty, was a fair and impartial comment on evidence and when viewed with all instructions given did not prejudice defendant. West's Ann.Health and Safety Code, §§ 11500, 11721.

11. Criminal Law ⇐1173(2)

In prosecution on information charging the unlawful transportation and sale of heroin, where defendant admitted knowing what heroin was, trial court did not commit prejudicial error by failing to instruct jury that knowledge of narcotic character of substance sold was an essential element of each of offenses charged. West's Ann.Health and Safety Code, §§ 11500, 11721.

12. Criminal Law ⇐984

Where possession and transportation of narcotic were necessarily incident to sale, separate convictions for unlawful transportation of heroin and unlawful sale of heroin were improper. West's Ann. Health and Safety Code, §§ 11500, 11721.

Frank Taylor, appellant in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Richard S. L. Roddis, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

By an information containing two counts, the defendant, Frank Taylor, was charged with two violations of section 11500 of the Health and Safety Code, and with two prior convictions for narcotic offenses in this state, one a felony in violation of Health and Safety Code, section 11160 (now 11500) in 1944, and one, a misdemeanor, violation of Health and Safety Code, section 11721 in 1955.

The first count charged the unlawful transportation of heroin; the second, the unlawful sale of heroin, both events being charged having occurred on November 7, 1956, in San Francisco. Defendant admitted the prior misdemeanor conviction and pleaded not guilty to the other charges. By a jury he was found guilty of all the charges and sentenced on the two counts, the sentences to run concurrently. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The facts are as follows: State Narcotic Inspector Ohlson was told by a confidential informant, one Frank Thomas, also known as "Tommie" that he had arranged to meet the defendant to make a purchase of heroin, between 2:30 and 3:30 p. m. on November 7, 1956, at the corner of Pierce and Eddy Streets in San Francisco. Before the appointed hour on November 7, 1956, Inspector Ohlson and Inspector Logan of the San Francisco Police Department met Frank Thomas at the State Building, stripped him, and thoroughly searched his clothing and his mouth. They gave him two $10 bills, the serial numbers of which the officers had recorded. Thomas had no personal property on his person except his clothing and these two bills. The officers drove Thomas to the corner of Pierce and Eddy Streets at 2:30 p. m. They let Thomas out of the car and parked on the east side of Pierce Street about 100 to 150 feet from the corner. Soon the defendant appeared, driving west on Eddy Street in a dark colored 1950 Kaiser automobile. The defendant stopped to pick up Thomas, who got in the car on the right side and sat in the front seat, and then proceeded west on Eddy Street about ¾ of a block, and then stopped in the traffic lane for about one minute. The officer's car followed the defendant at a distance of about 100 to 150 feet. Thomas got out of the defendant's car and walked east to the officer's car while the defendant's car continued west on Eddy Street. The inspectors had Thomas under continuous observation from the moment he left their car until he returned and handed them a bindle containing five grains of heroin. During this period no person except the defendant had contact with Thomas. The defendant and Thomas were alone in the defendant's car.

The officers then returned to the State Building with Thomas and searched him again. He did not have the two $10 bills in his possession.

On January 10, 1957, the defendant was arrested by the same two officers in Foster's Restaurant on Fillmore Street between McAllister and Fulton. The officers recognized the appellant as the person they had observed in the car with Thomas on November 7, and as the person previously pointed out to them as "Skippy" or "Frank Taylor". The officers had delayed the arrest for the November 7th transaction as they wanted to further investigate the defendant and ascertain his source of supply. Another sale to Frank Thomas had been arranged for November 8, but on this date the defendant was arrested by the San Francisco Police on vagrancy charges. At this time Officers Ohlson and Logan went to the Northern Station to talk to the defendant. On November 8, as well as on January 10, the defendant had numerous hypodermic puncture marks on the vein lines of his arms, some of them of recent origin.

The defendant took the stand and denied any connection with the sale transaction of November 7, 1956. He denied knowing Frank Thomas. He admitted owning a Kaiser automobile in November 1956, but stated that it was a 1947 rather than a 1950 model. He denied the possibility that anyone other than himself was driving his car on November 7, 1956, and admitted he might have been in the area on that day, but could not remember what he had been doing. He admitted being known by the nickname "Skippy". He admitted that he knew what heroin was and admitted being addicted to it at one time, but stated he had not used the drug since 1955.

[1, 2] Defendant's first major contention is that the fact that the people did not call the informant, Frank Thomas, as a witness for the prosecution was a denial of his right to confrontation. The case against the defendant rested entirely on the circumstantial evidence of the two police officers who witnessed the sale transaction. The right of the accused to be confronted with witnesses is the right to have the witnesses testify in his presence and the right of the accused to cross-examine them; it is not required that all witnesses or persons who may have knowledge of the crime be produced in court or called to testify. People v. O'Neill, 78 Cal.App.2d 888, 179 P.2d 10.

[3, 4] The defendant next contends that the people failed to properly reveal the identity of the informant as required by People v. Lawrence, 149 Cal.App.2d 435, 308 P.2d 821, and People v. Castiel, 153 Cal.App.2d 653, 315 P.2d 79, and that the trial court failed to grant him sufficient time to locate the informant. There is no merit in this contention. The record indicates that on cross-examination, Inspector Ohlson disclosed the name and nickname of the informant, his last known San Francisco address, and further stated that he had not seen the informant for several weeks and now believed him to be living in Los Angeles. On the defendant's request, a physical description of the informant was also given. Defendant's attorney stated he would make a concerted effort to find the informant over the week-end and requested a continuance which was granted. On Monday morning, defendant's attorney stated to the court that he had been unable to locate the informant and did not request a further continuance.

[5, 6] The defendant further contends that the evidence is insufficient to support the verdicts. The testimony of the officers is sufficient to establish that a sale of heroin took place on November 7, 1956. People v. Alvidrez, 158 Cal.App.2d 299, 322 P.2d 557; People v. Alonzo, 158 Cal. App.2d 45, 322 P.2d 42. In People v. Barnett, 118 Cal.App.2d 336, 257 P.2d 1041, relied upon by the defendant, the informant and the accused were not under observation by the officers for a considerable period of time. In the instant case, the officers observed the informant from the moment he left their car until he returned

to it a few minutes later. The defendant directs his most strenuous attack on the sufficiency of the evidence to support the identification by the officers of him as the person who took part in the criminal transaction on November 7, 1956. Both officers testified that although they were not personally acquainted with the defendant he had been pointed out to them on several prior occasions, that they had seen him drive his car on prior occasions, and as to their exact view of the defendant at the time. Whether or not the defendant was the person observed by the officers on November 7, 1956, was an issue properly left to the jury. The verdicts indicate that the jury resolved this question against the defendant. The evidence is sufficient to show the sale of heroin by the defendant.

[7, 8] Defendant next contends that the evidence relating to his prior crimes and prior use of heroin was inadmissible. The defendant denied the prior narcotics conviction in his plea. We are well aware of the rule that, generally, evidence of other crimes or of general propensity toward crime is not admissible; but where the defendant takes the stand in his own behalf, evidence of other crimes may be admitted to impeach his credibility as a witness. Code Civ.Proc. § 2051; People v. Peete, 28 Cal.2d 306, 169 P.2d 924. There is therefore no merit in this contention.

[9] Defendant next contends that the prosecution's argument to the jury constituted prejudicial misconduct requiring a reversal, particularly, the following:

> "It's a funny thing, ladies and gentlemen, about people who use heroin, who are addicted to narcotics—and, of course, you know from the facts that this defendant is addicted to narcotics because on his arms, both on the date of his arrest on the vagrancy charge, which was a day or so after the sale, he had fresh marks, fresh puncture marks on his arms; on the day on which he was finally arrested and charged with this charge, he also had fresh puncture marks on his arms, which, of course, is a sign of the addict; but there's something about someone who uses heroin that they just can't seem to tell the truth. They can't distinguish truth from untruth, or the reasons why they should tell the truth, and I don't think it's any more illustrated than the fact that a part of the charge was that the defendant had a prior narcotic conviction and yet he denied it. He denied it when he came into court and pled not guilty, he denied that he had had a prior narcotic conviction, and yet the records are just as cold, and here they are, and they were introduced into court, that he had one. They just can't seem to know what the truth is or what the truth isn't."

When the prosecutor's remarks were made, there was no objection to them, nor was any request made then or later that an admonition be given to the jury concerning them. As stated in People v. Johnson, 153 Cal.App.2d 564, 314 P.2d 751, 755; "The law is well settled that the prosecutor is limited to a fair comment in his argument to the jury, and when this limitation is exceeded, in a close case, the comments may be prejudicial. (Citing cases.) But when the prosecutor oversteps the line of fair comment it is the duty of the defense counsel to request an admonition, and the failure to make such a request precludes appellate consideration of the point if the admonition would have precluded prejudice. People v. Hampton, 47 Cal.2d 239, 302 P.2d 300.

"The prosecutor is permitted to draw reasonable inferences from the evidence and to comment on them. People v. Eggers, 30 Cal.2d 676, 185 P.2d 1. He is permitted wide latitude in discussing the merits of the case, and may state his views as to what the evidence shows as long as he stays within reasonable limits. People v. Sieber, 201 Cal. 341, 257 P. 64." We find no prejudicial error in the remarks of the prosecutor quoted above.

[10] Defendant's next contention is that the trial court committed prejudicial error by focusing the jury's attention on the issue of identity and improperly limiting the jury's discretion by the following instruction:

"Now as I listened to the arguments this morning, and as you listened to them, the District Attorney believes that he has presented a case which shows that this man is guilty of possessing and selling heroin on the 7th day of November, 1956. He is basing his case on the observations of two narcotic agents.

"Mr. Shinn believes that the agents are honest and he tells you that a sale, in his opinion, took place on the 7th day of November, 1956, but that his client didn't make that sale. Now it's a very simple case, if you believe that this man did make the sale and that the agents observed that, or whatever they did observe, observed him in the car, then you should find him guilty; if you believe the defendant's testimony that he did not make the sale, that he was not the person, that it was someone else, then naturally you should find him not guilty. The case is just that simple, and it seems to me that it's rather foolish in one sense that I should even give you instructions. However, the law says that I must give them to you, and there are a few points that I should call to your attention."

The record indicates that the issue of identity was the key theory of the defense; it was the sole issue argued by defendant's counsel to the jury. We think the instruction was a fair and impartial comment on the evidence, which when viewed with all of the instructions given, could not have been prejudicial to the defendant.

[11] Defendant also asserts that the trial court committed further prejudicial error by failing to instruct the jury that knowledge of the narcotic character of the substance sold was an essential element of each of the offenses charged, citing People v. Gory, 28 Cal.2d 450, 170 P.2d 433 and People v. Winston, 46 Cal.2d 151, 293 P.2d 40. There was no error here because the defendant admitted knowing what heroin was.

[12] Defendant's final point is that he has been improperly convicted of two offenses, transportation and sale, when these were, in fact, cooperative aspects of one criminal transaction. It is well established that where the only possession and transportation of a narcotic are necessarily incident to its sale or furnishing, separate convictions cannot be had. People v. Roberts, 40 Cal.2d 483, 254 P.2d 501; People v. Branch, 119 Cal.App.2d 490, 260 P.2d 27; People v. Castiel, 153 Cal.App.2d 653, 315 P.2d 79.

Accordingly, the judgment must be reversed as to Count I, charging transportation, and affirmed as to Count II, charging sale, and the order denying the motion for a new trial must be affirmed.

DOOLING and DRAPER, JJ., concur.



159 Cal.App.2d 721

Reinaldo MARQUEZ, Plaintiff and Appellant,

v.

John ORTIZ et al., Defendants,

John Ortiz and Ruby Romo, individually and doing business under the fictitious firm name of J & R Produce Co., Respondents.

Civ. 22472.

District Court of Appeal, Second District, Division 1, California.

April 28, 1958.

Rehearing Denied May 28, 1958.

Hearing Denied June 25, 1958.

Action for personal injuries allegedly sustained by plaintiff while engaged in loading a truck with produce for defendants. The Superior Court, Los Angeles

County, Philip H. Richards, J., entered judgment for defendants after a verdict in their favor, and plaintiff appealed. The District Court of Appeal, White, P. J., held that evidence presented questions for the jury as to whether defendants were negligent in leaning a portion of one side of a stake truck against the other side of such truck, as to whether plaintiff's head was struck by a portion of the gate of defendants' truck, or could have been so struck by such gate when it fell.

Judgment affirmed.

1. Master and Servant ⇐285(1), 286(1)

In action for personal injuries allegedly sustained by plaintiff while engaged in loading a truck with produce for defendants, evidence presented questions for the jury as to whether defendants were negligent in leaning a portion of one side of a stake truck against the other side of such truck, as to whether plaintiff's head was struck by a portion of the gate of defendants' truck, or could have been so struck by such gate when it fell.

2. Trial ⇐142

Unless it can be said as a matter of law that only one reasonable conclusion is legally deducible from the evidence, the trial court is not justified in taking a case from the jury.

J. B. Tietz, Edward Raiden, Los Angeles, for appellant.

Schell, Delamer & Loring, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff appeals from a judgment after verdict of the jury in favor of defendants in his action for damages for personal injuries.

Plaintiff came from Mexico about 20 years before, was about 63 years of age at the time of the accident, was partially deaf, and had little knowledge of English. He testified with the assistance of interpreters. His is the only "eye-witness" account of the accident.

Briefly, his account is that on February 8, 1954, and for some time before that, he lived on Central Avenue near Terminal Market. On that day, before 7 a. m., he walked from his home to the market to look for work. He talked with Mr. Ortiz, "the boss", who said "to move those vegetables that was there", and then he started to work "raising crates over to the truck." The accident happened about 9:30 a. m. "There was two trucks. First, one truck came in, and we loaded that truck. Then after that, the second truck came in, and we were loading that one, and that was when I was injured."

He further testified that when he was injured he was raising the crates for the truck, and standing close to the truck, about a distance of a half-a-yard, and continued as follows:

"Q. What happened that injured you? A. What happened is this: That one of the panels of that truck fell, and when this panel of the truck fell, it fell—it got loose, and it fell about the same time that we was loading one of the crates into the truck.

"Q. What happened with the panel? A. Well, it fell on my head, and squashed my head.

"Q. What happened to the crate of cabbages that you were then loading? A. We threw that crate up.

"Q. What happened when the panel fell on your head? What happened next? A. Well, after that, I didn't know any more. * * * I didn't know any more, because the weight set me down. * * * Well, it set me in the same place, on the cement that was there * * *. I remember setting there because I got dizzy. My head was turning around. * * * I believe I remained sitting there about 10 or 15 minutes. It was anyway until another worker came up, and helped me up."

On cross-examination he testified that for about three months before the accident he had worked throwing crates up in the trucks for several employers, including the defendant Ortiz, and continued as follows:

"Q. During this three months when you had been throwing crates up in the truck at the Terminal Market or Central Market, had you ever seen anyone take a gate from the truck and put it over on the other side?

* * * * * *

"Yes. I have seen that done, and even myself, I have done that, taken those gates out and put them out, yes.

"Q. How many times had you done this yourself?

* * * * * *

"A. I could not give you an estimate of how many times I did remove any of those, because that is done continuously all day long in all the trucks; even when I have to put the crates of oranges or apples, or any other kind of a crate * * *."

He testified that he did not move the gate on the morning of the accident and he does not know "who put it"; and continued:

"Q. Before the accident happened, do you remember seeing the tail gate situated on the other side of the truck? A. I am not sure if I saw it or if I did not see it. The only thing I remember is when the time that I saw that gate coming towards me.

"Q. How much time was there between the time that you put the last crate up on the truck and the time when the gate came down? A. Well, I believe a second. I believe a minute."

In his deposition taken under oath some time before the trial the following appears:

"Q. When the accident happened, did you have a crate in your hand at that time? A. Yes.

"Q. What happened to the crate when the accident happened? A. We threw it upwards and when it fell there, the crate fell there and then the block came and hit me here.

* * * * * *

"Q. What hit you? A. The gate of the truck.

* * * * * *

"Q. Mr. Marquez, were you lifting these crates by yourself or were you working with someone else who was helping you lift these crates? At the time of the accident?

* * * * * *

"A. When we lifted those crates, we took those crates, two of us, raised those crates. * * *"

Plaintiff does not remember the name of the worker who was lifting the crates with him. He saw the gate coming down, but at the time that the gate was coming down, "we was throwing this crate over the top of the truck".

The jurors were given photographs of the truck, and a demonstration of the position of the gates on the truck itself. Plaintiff marked a photograph and also the ground beside the truck to show where he was standing, "about two feet from the side of the truck" so he would be able to have room to throw the boxes.

A few years before the accident, plaintiff was with a number of cotton pickers in a truck when it turned over in a collision. He was then hit on the head.

While plaintiff's testimony would support a judgment in his favor, we cannot say as a matter of law that inferences could not be drawn therefrom also supporting findings that plaintiff was not injured by the falling of the gate on defendants' truck; that defendants' employees were not negligent in their handling of the gate; or that plaintiff was negligent in placing himself where he could be hit, and in throwing a crate on to the truck so carelessly as to cause the gate to fall.

The testimony of the other witnesses, if believed by the jury, negates most of the statements made by plaintiff, except as to the fact that his neck had been injured that day or prior thereto. According to employees of defendants and defendants themselves, plaintiff was not working for or with them. He did not put any crates of cabbage onto the truck. Those witnesses were working on or near the truck and none of them saw plaintiff in the vicinity of the truck until after the gate was heard to fall. No one knows what caused the gate to fall. Seconds after it fell, it was seen flat on the bed of the truck extending over the side only about two inches. According to plaintiff's testimony he was 18 to 24 inches from the truck.

After the "falling of the gate" on the truck bed, plaintiff's statement that it had hit him, and the driver's telling plaintiff that he did not believe him, plaintiff walked home and thereafter went by public transportation to Georgia Street Receiving Hospital and later to Los Angeles General Hospital where he was treated. While there is no witness who says he saw "the falling of the gate" and that it could not have hit plaintiff on the head, neither is plaintiff's time before and after "the falling of the gate" so accounted for that he could not have been injured in some other manner. The record contains no medical opinion or other evidence to the effect that one's neck could be so injured from a blow on top of one's head by a 75-pound "gate" without leaving any trace of the blow on the top of his head.

[1] Appellant urges that in the instant action, the questions of negligence and contributory negligence are questions of law—not fact—and that the submission of those questions to the jury was reversible error. Cited and relied upon in this connection, are Pierce v. Black, 131 Cal.App.2d 521, 524, 280 P.2d 913; Gray v. Brinkerhoff, 41 Cal.2d 180, 183, 258 P.2d 834; and LeBlanc v. Browne, 78 Cal.App.2d 63, 75, 177 P.2d 347. Those decisions involve injuries caused by violations of traffic laws and were not made upon conflicting evidence.

As stated by the Supreme Court in Gray v. Brinkerhoff, supra, 41 Cal.2d at page 183, 258 P.2d at page 836, "Whether or not defendant was guilty of negligence * * * or plaintiff was guilty of contributory negligence * * * is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented."

Defendants' negligence, if any, in the instant action consists of removing and leaning a third of one side against the other side of a stake truck with its lower edge upon the floor of the truck about 15 to 18 inches from the other side. According to all the witnesses, that was usually done to facilitate the loading of the truck. Plaintiff testified that he knew of such custom and had seen it done many times.

It is not disputed that the portion of the side so leaning did fall onto the floor of the truck. There is no testimony as to what caused it to fall or that any one other than plaintiff saw it fall. At and before the time of the falling of the side, the truck driver was walking on the bed of the truck, carrying and stacking crates of cabbages, and another employee of defendants had been lifting such crates from a hand truck to the floor of the truck but had returned to the stall to reload the hand truck. Plaintiff testified that he had also been putting crates onto the floor of the truck.

On the instant appeal, as said by the Supreme Court in Crogan v. Metz, 47 Cal.2d 398, 404, 303 P.2d 1029, 1032, "The test, of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor of the respondent". An appellate court must accept as true all evidence which tends to establish the correctness of the findings and decision of the trial court, as well as the inferences which might reasonably have been drawn by the trial court from such evidence.

While cases cited in the briefs of appellant and many others hold that, where the evidence is entirely without conflict and no conflicting inferences can be drawn there-

from, the questions of negligence and contributory negligence are questions of law requiring that the court grant a motion for nonsuit, direct a verdict, render judgment notwithstanding the verdict, grant a motion for new trial, or reverse a judgment on appeal, we cannot say that in the instant action the evidence does not support the verdict of the jury.

In the case at bar, defendants' truck was not being loaded upon a public street where plaintiff had a right to expect that others would guard his safety. The situs of the claimed injury in the instant action was a private way inside of Terminal Market, of which defendants and their employees were tenants. Plaintiff was neither a farmer delivering nor a retailer buying produce, and therefore he was not an invitee while in the market lane. If plaintiff was a trespasser, as could be inferred from some of the testimony, then there is no evidence in the record of such a lack of care on the part of the defendants as could make them responsible for plaintiff's injury.

From all the evidence in the instant action, we cannot say that, as a matter of law, the leaning of the portion of one side of the stake truck against the other was negligence upon the part of the driver of defendants' truck.

From the entire record in the instant action, the jury was not required to find that plaintiff's head was struck by the portion of the defendants' truck, or even that it could have been so struck. Defendants' driver testified that in a matter of seconds after he heard the gate fall he looked around and it was protruding over the bed of the truck only about two inches. There is no evidence that it had at any time gone more than two inches beyond the bed of the truck, or that plaintiff's head had ever been within two inches of the truck bed.

[2] Unless it can be said as a matter of law that only one reasonable conclusion is legally deducible from the evidence, the trial court is not justified in taking the case away from the jury. Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 572–573, 90 P.2d 792; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799.

Appellant claims that "the court erred in refusing plaintiff's requested instruction that defendants set up the gate and where one sets the stage by creating a dangerous condition he is responsible for all the natural consequences". That requested instruction is not in the record on appeal. However, from an examination of the instructions given, we are satisfied that the jury was correctly and adequately instructed and that it was not misled or confused.

A number of the rulings on the admission of evidence are cited by appellant as reversible errors. They have been examined and we are convinced that the trial was fair and that none of the rulings complained of constituted prejudicial error in the instant action. No useful purpose would be served by a detailed discussion of those rulings.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

Hearing denied; CARTER, J., dissenting.



159 Cal.App.2d 828

Jennie ALGERI, Plaintiff and Respondent,

v.

Milton TONINI and Bertha Tonini, his wife, et al., Defendants and Appellants.

Civ. 17599.

District Court of Appeal, First District, Division 1, California.

May 1, 1958.

Action for judicial foreclosure of deed of trust and for deficiency judgment if proceeds from sale were insufficient to pay claim. The Superior Court, County of San Mateo, Edmund Scott, J., entered judgment for plaintiff, and defendants ap-

pealed. The District Court of Appeal, Peters, P. J., held that defendants, who at the trial had denied that there was a loan of any nature and had asserted that money had been given to defendants by plaintiff in connection with oral joint venture for purchase of property for resale, could not, for the first time on appeal, contend that that deed of trust was a purchase money deed of trust and that therefore under the statute it was error to grant a possible deficiency judgment.

Affirmed.

1. Mortgages ⇐38(1)

In action for judicial foreclosure of deed of trust and for deficiency judgment if proceeds from sale were insufficient to pay plaintiff's claim, evidence sustained finding that money received by defendants had been a loan secured by deed of trust and had not, as defendants contended, been given by plaintiff in connection with alleged oral joint venture of parties for purchase of property for resale.

2. Mortgages ⇐572

Defendants, who in action for judicial foreclosure of deed of trust and for deficiency judgment if proceeds from sale were insufficient to pay plaintiff's claim, denied that there was a loan and asserted that plaintiff had given them money in connection with oral joint venture of parties for purchase of property for resale, could not, for the first time on appeal, raise issue that deed of trust was a purchase money deed of trust and that it was therefore error under the statute to grant a possible deficiency judgment. West's Ann.Code Civ.Proc. § 580b.

3. Appeal and Error ⇐169, 172(1), 173(1)

Questions not raised in trial court will not be considered on appeal and a party is prohibited from asserting on appeal claims to relief or matters of defense not asserted or requested in court below.

Joseph J. Dignan, San Francisco, for appellant.

Samuel D. Hamburg, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against the defendants for the judicial foreclosure of a deed of trust and for a deficiency judgment if the proceeds from the sale were insufficient to pay plaintiff's claim. The trial court granted this relief. Milton and Bertha Tonini appeal. Their sole contention is that the deed of trust in question was a purchase money deed of trust and that, under the provisions of section 580b of the Code of Civil Procedure, no prospective deficiency judgment should have been allowed.

The issue as to whether or not this was a purchase money deed of trust was not presented in the pleadings nor at the trial. So far as the Toninis are concerned, the complaint alleges that on August 5, 1952, they executed and delivered to plaintiff their promissory note for $14,102 payable on or before one year from date; that the note was secured by a deed of trust upon certain real property; and that no part of the principal or interest has been paid.

The Toninis did not deny the major allegations of the complaint. Their sole defense in their answer and at the time of trial was that there was no loan at all from the plaintiff to them; that the plaintiff had entered into an oral joint venture agreement with the Toninis to purchase the property and to hold it for resale; that title was to be taken in the Toninis' name and plaintiff was to receive the promissory note and trust deed to secure the funds advanced by her in the joint venture; that the note was to be paid only from the proceeds of the sale of the property; that in no event was the plaintiff to receive any payment from the Toninis until the sale of the property; that since the property had not been sold, no payment was due to the plaintiff.

The case was tried upon the sole issue of whether or not the transaction was a loan, or a joint venture. The court found

it to be a loan and entered its judgment accordingly.

[1] The conclusion that the transaction was a loan secured by a deed of trust is supported by the evidence. The plaintiff, of Italian heritage, who reads and speaks English with great difficulty, and who gave some of her testimony through an interpreter, testified that, prior to August 5, 1952, she had money on deposit in a bank at 2 per cent interest; that on that day she withdrew $14,102 and turned it over to Milton Tonini; that it was a loan to Tonini; that he took her to a title company where she paid over the money; that Tonini told her it was for a speculation he was interested in; that he told her that she was loaning the money to him for this speculation and that she would get 6 per cent interest; that she had been taken to see the property later given as security in October of 1951; that she received a title insurance policy as a receipt for the money loaned to Tonini, and got a note and deed of trust from the Toninis; that Milton Tonini told her, on many occasions, that she would get 6 per cent interest; that he never told her that she would receive 25 per cent of the profits when the property was sold; that she never received from Tonini a memorandum to this effect; that on several occasions when she asked Tonini for the money he replied that she should not worry because she was getting 6 per cent interest. Although her testimony is somewhat difficult to follow, it is clearly to the effect that she did not advance the money to purchase any real property, but loaned it to Tonini on his promise to pay her 6 per cent interest. The unpaid interest at the date of trial amounted to $3,128.96.

Milton Tonini testified that at the time of trial he was a licensed real estate broker, but was not so licensed on August 5, 1952; that prior to that date he had given the plaintiff advice as to investments in other property; that she came to him to find property in which to invest; that he showed her the real property here involved in July of 1952; that he told her that a trust deed would protect her for 6 per cent interest if she would buy the property with him, and that she would also get 25 per cent of the net profits when the property was resold; that he gave her a memorandum to that effect (which the plaintiff denied receiving); that he gave her the note and deed of trust to protect her if he died or went bankrupt; that he drew up the note and deed of trust and opened the escrow before he had closed the deal to buy the property; that when the property was purchased he instructed the title company to deed it to him and to make out the deed in his name alone, and to deliver the note and deed of trust to the plaintiff; that he did not put the property in both their names because he wanted full control; that he actually purchased the property for over $1,300 less than the $14,102 that plaintiff had paid to the title company; that this $1,300 plus was paid to him out of the escrow but he never told plaintiff of this fact; that he did not contribute one cent towards the purchase of the property, but has paid out $907 for insurance and advertising since the purchase; that he has paid no interest on the note; that the 25 per cent memorandum was not put into the escrow.

Some of this testimony by Milton Tonini was corroborated by Katherine Gunst, a licensed real estate broker, who has been Tonini's partner in business since 1934. She testified that plaintiff put up the money to buy this particular property and was to get 6 per cent interest on her investment, plus 25 per cent of the profits when the property was sold. Nothing was said about the money being a loan. The witness had typed the memorandum providing for the 25 per cent share of plaintiff in the profits, and Tonini gave plaintiff a copy and read it to her. The whole transaction was fully outlined to plaintiff by Tonini.

The representative of the title company testified that the property was purchased by Tonini for $12,616.57, plus $118.90 title fee; that title was taken in his name, and

that Tonini got a check for $1,366.53 out of the escrow.

[2] On this evidence the trial court concluded that the transaction was a loan and not a joint venture, ordered the property sold and granted a deficiency if the purchase price was not sufficient to pay off the loan, plus interest. These were the issues, and the only issues, presented to the trial court. Now, on appeal, the appellants' sole contention is that the transaction was a loan but that the deed of trust was a purchase money deed of trust, and so it was error to grant a possible deficiency judgment. Appellants are attempting to raise this issue for the first time on appeal. In their pleadings and at the trial they denied that there was a loan of any nature. Now they seek to contend that there was a loan, but that the money was advanced to Tonini so that he could purchase the specific property and give back a note and a purchase money deed of trust. Appellants cannot raise this issue for the first time on appeal, when the issue was neither pleaded nor asserted at the trial. This rule is particularly applicable here because to now permit the appellants to raise the issue would be to permit them to repudiate on appeal the theory of their answer and evidence.

[3] It is elementary that questions not raised in the trial court will not be considered on appeal. (See many cases collected 3 Cal.Jur.2d p. 604, § 140.) Under this well settled rule a party is prohibited from asserting on appeal claims to relief not asserted or requested in the court below, and is prohibited from asserting matters of defense not there presented. Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193; J. D. Halstead Lbr. Co. v. Security etc. Co., 116 Cal.App. 679, 3 P.2d 52; In re Estate of Raphael, 115 Cal.App.2d 525, 252 P.2d 979; Rabbitt v. Carthage Marble Corp., 12 Cal.App.2d 572, 55 P.2d 1205; Sketchley v. Lipkin, 99 Cal.App.2d 849, 222 P.2d 927; 3 Witkin, California Procedure, p. 2261.

These cases are decisive of this appeal. If the issue had been presented in the trial court the plaintiff could have offered evidence on it, and the trial court could have made a finding on whether the deed of trust was or was not a purchase money deed of trust.

The evidence that was introduced certainly does not establish, as a matter of law, that the deed was a purchase money deed of trust. The evidence does not compel a finding that the money was loaned to Tonini for the express purpose of buying this specific property, and the cases do not hold that a transaction as described by respondent necessarily involves a purchase money deed of trust or mortgage. Peterson v. Wilson, 88 Cal.App.2d 617, 199 P.2d 757, 6 A.L.R.2d 258, and cases cited. It must be remembered that Tonini testified that he kept over $1,300 of the money advanced by respondent for his own purposes, without disclosing this fact to respondent. If he is correct that respondent advanced the money to him for the express purpose of purchasing the property, then he, in effect, converted this $1,366.53. This would also be true if, as he contended in his pleadings and at the trial, the transaction was a joint venture. His action in keeping this money clearly indicates that he thought there had been a loan made to him of $14,102, and that he was entitled to all of this loan. If this was not the nature of the transaction then Tonini was guilty of a most serious breach of trust, and perhaps of a theft.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

159 Cal.App.2d 746

Margaret FOWLER, Plaintiff and Appellant,

v.

George Henry CALLIS, John Doe Dempsey and John Doe Saunders, doing business as Dempsey & Saunders, et al., Defendants and Respondents.

Civ. 17787.

District Court of Appeal, First District, Division 2, California.

April 29, 1958.

Rehearing Denied May 29, 1958.

Action for injuries sustained by plaintiff when automobile, left in gear while seat covers were being installed at defendants' garage, ran away, after owner got into it for purpose of turning on heater, and collided with metal bus stop pole, which knocked over plaintiff, who was waiting for bus. The Superior Court, Alameda County, A. J. Woolsey, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that evidence would sustain finding that defendants' conduct had not been a concurrent proximate cause of the accident.

Affirmed.

1. Negligence ⇐61(1)

Defendant's negligence need not have been sole cause of plaintiff's injury in order to justify holding defendant liable, and it is enough if it was a legal cause.

2. Automobiles ⇐244(36)

In action for injuries sustained by plaintiff when automobile, left in gear while seat covers were being installed at defendants' garage, ran away, after owner got into it for purpose of turning on heater, and collided with metal bus stop pole, which knocked over plaintiff, who was waiting for bus, evidence would sustain finding that defendants' conduct had not been a concurrent proximate cause of the accident.

3. Evidence ⇐194

Trial ⇐28(2)

In action for injuries sustained by plaintiff when automobile, left in gear while seat covers were being installed at defendants' garage, ran away, after owner got into it for purpose of turning on heater, and collided with metal bus stop pole, which knocked over plaintiff, who was waiting for bus, it was not an abuse of discretion to refuse to allow in evidence coat worn by plaintiff at time of accident, and it was likewise not an abuse of discretion to refuse to permit jury to inspect scene of accident.

4. Trial ⇐131(1)

By failing to object, to defense counsel's statement in argument, or request instruction that jury disregard same, plaintiff waived error, if any.

5. Trial ⇐127

It is improper for counsel to argue with reference to insurance coverage of defendant in personal injury action.

6. Appeal and Error ⇐1060(1)

Reference in argument, to fact that defendant in another action filed by same plaintiff was insured, did not constitute such error as would require reversal of judgment for defendants in personal injury action, where plaintiff herself had called jurors' attention to existence of other action and where remarks of defense counsel were not of a willful or persistent nature.

7. Appeal and Error ⇐1015(5)

Reviewing court would have to give weight to fact that plaintiff's motion for new trial had been denied and that trial court had thus indicated that it did not think that jury had been prejudicially influenced by improper argument of defense counsel.

Benjamin F. Marlowe, Oakland, for appellant.

James C. Calkins, Alameda, for respondents.

KAUFMAN, Presiding Justice.

The plaintiff, Margaret Fowler, appeals from a judgment entered on a jury verdict

in favor of the defendant in an action for personal injuries. She urges the following errors on appeal: (1) the verdict is not supported by the evidence; (2) the trial court abused its discretion in sustaining the defendant's objection to the introduction of certain evidence; (3) the trial court erroneously instructed the jury; (4) defense counsel's reference to an insurance company constituted prejudicial error.

On the morning of April 26, 1955, at about 10:55 a. m., the plaintiff, a thirty-seven year old woman, was a pedestrian waiting for a bus near the intersection of 24th and Harrison Streets in Oakland. The garage of the defendant, Dempsey & Saunders, is located at that intersection. The plaintiff was standing on the south sidewalk of 24th Street, leaning against the bus stop sign, which was located in front of the defendant's garage, about 100 feet from the intersection.

On the morning of April 26, the defendant, Max Wrigglesworth, an employee of Dempsey and Saunders, had begun to install seat covers in a 1950 Chrysler automobile owned by the defendant, George H. Callis, an employee of the Stafford Ink Company. Callis died before the trial and the case against him and that against the ink company were dismissed. Wrigglesworth drove the Callis vehicle around the block from the service garage on Harrison Street, to 24th Street, and parked it facing west, partially on the sidewalk and partially on the street, with the front of the car beyond the garage doors, and about twenty-five feet from the bus stop sign. He engaged the emergency brake, left the keys in the ignition, and left the vehicle in gear, but did not inform Callis, who was around, of these facts. While Wrigglesworth was working on the front seat covers, Callis arranged samples in the car and brushed the cushions.

After finishing the front seat, Wrigglesworth went inside the garage to work on the rear cushions. Callis then got into his automobile apparently to turn on the heater. According to several eye-witnesses, the automobile veered backward in a straight line at considerable speed and struck the metal bus stop sign. The plaintiff was knocked down by the metal pole of the sign which fell on her, and pinned her under the car. The car left skid marks as follows: right rear wheel 20 feet; left rear wheel 12 feet, leading eastward. After the accident, the automobile, which had a standard shift, was in reverse gear. Plaintiff sustained serious and critical injuries, including a skull fracture and other permanent brain injury.

[1, 2] As the uncontroverted evidence shows that the vehicle was parked in violation of Vehicle Code, section 586, and plaintiff was clearly within the protection of that statute, the only question about the sufficiency of the evidence is whether the defendant's conduct was the proximate cause of the injury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279. Plaintiff maintains that defendant's conduct was a concurrent proximate cause of the accident. "'The sequence of facts, one to another, and the relation of negligent precipitous acts * * * and the determination of whether the causation was independent or concurrent are questions of fact.'" Burke v. W. R. Chamberlin & Co., 51 Cal.App.2d 419, at page 423, 125 P.2d 120, 123. Defendant's negligent act need not be the sole cause of the injury; it is enough if it is a legal cause. Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559. On the issue of proximate cause, our Supreme Court said in McEvoy v. American Pool Corp., 32 Cal.2d 295, at pages 298 and 299, 195 P.2d 783, 786:

> "The following rules from the Restatement of Torts with respect to proximate causation have been approved in California (Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; Stasulat v. Pacific Gas & Elec. Co., 8 Cal.2d 631, 637, 67 P.2d 678), and are applicable in the present situation:

"Section 447—'The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act.'

"Section 449—'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.'

"Section 453, comment (a): 'If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor's liability. If, however, the negligent character of the third person's intervening act or the reasonable foreseeability of its being done is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.' "

In the light of the foregoing we cannot agree with the plaintiff that the defendant is liable as a matter of law. The question of proximate cause was one of fact properly left to the jury. Mosley v. Arden Farms, 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872; Fennessey v. Pacific G. & E. Co., 20 Cal.2d 141, 124 P.2d 51. While the facts here present close questions on the matter of concurring cause and proximate cause, the jury was thoroughly and properly instructed. We cannot agree that the finding of the jury was without evidentiary support or that there were any errors in the court's instructions to the jury.

[3] Plaintiff next argues that it was prejudicial error not to allow in evidence the coat worn by her at the time of the accident and not to permit the jury to inspect the scene of the accident. These matters were within the sound discretion of the trial court and we can find no abuse of such discretion.

[4] Plaintiff's final contention is that the following statement by defense counsel constitutes prejudicial error:

"Now Mr. Marlowe did these two things on this one point, and it is a misstatement and it is a misrepresentation, and I am going to show you why. He said, 'The only reason I filed this action against Callis and the estate or joined him in this other action'—it doesn't make any difference—was to get this statement in that the Judge twice ruled was inadmissible. The statement of Callis that Callis gave to the officer at the scene. And he referred to it and then he said, 'I doubt if that action against the estate of Callis will ever go to trial or will be tried.' Mr. Marlowe stood here and told you that when he knew that Mr. Callis was covered by insurance at the time of the accident, and that insurance inures to the benefit of the estate of Callis, and he told you the only reason he filed this action—

"Mr. Marlowe: Just a moment. If I would say something like that would be a mistrial. You know you can afford to say something like that, and—

"Mr. Van Sicklen: Just a minute. You object to the Court.

"Mr. Marlowe: I sat here and listened to you do one thing after another that was wrong. There are some things I can't answer, and you know it.

"Mr. Van Sicklen: Isn't that the truth, Mr. Marlowe?

"The Court: Gentlemen—

"Mr. Van Sicklen: Isn't that the truth?

"Mr. Marlowe: I—

"The Court: Wait a minute now.

"Mr. Marlowe: I know we can't get beans out of that estate, if you want to know the truth about it, go check.

"The Court: Don't—

"Mr. Van Sicklen: You know the name of the company and you know the coverage.

"Mr. Marlowe: I know of no such company.

"Mr. Van Sicklen: Pacific Employers, and I told you several times over the telephone.

"Mr. Marlowe: There are more things than insurance companies. When I get through arguing this case you will be convinced to that.

"The Court: Gentlemen, let's proceed with the argument and not have this controversy."

Aside from the above quoted colloquy plaintiff made no objection or request for an instruction that it be disregarded. She therefore waived the error if any.

[5–7] The case relied upon by the plaintiff on this point, Robinson v. Wada, 10 Cal.App.2d 5, 51 P.2d 171, involved the improper questioning of a juror on voir dire and indicating to the jury at that time the defendant was insured. While plaintiff's point that the rule can apply equally to improper references by defense counsel is well taken, we do not think the reference improperly influenced the jury here. The reference was not to the fact that the defendant in this action was indemnified for liability, but rather that the defendant in another action filed by the same plaintiff was insured. Plaintiff herself called the attention of the jury to the existence of the action against Callis. We do not think that the remarks of defense counsel were of that wilful or persistent nature which is necessary to constitute reversible error. Willoughby v. Zylstra, 5 Cal.App.2d 297, 42 P.2d 685. We must also give weight to the fact that plaintiff's motion for a new trial was denied, indicating that the trial court did not think the jury was prejudicially influenced. Tellefsen v. Key System Transit Lines, 158 Cal.App.2d 243, 322 P.2d 469.

In view of the foregoing it is clear that the verdict and judgment is supported by the record before us and that no prejudicial error appears.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



Claude F. CASIDA, Plaintiff and Appellant,

v.

Hollis B. ROBERTS, Defendant and Respondent.*

Civ. 5657.

District Court of Appeal, Fourth District, California.

May 5, 1958.

Hearing Granted July 2, 1958.

Action for dissolution of partnership and for accounting. From a judgment of the Superior Court, Kern County, W. L. Bradshaw, J., in favor of the plaintiff for certain amount, the plaintiff appealed. The District Court of Appeal, Mussell, J., held, inter alia, that where it appeared that there was no miscarriage of justice in accounting rendered by the trial court, judgment would be affirmed.

Affirmed.

1. Appeal and Error ⇐1010(1)

Trial court's findings supported by substantial evidence cannot be disturbed on appeal.

2. Appeal and Error ⇐171(1)

Where both trials of action for dissolution of mining partnership were conducted on accounting issues, the plaintiff

 * Opinion vacated 337 P.2d 829.

could not change his theory on appeal and claim error in trial court's failure to find value of partnership assets at date of dissolution. West's Ann.Corp.Code, § 15042.

3. Appeal and Error ⇐171(1)

Theory upon which a case is tried must be heard on appeal, and an issue not presented by the pleadings cannot be considered upon appeal.

4. Appeal and Error ⇐1135

In action for dissolution of mining partnership and for accounting therein, where it appeared that there was no miscarriage of justice in accounting rendered by the trial court, judgment would be affirmed.

Morris B. Chain and William E. Swiney, Bakersfield, for appellant.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action for dissolution of a partnership, an accounting and for damages and is before us for the second time on appeal. In the first trial a jury returned a special verdict finding that "Hollis B. Roberts and Claude F. Casida became partners to mine, extract and sell gypsum and share the profits equally" and it was stipulated by the parties "that the intention of said verdict was to refer solely to the extraction, mining and selling of gypsum from deposits situated on Section 13, Township 26 South, Range 20 East, M. D. B. & M., Kern county, California." Judgment was rendered in accordance with this verdict of the jury on October 19, 1953, and the parties stipulated that the accounting issues in the case be heard at a later date by the court. A trial was then had on these issues and judgment was rendered therein in favor of plaintiff on May 19, 1954, for the sum of $21,004.55, plus interest and costs. On appeal from the judgment of May 19, 1954, it appeared that while the court found that defendant was entitled to an allowance for the use of his machinery and equipment in the settlement of the partnership affairs, it failed to determine the reasonable value thereof and the amount to be allowed therefor. This was held to be reversible error and the judgment of May 19, 1954, on the accounting issues was reversed (Casida v. Roberts, 132 Cal.App.2d 228, 281 P.2d 901) in order that the entire accounting issue as to section 13 could be retried. Upon a retrial of this issue the court rendered judgment in favor of plaintiff in the sum of $1,754.55, plus interest and costs, and plaintiff appeals therefrom.

[1] The trial court found in part "* * * that the entire accounting issue has been tried with respect to operations on Section 13 alone; and the court finds that the tonnage produced from Section 13 totals 68,601.42; and that the profit on said tonnage (without deduction for the reasonable rental value of defendant's equipment used in producing said tonnage, hereinafter deducted) is 78 cents per ton, a total profit of $53,509.10; that the reasonable rental value of defendant's machinery and equipment used in operations on Section 13 to produce said tonnage is $50,000; that the balance with respect to operations on Section 13 alone is a balance of $3,509.10 resulting from deducting $50,000 reasonable rental value from the aforesaid profit of $53,509.10; and that the share of each partner in said net profit of $3,509.10 is $1,754.55, determined to be due and owing to plaintiff from defendant as plaintiff's share of the net profits of partnership operations." These findings are supported by substantial evidence and thus cannot be here disturbed.

It was stipulated at the trial of the instant action that all of the testimony of the witnesses at the former trial and the exhibits be introduced in evidence. In addition thereto further testimony was taken and other exhibits introduced on the accounting issue.

Appellant claims that the court erred in allowing the sum of $50,000 for the use of defendant's machinery and equipment fully operated and maintained at his personal expense and also allowing defendant the

expense of maintaining and operating it. However, the report and testimony of the witness Hobson, a certified public accountant was to the effect that there was no such duplication in arriving at the figures used in determining the allowance to show the value of the use of defendant's machinery and equipment (Defendant's exhibit F).

[2, 3] Appellant further claims that the court erred in failing to find the value of the partnership assets at the date of dissolution and that such a finding is required by section 15042 of the Corporations Code, which provides that

> "When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 15041 (1, 2, 3, 5, 6), or Section 15038 (2b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership * * *"

There is no merit to this argument. The record shows the plaintiff did not plead a cause of action based on the provisions of this section and both trials in the superior court were conducted on the accounting issues. Appellant cannot change his theory on appeal.

As is said in Mears v. Jeffry, 80 Cal. App.2d 610, 616–617, 182 P.2d 294, 298:

> "Not only did appellant fail to plead that the actions were prematurely filed, but the cases were heard in the lower courts upon a different theory specifically expressed by appellant. In Munfrey v. Cleary, 75 Cal.App.2d 779, 784, 171 P.2d 750, we held, on the authority of numerous cited cases, that as a general rule an issue not presented by the pleadings cannot be considered upon appeal; and in Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715, 718, the Supreme Court said: 'The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. 2 Cal. Jur., sec. 68, p. 237.' Also see Hayward Lumber & Investment Co. v. Ford, 64 Cal.App.2d 346, 354, 148 P.2d 689."

[4] It would serve no useful purpose to here review the many pages of testimony and the records upon which the court based its findings where, as here, it can be ascertained therefrom that there is no miscarriage of justice in the accounting rendered. Pizer v. Brown, 133 Cal.App.2d 367, 374, 283 P.2d 1055.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



160 Cal.App.2d 162

In the Matter of the ESTATE of Fannie M. HECK, also known as Fannie May Heck, Deceased.

Sidney J. W. SHARP, Individually, and as Executor of said Estate, Appellant,

v.

Hattie J. LANE, Objector, Respondent.

Civ. 5662.

District Court of Appeal, Fourth District, California.

May 6, 1958.

Rehearing Denied May 26, 1958.

Hearing Denied July 2, 1958.

Estate administration proceedings. The Superior Court, Fresno County, Edward L. Kellas, J., entered an order settling final account of executor and directing

entry of decree of final distribution and executor appealed. The District Court of Appeal, Mussell, J., held that executor's commissions and attorney's fees were allowable in accordance with statute in effect at time of final account and entry of final decree of distribution, rather than in accordance with a statute in effect prior to that time, notwithstanding the fact that certain fees had been allowed prior to entry of final decree of distribution.

Part of the order appealed from reversed, motion to dismiss appeal denied.

1. Executors and Administrators ⇐501

Although a probate court may, prior to a final accounting, designate a fee as compensation for services rendered over a certain period, an executor's or administrator's compensation is for the total of the services to the estate, and any compensation granted before the final account is merely an advance allowance on the full fee allowable, which can be determined only at the final accounting. West's Ann.Prob. Code, §§ 901, 904, 910.

2. Executors and Administrators ⇐501

An executor or administrator is not entitled to commissions allowed by law until settlement of his final account, and until such settlement, attorney's fees, allowable by law, are not payable. West's Ann.Prob. Code, §§ 901, 904, 910.

3. Executors and Administrators ⇐489

Executor's commissions and attorney's fees were allowable in accordance with statute in effect at time of final account and entry of final decree of distribution, rather than in accordance with a statute in effect prior to that time, notwithstanding the fact that certain fees had been allowed prior to entry of final decree of distribution. West's Ann.Prob.Code, §§ 901, 904, 910.

Herbert M. Braden, Hanford, for appellant.

Kimble, Thomas, Snell, Jamison & Russell, Fresno, for respondent.

MUSSELL, Justice.

Fannie M. Heck died testate in 1952 and her will was admitted to probate on September 30, 1952. At that time section 901 of the Probate Code read in part as follows:

> "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent."

By an amendment to section 901 of the Probate Code, effective September 7, 1955, the fee schedule was increased as follows:

Size of Estate		Former Rates	New Rates
First	$1,000	7%	7%
Next	9,000	4	4
Next	10,000	3	3
Next	30,000	2	3
Next	100,000	1	2
Next	350,000	1	1½
Over	500,000	1	1

Section 910 of the Probate Code reads as follows:

> "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services."

The executor filed three accounts current prior to September 7, 1955, the date the amendment to section 901 of the Probate Code became effective. On July 8, 1954, the court made an order approving the second account current of the executor and allowing him the sum of $1,580.71 for ordinary services rendered, and the same

amount was allowed for attorney's fees. These sums were paid on July 8, 1954. On July 1, 1955, the executor filed his third account current and the further sum of $1,500 was allowed paid to him and a like amount was allowed and paid as attorney's fees for ordinary services.

On July 25, 1957, the fourth and final account of the executor and his report and petition for a decree of final distribution was filed. In this report he stated that the appraised value of the estate as of the date of the death of decedent, plus additional deposits as shown by the previous accounts, was the sum of $271,735.61; that based on sections 901 and 910 of the Probate Code, as amended in 1955, the executor was entitled to commissions as follows:

First	$ 1,000.00 @ 7%	$ 70.00
Next	9,000.00 @ 4%	360.00
Next	40,000.00 @ 3%	1,200.00
Next	100,000.00 @ 2%	2,000.00
Next	121,735.61 @ 1½%	1,826.02
		$5,456.02

that a like amount was due for attorney's fees for ordinary services in administering said estate; that the executor had theretofore been paid for such ordinary services the following sums: $1,580.71, paid 7–8–54, and $1,500, paid 7–11–55, totaling $3,080.71; that a like amount had been paid for attorney's fees, leaving a balance due the executor of $2,375.71 for commissions for ordinary services rendered in the administering of said estate, with a like sum due for attorney's fees.

On November 5, 1957, the probate court made its order settling the fourth and final account and ordered final distribution of the estate reducing the amount of the ordinary commissions for the executor from $2,375.71 to $517.83, with a similar reduction for attorney's fees for ordinary services rendered. The executor appeals from this part of the order, claiming that the court erred in refusing to allow the amounts claimed as executor's commissions and attorney's fees as set forth in the petition.

In re Estate of Lucksinger, 47 Cal.2d 396, 303 P.2d 1016 and in Re Estate of Johnston, 47 Cal.2d 265, 270, 303 P.2d 1, it is held that the commissions of the executor and his attorney should be the amount of the statutory commissions in effect at the time of the settlement of the account and the making of the order allowing compensation.

In the instance case the court erred in allowing executor's commissions and attorney's fees in accordance with the statute in effect prior to September 7, 1955, and not in accordance with the statute in effect at the time of the approval of the final account and entry of the final decree of distribution.

Respondent argues that in determining executor's fees the statutory rates in Probate Code section 901, as amended in 1955, should not be applied to that portion of the estate which had already been accounted for and upon which fees had already been determined and allowed prior to the effective date of such amendment. However, section 904 of the Probate Code provides that

> "Any executor or administrator, at any time after six months from the issuance of letters testamentary or of administration, and upon such notice to the persons interested in the estate as the court or a judge thereof shall require, may apply to the court for an allowance upon his commissions; and on the hearing the court shall make an order allowing him such portion of his commissions, for services rendered up to that time, as the court shall deem proper, and the portion so allowed may be thereupon charged against the estate."

It is apparent that the court is empowered by this section to allow a portion of the commissions it deems proper for services rendered up to the time of the hearing and it does not require the court to fix this compensation on the basis of the provisions of section 901.

In 21 California Jurisprudence 2d, section 893, page 284, it is said:

> "The representative's compensation is for the total of his services to the estate, and any compensation granted

before the final accounting is merely an advance allowance toward the full fee allowable, which can be determined only at the final accounting."

[1] In Kauffman v. Westover, D.C., 111 F.Supp. 752, 754–755, the court said:

"* * * although a probate court may, prior to a final accounting, designate a fee as compensation for services rendered over a certain period, an executor's or administrator's compensation is for the total of his services to the estate, and any compensation granted before the final accounting is merely an advance allowance or 'on account of' the full fee allowable, which can be determined only at the final accounting."

[2] In re Estate of Hite, 155 Cal. 448, 458–459, 101 P. 448, it is said that the amount to be allowed an attorney as compensation for ordinary probate proceedings cannot be ascertained until the amount of the estate accounted for in the administration is known, and unless the whole amount of the compensation can be ascertained, it is impossible to arrive at the proportionate amount to be allowed for a part of such services; that it is settled that an executor or administrator is not entitled to the commissions allowed by law until the settlement of his final account, and that the same rule is applicable to the allowance of attorney's fees.

[3] In the instant case the probate court should have determined the amounts due the executor and attorney on the entire estate at the time of the hearing on the fourth and final account and petition for final distribution and then have deducted therefrom the amounts paid on account of such services, allowing the balance under the rates prescribed in section 901 of the Probate Code, as amended.

The part of the order appealed from is reversed. The motion to dismiss the appeal herein is denied.

BARNARD, P. J., and GRIFFIN, J., concur.

160 Cal.App.2d 135

Bent H. CARDAN, Appellant and Cross-Respondent,

v.

Murray STERN et al., Respondents.

Green Brothers Construction Company et al., Cross-Appellants and Respondents.

Civ. 22589.

District Court of Appeal, Second District, Division 3, California.

May 6, 1958.

Rehearing Denied May 16, 1958.

Action was brought to recover under first count of complaint compensatory and exemplary damages for the allegedly wrongful appropriation by defendants of plaintiff's plans and specifications for an apartment building, and for an injunction under the second count. The Superior Court, Los Angeles County, Robert H. Scott, J., entered an order, and the plaintiff appealed, and certain of the defendants cross appealed. The District Court of Appeal, Shinn, P. J., held that where all parties stipulated that if jury should return a verdict for plaintiff for damages under first count, an injunction under second count might issue in favor of the plaintiff, and jury returned a verdict for the plaintiff on the first count, but judgment entered on the verdict did not provide for an injunction, judgment, though incomplete and erroneous because it did not provide for an injunction, was not void and furnished a sound basis for motion by defendants for new trial.

Order affirmed.

1. Stipulations ⇐14(12)

Where all parties stipulated that if jury should return a verdict for plaintiff on first count of complaint, an injunction might issue in favor of plaintiff under second count, and jury returned a verdict for plaintiff for damages under first count, trial court should have included in the judgment a provision for an injunction in accordance with the stipulation.

2. Action ⇐38(2)

Violation of one primary right constitutes a single cause of action, though it may

entitle injured party to many forms of relief.

3. Action ⇐38(2)

Where first count of complaint sought recovery of compensatory and exemplary damages for the allegedly wrongful appropriation by defendants of plaintiff's plans and specifications for apartment building, and second count for injunctive relief was based on the specific facts alleged in the first count, only one cause of action was stated by the complaint.

4. New Trial ⇐4

Where all parties stipulated that if jury should return a verdict for plaintiff on first count of complaint for damages for allegedly wrongful appropriation by defendants of plaintiff's plans and specifications for an apartment building, an injunction might issue in favor of plaintiff under second count of complaint, and jury returned a verdict for plaintiff for damages under first count, and judgment for plaintiff did not provide for injunction, judgment, though incomplete and erroneous because it did not provide for an injunction, was not void, and it furnished a sound basis for motion of defendants for new trial.

5. New Trial ⇐163(2)

Where order granting defendants a new trial was a valid order, all subsequent proceedings in trial court were in vain, and later motions were properly denied.

6. Appeal and Error ⇐237(5)
Judgment ⇐199(6)

Where motions of defendants for judgment notwithstanding verdict were made six months after judgment was entered, and defendants did not move for a directed verdict, the appeal failed. West's Ann. Code Civ.Proc. § 629.

Hill & Attias, Philip Glusker, Beverly Hills, for appellant, Bent H. Cardan.

Snow & Snow, Beverly Hills, for respondent, Murray Stern.

T. Ed. Scarborough, Gardena, for remaining respondents.

SHINN, Presiding Justice.

Action for an injunction and damages. The complaint alleges that plaintiff has developed and owns a set of plans and specifications for a nine unit apartment building which he builds complete for $50,000; his plans and specifications are of superior quality, workmanship and design, the result of his unique efforts in the development thereof; defendant Stern borrowed plaintiff's plans and specifications upon a representation that he contemplated constructing an apartment building; Stern took the plans and specifications to Jim B. Dodge and Paul E. Iacono who made copies of them at the request of defendants Stern and Green Brothers Construction Company; the latter company was engaged in the construction of a building for Stern in accordance with the plans and specifications. Plaintiff sought compensatory damages in the sum of $25,000 and exemplary damages in the sum of $50,000. In what he has designated as a second cause of action, the complaint reiterates by reference all the allegations of the first cause of action with the exception of the allegation of damage. It was then alleged plaintiff would be irreparably damaged if further use is made of the plaintiff's plans and specifications by defendants. In additions to the prayer for damages there was demand for an injunction against continued use of the plans and specifications by defendants.

At the commencement of the trial there was an extended colloquy between the court and counsel. The building had been completed. It was agreed that the issues as to the alleged wrongful appropriation of plaintiff's property and the demand for damages would be submitted to a jury. All parties stipulated that if the jury should return a verdict in favor of plaintiff an injunction might issue in his favor. As stated by defendants "an injunction would follow." The agreement was stated by the court as follows: "In the event of a verdict in favor of the plaintiff on the first cause of action, that would include an implied finding that the allegations of the plaintiff's complaint alleging wrongdoing by the defend-

ants are true, and upon the basis of that implied finding by the jury, that your clients did these wrongful acts. The stipulation would be on that finding, without the necessity of any further evidence of wrongdoing on the part of the defendants, the judgment may be entered granting the injunction as prayed." Counsel expressed their agreement.

September 5, 1956, the jury returned a verdict in favor of plaintiff and against defendants Otis R. Green, O. J. Green, Murray Stern and Jim B. Dodge for $20,000 compensatory and $30,000 exemplary damages. Thereupon judgment upon the verdict was duly entered by the clerk. No judgment was signed by the court and the judgment as entered did not provide the an injunction. Thereafter, numerous proceedings were had. September 14, 1956, the Greens and Dodge gave notice of intention to move for a judgment notwithstanding the verdict or, in the alternative, for an order granting them a new trial. September 17, Stern filed a similar notice. September 18, plaintiff gave notice of a motion to vacate the judgment and for the entry of a judgment on both the first and second causes of action, namely, for damages and also an injunction. October 9, the three motions were heard together. October 16, by a single order, the two motions for new trials were granted and defendants' motions for judgment notwithstanding the verdict were denied and plaintiff's motion to vacate the judgment and for entry of a judgment on both causes of action was placed off calendar and not acted upon.

[1] The court should have included in the judgment a provision for an injunction in accordance with the stipulation and having failed to do so should have granted plaintiff's motion.

Following the court's refusal to grant an injunction against the further use of plaintiff's property, and as a result of the error, the parties set about to devise ways and means for the preservation of their rights as they conceived them to be. Plaintiff sought to preserve his judgment for damages; defendants sought to sustain the order granting them a new trial. A recitation of the devices that were employed will picture a condition of "confusion worse confounded."

October 31, 1956 plaintiff filed a request for dismissal of the purported second cause of action; dismissal was entered November 1st.

February 28, 1957, plaintiff gave notice of a motion to vacate the order granting defendants a new trial and for an order directing the issuance of a writ of execution on the judgment. March 4, 1957, Green Brothers and Dodge noticed a motion to vacate the judgment of September 5 in favor of plaintiff or in lieu thereof to permit the defendants to move for a new trial. On the same day they noticed a motion for a judgment in their favor notwithstanding the verdict or in the alternative for a new trial. March 25, 1957, plaintiff's motion to vacate the order granting a new trial and for writ of execution was denied. On the same day the motion of Green Brothers and Dodge to vacate the judgment of September 5 or in lieu thereof to permit them to move for a new trial and the motion of said defendants for judgment notwithstanding the verdict or in the alternative for a new trial were denied. The minutes on the same day show that a motion of Stern to vacate the judgment of September 5 or to correct a clerical error of the clerk in failing to enter a judgment on the second cause of action was denied. There is no record of such notice of motion or motion in the clerk's transcript.

April 5, 1957, plaintiff filed notice of appeal from this order of March 25. April 29, 1957, Green Brothers and Dodge gave notice of a counter appeal from the order of March 25 "denying said defendants' motion for relief against the alleged judgment." It does not appear that Stern took an appeal from this order.

Plaintiff advances the following contentions on his appeal: (1) The judgment of September 5 was void for the reason that the court may not render judgment until all the issues in the case have been

determined. (2) The notices of intention to move for new trial were premature because they were given prior to the rendition of a valid judgment, and the order granting a new trial was void. (3) Although the judgment was void it was validated by plaintiff's voluntary dismissal of his second cause of action. (4) Although the judgment was thus validated the proceedings on the motions for new trial were not validated, and the order granting the motions was in excess of the court's jurisdiction.

The contentions of the defendants are: (1) The judgment of September 5 was void because it was entered prior to the determination of all the issues in the case. (2) It was not validated by dismissal of the second cause of action. (3) A motion for new trial will lie at any time after a decision of the facts and, in this case, after the entry of the verdict of the jury. (4) The order granting the motions for a new trial was valid and there is no existing judgment upon which execution could be issued.

Plaintiff did not appeal from the order granting defendants a new trial. Defendants, quite naturally, having been granted a new trial, did not appeal from denial of their motions for judgment notwithstanding the verdict.

At this point, in the interest of clarity, a measure of elucidation may be helpful. About a month after his motion for a different judgment had been denied plaintiff conceived the theory that the judgment and the new trial proceedings were void in the beginning but that the judgment could be validated by the dismissal of his so-called second cause of action. Later, he claimed it had been validated by his dismissal. He contended that the order granting a new trial was void for the reason that the notice of the motions was given before all the issues in the case had been determined, but he denied that the new trial proceedings were or could be validated. Upon this theory he sought execution on his judgment. The defendants in making their motions in March 1957 also contended that the judgment was void because all the issues had not been determined, that it never became valid, and they maintained that the new trial proceedings were nevertheless valid. They maintain the same contentions on the appeal.

Thus, plaintiff, and the defendants as well, maintain that it was unnecessary for any appeal to be taken from the September 5 judgment, or from the order entered October 16 denying their several motions, upon the theory that the judgment and the order, insofar as it was adverse to their respective claims was void and could be questioned at any time. We shall not pause to comment upon the fact that it is also assumed that a void order is not appealable. For reasons which are obvious, neither side questions the appealability of the order. We shall not. We have read 134 pages of briefing, with some explanatory letters, which is enough. And we have no intention of disturbing the order in whole or in part.

The proceedings which followed by some four and one-half months the order of October 16 created problems for the parties which they have wrestled with at tedious length and with considerable ingenuity, all, unfortunately, to no good end. We have found it necessary to decide the appeals under rules of procedure to which the briefs give no recognition.

The respective appeals are presented on the false premise that the judgment and the order of October 16 were void. For reasons to be stated we hold they were not void; the judgment was valid; the proceedings on motion for new trial were regular; and the order granting defendants' motions for new trial was valid, and vacated the judgment.

Granted that, no valid judgment can be entered while material issues remain undetermined, we do not have such a case. In the first place, there was but a single wrong alleged and but a single cause of action. The demand for an injunction is predicated upon the identical facts alleged as the

basis of the demand for damages. This appears from the pleadings.

[2, 3] As the court said in Wulfjen v. Dolton, 24 Cal.2d 891, at pages 895–96, 151 P.2d 846, 849: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." See, also, Work v. County Nat. Bank etc. Co., 4 Cal.2d 532, 540, 51 P. 2d 90; Dabney v. Phillco, 38 Cal.2d 60, 68, 237 P.2d 648; Merlino v. West Coast Macaroni Mfg. Co., 90 Cal.App.2d 106, 115, 202 P.2d 748. Since the count for injunctive relief was based upon the specific facts alleged in the first count, but one cause of action was stated. Tiedje v. Aluminum Taper Milling Co., 46 Cal.2d 450, 452, 296 P.2d 554.

[4, 5] In the second place, at the commencement of the trial, the defendants consented that the court should enter judgment against them for an injunction if the verdict of the jury should be in favor of the plaintiff and it was stipulated that this might be done without the taking of further evidence. The court not only had authority but a duty to enter a judgment in favor of plaintiff for the requested injunction, in accordance with the stipulation of the parties. When the verdict was returned the court was empowered to enter a judgment, not merely because a verdict had been returned which determined all the issues, but also because the trial had been completed and a judgment on the entire case was due under the stipulation. The judgment as entered was incomplete, and for that reason was erroneous, but it was not entered while issues remained undetermined and it was not void. It furnished a sound basis for the proceedings for a new trial. The order granting defendants a new trial was a valid order. All subsequent proceedings were in vain, and the later motions were properly denied.

[6] There is no merit in the cross appeal. Defendants did not appeal from the order of October 16 denying their motions for judgment notwithstanding the verdict. Their appeal from the order of March 25 insofar as it denied their motions for judgment notwithstanding the verdict fails for the reason that their motion was made six months after the judgment was entered and for the further reason, as above noted, that they did not move for a directed verdict. Code Civ. Proc. § 629. Also it is far too late for them to contend that the principal issue in the controversy, namely, plaintiff's claim that he had a protectible property right, should not have been submitted to the jury.

The order is affirmed in its entirety; each party to bear his own costs on appeal.

VALLÉE, J., and PATROSSO, J. pro tem., concur.



159 Cal.App.2d 798

George GARDNER, Trustee In Bankruptcy of the Estate of Vivian A. Corradini, Bankrupt, Plaintiff and Appellant,

v.

H. P. SIMPKINS and Southern California Sewers, Inc., Defendants and Respondents.

Civ. 22511.

District Court of Appeal, Second District, Division 3, California.

April 29, 1958.

Rehearing Denied May 14, 1958.

Hearing Denied June 25, 1958.

Action to rescind contract whereby plaintiff purchased half interest in sewer business owned by individual defendant after plaintiff's accountant had gone over books of business. From adverse judgment of the Superior Court, Los Angeles County, Wm. P. Haughton, J., the plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that evidence sustained

finding that individual defendant made no false or fraudulent representations to induce plaintiff to enter into transaction and that plaintiff did not rely upon any representation or statements made to him by such defendant.

Affirmed.

1. Sales ⇐52(7)

In action to rescind contract whereby plaintiff purchased half interest in sewer business owned by individual defendant after plaintiff's accountant had gone over books of business, evidence sustained finding that individual defendant made no false or fraudulent representations to induce plaintiff to enter into transaction and that plaintiff did not rely upon any representation or statements made to him by such defendant.

2. Continuance ⇐20(1)

In action to rescind contract whereby plaintiff purchased from individual defendant a half interest in sewer business owned by such defendant, trial court did not abuse its discretion in denying motion for continuance made on morning case was called for trial to enable substituted attorney to prepare for trial and plaintiff suffered no prejudice as result thereof when case was continued for trial until following morning and after three days of trial case was continued for a week and original attorney actively participated in trial.

Murray M. Chotiner and Gray & Guy, Beverly Hills, for appellant.

Egly & Wiener, Nichols, Cooper, Hickson & Lamb, Pomona, for respondents.

PATROSSO, Justice pro tem.

[1] This action was instituted by Vivian A. Corradini to rescind a contract whereby he purchased from the defendant Simpkins a half interest in what is referred to in the record as a sewer business owned by the latter upon the alleged ground that he had been induced to enter into the contract for the purchase thereof by reason of certain false and fraudulent representations of Simpkins. Subsequent to the rendition of judgment in favor of the defendants, plaintiff was adjudicated a bankrupt and his trustee in bankruptcy was substituted in his stead as plaintiff herein and prosecutes this appeal. In this opinion we shall continue to refer to the original plaintiff as such and to the defendant Simpkins by name.

Viewed in the light most favorable to the defendants the material facts necessary to an understanding of the questions involved are these: On November 7, 1954, plaintiff caused to be published an advertisement in the Los Angeles Times reading as follows:

> "Business Wanted! Are you in the 70% or higher inc. tax bracket? Why not sell to me an interest in your business for a capital gain. Gain an active partner + only a small loss to you after taxes. Check this proposition with your tax attorney for its soundness. Can stand rigid investigation; best refs. I will invest up to $200,000 cash. Give brief outline of your business 1st letter. Box G-186, Times."

In response to this Simpkins on November 8, 1954, addressed a letter to the address given in the advertisement wherein he stated that he had a "sewer contracting buisness [sic] which is netting over $6000.-00 per month"; that he had more business than he could take care of; and that his reason for selling part of his business was "that I need help in the management as it looks like it will double within the next year." At this time Simpkins was a contractor engaged in installing cesspools and septic tanks and the rental of movable toilets in what may be termed the San Gabriel Valley although he also operated farther to the east and to some extent in Orange County. He had been so engaged since 1948, starting in a modest manner and gradually expanding his business until 1953, when it earned a net profit after depreciation of $52,297.89.

As a result of this correspondence plaintiff arranged for a meeting with Mr. Simpkins on November 11th. Plaintiff was then approximately 49 years of age. From 1930 until 1946 he had been engaged in the business of lace manufacturing in the State of New Jersey; first starting in his father's business which then consisted of six or seven employees. In 1935 he acquired a a half interest in the business from his father by way of gift and in 1943 he acquired the other half by purchase. He thereafter continued to operate the business as sole proprietor until he sold the same in 1946, at which time the business had approximately 40 employees and was doing an annual business of between $250,000 and $275,000 and during which period the business was under plaintiff's management. Subsequent to 1946 plaintiff had engaged in the business of importing embroidering machines from Europe and in loaning money upon the security of real property. He was familiar with books of account, profit and loss statements, depreciation and the capital gains tax.

At the first meeting between the parties Simpkins exhibited to plaintiff an adding machine tape showing the profits of his business for the calendar years 1948 to 1953 inclusive as well as for the first three months of 1954. The figure for the latter period was $18,106.84. Simpkins stated to the plaintiff that the figures shown thereon for the calendar years 1948 to 1953 inclusive were net after depreciation but that the figure for the first three months of 1954 was before depreciation. At the same time Simpkins exhibited to plaintiff profit and loss statements for the period ending March 31, 1954, and the period ending June 30, 1954, the figure for the latter period being $41,845.70. These profit and loss statements upon their face disclosed that no deduction had been made for depreciation and Simpkins so advised plaintiff.

Two subsequent meetings were held between the parties before any agreement was consummated. During the course of these Simpkins explained to the plaintiff that his business was getting bigger all of the time and that there was no reason why, with some help, it could not continue to do so; that he, Simpkins, was going into the business of installing sewers and that he intended to go to Port Hueneme where a sale was to take place and purchase equipment which would enable him to engage in this type of business; that he intended to purchase such equipment whether or not plaintiff should acquire an interest in the business; that an ordinance had been adopted and that sewers were coming into Covina and West Covina, in which area Simpkins was operating, and that as a consequence there would be additional income from the sewer contracting business; that with sewers coming in he thought the business would double because he would keep the cesspool business which would move farther out into new subdivision areas where there were no sewer systems. Simpkins stated that his asking price for the business was $125,000 but that he would sell one-half of it for $62,500 plus one-half of the actual cost of any equipment purchased by him at the Port Hueneme sale.

During the course of these several meetings the equipment owned by Simpkins and used in the business was discussed and explained to plaintiff and shown to him. Also Simpkins took plaintiff around to various places where he had work in progress and showed him the work being done there and the manner in which it was being performed.

On November 12 plaintiff requested his banker to check upon the financial responsibility of Simpkins, and from this source was advised that the manager of the bank with whom Simpkins transacted business had informed plaintiff's banker that Simpkins had been very successful in his business operations; that his net worth had substantially increased since he commenced business and that the bank's dealings with him had been very satisfactory.

On December 11 or 12 plaintiff requested Martin A. Samuelson, a certified public accountant of considerable experience, to make an investigation of Simpkins' finan-

cial records for the years 1952 and 1953. At this time plaintiff delivered to Mr. Samuelson the financial statements furnished to him by Mr. Simpkins as previously stated and on December 14, in compliance with plaintiff's request, Samuelson went to Simpkins' place of business and spent some two hours there in going over the books and records of Simpkins and talking to Mr. and Mrs. Simpkins. While there, there was made available to Mr. Samuelson the journal and general ledger, which he examined, as well as copies of Simpkins' federal income tax returns which he checked against the financial statements that had been furnished plaintiff. Samuelson also examined the profit and loss statement for the period ending November 30, 1954, which showed a profit before depreciation of $67,900. When he left Simpkins' place of business, Mr. Samuelson took with him copies of the federal income tax returns and the financial statements previously mentioned which he retained for a period of some two weeks. Following his investigation of Simpkins' records Samuelson advised plaintiff that he found that the income tax returns checked with the figures on the profit and loss statements which Simpkins had furnished to the plaintiff.

On December 17 plaintiff took Simpkins to the office of his attorney, James Boyle, at which time plaintiff stated, as he had previously stated to Simpkins, that Mr. Boyle would be representing him, plaintiff, in the transaction as his attorney. At this time plaintiff stated to Mr. Boyle the terms of the agreement that he desired him to prepare which was generally to the effect that plaintiff would purchase one-half of Simpkins' business for $65,950, payable $40,950 in cash and the balance to be evidenced by promissory note of $25,000 bearing interest at six per cent; the immediate formation of a corporation and the transfer to it of plaintiff and Simpkins' interest in the business in exchange for stock. Agreements to this effect were prepared by Mr. Boyle at plaintiff's direction and executed by the parties.

Subsequently on January 4, 1955, plaintiff's accountant, Mr. Samuelson, addressed a letter to Mr. Boyle suggesting changes in the agreement as prepared and executed by the parties on December 17. A new agreement in accordance with Mr. Samuelson's recommendation was prepared by Mr. Boyle and executed by the parties on the same date. By the terms of the modified agreement it was provided that plaintiff should pay Simpkins $65,950, payable $20,950 in cash and a promissory note for $45,000, each party to purchase stock in the new corporation in the amount of $20,000; the corporation to purchase from plaintiff and Simpkins for the total sum of $131,900 all of the fixed assets of the business owned by them, payable $65,950 to each as follows $20,000 cash and the new corporation's promissory note in the sum of $45,950. It was further provided that upon receipt of the $20,000 cash payment from the corporation plaintiff would immediately pay said sum to Simpkins to apply on plaintiff's promissory note to the latter in the sum of $45,000, as security for the payment of the balance of which the plaintiff agreed to pledge the corporation's note payable to plaintiff.

Parenthetically it should be noted that prior to the time that the parties reached an agreement, Simpkins, as he had previously stated to plaintiff he intended to do, had purchased additional equipment at the sale at Port Hueneme for the sum of $20,000 in cash.

The parties' association did not prove to be a happy one. Within two weeks of the time that the new venture began operations plaintiff expressed some dissatisfaction therewith and Simpkins then stated to him that if he was unhappy he was willing to cancel the transaction provided plaintiff would pay the expenses incurred with Mr. Boyle. Plaintiff then apparently had a change of heart and stated that he wanted to continue. However, the differences between the parties increased, each blaming the other for the unsatisfactory results of the business, and on May 16, 1955, plaintiff

caused notice of rescission to be served upon Simpkins.

The trial court found that it was not true as alleged by plaintiff that Simpkins had made any false or fraudulent representations to induce plaintiff to enter into the transaction and further found that it was not true that plaintiff relied upon any representation or statements made to him by Simpkins but on the contrary that he entered into the transaction with full knowledge of the true facts.

The trial court's findings are assailed by plaintiff as being unsupported by the evidence. His principal argument in support of his claim is that the statement contained in Simpkins' letter in reply to plaintiff's advertisement to the effect that his business was "netting over $6000.00 per month" was patently false because it necessarily implied that this was after deducting depreciation. However, as appears from the foregoing recital of the evidence this fact was made known to the plaintiff at the very first interview with Mr. Simpkins, and was disclosed upon the face of the profit and loss statements for the periods ending March 31, 1954, June 30, 1954 and November 30, 1954, which were made available to plaintiff and his accountant and with which plaintiff was fully advised prior to entering into the transaction in question. There is no claim that these profit and loss statements were incorrect or that they did not truly reflect the condition of Simpkins' business for each of the periods indicated. Each of these statements disclosed that the profit for each of these periods before any deduction for depreciation was in excess of $6,000 per month. In the light of this we see no basis for the claim that plaintiff was deceived by the statement in the letter that Simpkins' business was netting over $6,000 per month.

Plaintiff also contends that Simpkins was guilty of fraud in that he knew that sewer systems were being installed in various cities in the area in which Simpkins was operating and that such installation would operate to eliminate the necessity for cesspools in such areas, and hence that Simpkins was not warranted in expressing the opinion which he did that the business would continue to materially increase or even double within the next year. As previously noted at the first meeting between the parties Simpkins told plaintiff of the fact that an ordinance had been adopted for the sewering of the cities of Covina and West Covina and that, while this would cause the cesspool business to move further out into new areas where no sewers were installed, the need for cesspools in such new areas would continue and that in addition the coming in of sewers would provide a new source of revenue. Moreover, that Simpkins' opinion as to the increase in the cesspool business that might be anticipated within the next year was not without foundation is indicated by the testimony of others engaged in the cesspool business in the same general area that, despite the installation of sewers, their business had substantially increased during the year 1955 and in one case as much as 471 per cent. In view of this testimony the fact that the business operated at a loss during January and February does not compel the conclusion that when Simpkins expressed the opinion that the business should greatly increase during the next year that he had no reason to believe that this would be true. Admittedly the operations during this period were interrupted by inclement weather which undoubtedly influenced the volume of work performed. However, in March the business earned a profit before depreciation of $7,807.64 and this despite the fact that in accordance with the agreement plaintiff and Simpkins each drew a salary during this period of $1,000 per month. While the business decreased in April and May the trial court could reasonably conclude that this was in large measure due to the disagreement between the parties which culminated in the service of plaintiff's notice of rescission on May 16.

Aside from other considerations the judgment is supported by the trial court's finding that plaintiff did not rely upon any

representation made to him by Simpkins and this finding is amply sustained by the evidence. As noted in the recital of the evidence in an earlier portion of this opinion, plaintiff, prior to entering into the contract with Simpkins, made a full investigation with respect to the operation and past earnings of the business. In this he had the assistance of an experienced public accountant who checked the profit and loss statements furnished by Simpkins against the federal income tax returns for previous years and found them to be in substantial accord therewith. While the accountant testified that he did not make a detailed audit of the books, as previously stated, there is no claim that the profit and loss statements were not true and correct. The record discloses that Simpkins' books were present in court during the trial and no attempt was made to show any discrepancies between them and the profit and loss statements. As stated in Carpenter v. Hamilton, 1936, 18 Cal.App.2d 69, 71, 62 P.2d 1397, 1399; "Plaintiffs had a right to rely upon the representations made to them concerning matters of fact which were unknown to them, without making any inquiry concerning the truth thereof, and had they done so defendant could not evade the consequences of any false and fraudulent statements he may have made by showing that means of knowledge of the truth were easily available to plaintiffs. (Citations.) But the right to rely upon the representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and, in making such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts. (Citations.)"

[2] Finally plaintiff contends that the trial court erred in denying his motion for a continuance made on the morning that the case was called for trial. The ground stated for the motion was that Mr. Boyle, whose firm was counsel of record for the plaintiff, had some days previously been served with a notice to produce certain documents "which would disclose that he would of necessity be one of the principal witnesses in the law suit," and that the attorney making the motion, who was a partner in Mr. Boyle's firm, was of the belief that the canons of judicial ethics would prevent his trying the action with Mr. Boyle as a witness. In connection with his motion for a continuance he moved to substitute Mr. Leonard Shelton as attorney of record for the plaintiff, stating that the latter had no knowledge of the case except such as had been given him that morning. Defendants objected to a continuance upon various grounds. It was pointed out that on January 26, 1956, the case was set for trial on June 18, 1956, the date it was called for trial and that defendants were under a restraining order preventing the disposition of any of the defendants' assets. Furthermore, defendants expressly stated that they would raise no objection to Mr. Boyle being a witness in the case. The trial judge advised counsel that, in view of the condition of the calendar in the Pomona department where the case was pending for trial, if a continuance were had the case would have to go over for approximately one year and that under the circumstances the motion would have to be denied. The case, however, was continued for trial until the following morning at which time the trial commenced with the plaintiff's case being actively conducted by Mr. Shelton. However, the record discloses that a member of Mr. Boyle's firm was present throughout the trial and actively participated therein. Mr. Boyle was not called as a witness by either party and, while the exact nature of the documents which it was demanded he produce is not made to appear, they were presumably the agreements prepared by Mr. Boyle, executed by the parties, which were introduced in evidence and concerning the admissibility of which no objection was or is raised.

While plaintiff advances the claim that Mr. Shelton was not adequately prepared to try the case and hence that the trial

court abused its discretion in denying the motion for a continuance, a reading of the record completely belies such claim. The record discloses that plaintiff's case was presented by Mr. Shelton with consummate skill and as it could have been presented only by one having a complete and detailed knowledge of every aspect of the action. Moreover, after the case had been on trial for three days it was continued for a week. If, as does not appear, any further time for preparation was required by Mr. Shelton it was afforded him during this interval. The court did not abuse its discretion in denying the continuance and plaintiff suffered no prejudice as a result thereof.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



Martha M. BARBER, Plaintiff and Respondent,

v.

Marion M. BARBER, Defendant and Appellant.*

Civ. 22759.

District Court of Appeal, Second District, Division 1, California.

May 1, 1958.

Hearing Granted June 25, 1958.

Action by wife for separate maintenance. The Superior Court, Los Angeles County, Clarence E. Johns, J. pro tem., entered judgment adverse to husband, and he appealed. The District Court of Appeal, Lillie, J., held that where husband made a general appearance by filing a demurrer and answer in his wife's separate maintenance action in California, he could not defeat acquired jurisdiction of California court by filing a divorce action in another state and securing a decree of divorce in such other state prior to judgment in California action, since California jurisdiction, first assumed and exercised, continued to judgment.

Judgment affirmed.

* Opinion vacated 331 P.2d 628.

1. Courts ⇐514

Where husband made a general appearance by filing a demurrer and answer in his wife's separate maintenance action in California, he could not defeat acquired jurisdiction of California court by filing a divorce action in another state and securing a decree of divorce in such other state prior to judgment in California action, since California jurisdiction, first assumed and exercised, continued to judgment.

2. Divorce ⇐399(3), 403(1)

In separate maintenance action, California court which acquired personal jurisdiction of husband as well as wife had full authority to make proper awards for support and child care, and to award community property as separate property of wife, notwithstanding fact that husband, after appearing in California action, secured a divorce decree in another state.

MacBeth & Ford, Los Angeles, for appellant.

James N. Reese, Los Angeles, for respondent.

LILLIE, Justice.

Defendant husband appeals from a judgment in favor of plaintiff wife entered in a separate maintenance action. It awards Mrs. Barber certain community property as her separate property, orders the husband to pay a monthly sum of $1 for the wife's support and awards the sum of $50 per month for support of the minor son whose custody is granted to Mrs. Barber. In his appeal, defendant makes no attack upon that portion of the decree awarding child custody and child support. The parties were married on February 14, 1942, in Oklahoma and have two minor children;

Cedric, aged 10 years, who resides with his mother and Mae Karen, aged five, who lives with her maternal grandmother in Washington, D. C. The trial court found that the parties separated about May 24, 1953, at Los Angeles and that the real property located at 2420 W. 30th Street in Los Angeles, held under a joint tenancy deed, was community property and awarded the same to Mrs. Barber. In supplemental findings the trial court found that the District Court of Pottawatomie County, Oklahoma, "was without jurisdiction to determine the divorce matter between the parties * * * since at a prior time this court (Los Angeles) had acquired jurisdiction over the subject matter and the parties."

Chronologically, the following successive steps were taken: On August 4, 1953, Martha M. Barber filed this action for separate maintenance in the Superior Court of Los Angeles County. The husband, appellant herein, then living in Oklahoma, on August 24, 1953, filed a demurrer and answer to the wife's action in California, appearing in propria persona. Three days later, on August 27, 1953, appellant husband filed an action for divorce in the Oklahoma court, proceeding by way of notice by publication. In the Oklahoma action the wife made a general appearance by filing an answer. On October 9, 1953, the Oklahoma court granted the husband a divorce on grounds of cruelty, the decree reciting that "the defendant (wife) appeared not in person or by attorney, but made default."

The Oklahoma divorce decree granted custody of both children to the husband and divided "the real property of said marriage" equally between the parties, granting the west half of the lot to the husband and the east half to the wife.

On April 17, 1957, Mrs. Barber's action for separate maintenance came on for trial in Los Angeles, she being present in person and the husband being duly represented by counsel. This action resulted in the wife's favor, the trial court finding that the Oklahoma court was without jurisdiction since the California court had previously acquired jurisdiction.

The appellant husband now contends that the Oklahoma decree of divorce was a valid decree of a sister state, entitled to full faith and credit in the courts of California and as respondent participated in the action and had opportunity to litigate the jurisdictional issue, the decree is *res judicata* as to the jurisdiction of the Oklahoma court. Appellant also claims that since the Oklahoma decree terminated the marriage relation on October 9, 1953, without an effective disposition of the property of the parties, the real property located in California, if it was community property prior to that time, became vested in the parties as tenants in common and could not be awarded to respondent in this action. Finally, appellant argues that the evidence fails to support the trial court's finding that the real property was ever community property; that, the marriage relation having terminated and the issue of support having been decided by the Oklahoma court adversely to respondent, the respondent is not entitled to any support from appellant and that the demurrer to the wife's complaint should have been sustained.

[1] Basically, appellant is seeking to have this court declare that a husband who has made a general appearance by filing a demurrer and answer in his wife's separate maintenance action in California may then defeat the acquired jurisdiction of the California court by filing action in another state and there securing a decree of divorce.

The appellant has cited no case which may stand as sanction for such position and the contention is wholly untenable. Cases in which a *prior* action was instituted and completed in a sister state and the effect of such procedure upon a *later* action in California are obviously inapplicable. In the instant situation the prior action was commenced in California. Three days after filing a demurrer and answer in the California court the husband filed his divorce action in Oklahoma and there secured

a decree before the California action was brought to completion. Both parties appearing by attorneys participated in both actions. Nor does the case of Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385, cited by appellant support his contention. In that case the parties lived in California and acquired property here. In 1944 the husband filed a divorce action in this state which was later dismissed as a part of an attempted reconciliation. In July, 1945, the husband commenced a divorce action in Nevada. The wife was personally served in Nevada, engaged an attorney and filed a cross-complaint for separate maintenance. The husband there secured a divorce decree embodying certain support provisions for the wife but making no disposition of the community property interest. In November, 1945, the husband returned to California and executed certain conveyances of community property to his brothers whereupon the wife instituted in California an action to set aside such transfers. The trial court set aside the husband's conveyances "on the theory that because of jurisdictional defects in the Nevada divorce action, they were still husband and wife," jurisdictional defects being based on "alleged sham and fraudulent intent in the domiciliary claims of the husband." Citing Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 and Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451, the trial court's decision in the Heuer case was reversed on the theory that the Nevada decree was entitled to full faith and credit and that since the wife "had full opportunity to litigate the issue" of jurisdiction it was immaterial whether such issue was actually litigated even though a relitigation of such question might show a fraudulent domiciliary claim in the Nevada court.

The preceding statement in reference to the Heuer case indicates the great factual divergence between that case and the present controversy. Obviously each case must stand and be determined on its own merits. Principles applicable to one set of facts are not necessarily controlling in respect to a materially different situation. And so it is here; there is nothing in the Heuer case which requires a reversal in the instant action. To rule otherwise would amount to placing a premium on a party's ability to rush from one state to another in an attempt to curtail or extinguish California jurisdiction of an action first instituted in this state. Neither comity nor any other legal principle sanctions such a result. This is fully recognized in Simmons v. Superior Court, 96 Cal.App.2d 119, at page 130, 214 P.2d 844, at page 852, 19 A.L.R.2d 288, in which the court said, "Races between parties likely to result in unseemly controversy between courts of different states should be frowned upon and avoided if possible." Since California first assumed and exercised jurisdiction there is no valid reason why such jurisdiction should not continue to the end, nor why it should in any manner be hampered by appellant's subsequent action in Oklahoma.

[2] In reference to the community property and regardless of how title thereto may have been taken, the record discloses substantial evidence that the property in question was purchased with community funds. It was located in California, not in Oklahoma, and the Oklahoma decree in no manner affected its nature nor foreclosed the California tribunal from making disposition thereof. The California court had full authority to make proper awards for support and child care. The appellant's demurrer to the wife's California complaint was properly overruled. No reversible error has been made manifest.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

159 Cal.App.2d Supp. 875

Joseph ESPREE, Plaintiff and Respondent,

v.

WESTERN PIONEER INSURANCE CO., a corporation, Defendant and Appellant.

C. A. 237.

Appellate Department, Superior Court, Alameda County, California.

April 18, 1958.

Action by insured to recover cost of repairing his truck, which was allegedly damaged as result of an "upset". From adverse judgment of the Municipal Court for the Oakland-Piedmont Judicial District, Charles W. Fisher, J., the insurer appealed. The Superior Court, Appellate Department, Wagler, P. J., held that under liability policy insuring against damage from "upset", dump truck, which lost its equilibrium while unloading load of fill dirt and which would have tipped completely over had not one corner of truck bed come to rest on soft earth, "upset" within contemplation of policy, and insured was entitled to recover damage to frame of bed and to truck bed itself.

Judgment affirmed as modified.

1. Insurance ⇐424

Under policy insuring against damage from "upset", dump truck, which lost its equilibrium while unloading load of fill dirt and which would have tipped completely over had not one corner of truck bed come to rest on soft earth, "upset" within contemplation of policy, and insured was entitled to recover damage to frame of bed and to truck bed itself.

See publication Words and Phrases, for other judicial constructions and definitions of "Upset".

2. Insurance ⇐146(3)

Any ambiguity or uncertainty in insurance policy is to be resolved against insurer, and if semantically permissible, contract will be given such construction as will fairly achieve its object of securing indemnity to insured for losses to which insurance relates.

3. Insurance ⇐146(3)

If insurer uses language which is uncertain, any unreasonable doubt will be resolved against it and if doubt relates to extent or act of coverage, whether as to peril insured against, amount of liability, or person or persons protected, language will be understood in its most inclusive sense for benefit of insured.

4. Insurance ⇐424

In absence of express language in policy to the contrary, a vehicle must be deemed to have suffered an "upset" once it loses its equilibrium and overturning process has commenced and proceeded beyond power of those in charge of vehicle to stop its progress, and it is not necessary that vehicle turn bottom side up, or even over on its side.

5. Insurance ⇐424

Under policy excluding coverage for any damage to vehicle due to mechanical or electrical breakdown or failure unless damage was result of other loss covered by policy, insured was not precluded from recovery when right rear wheel on dump truck sank into soft ground while truck was being unloaded, causing frame of bed to break and bed itself to twist off to one side, since process of upsetting came first and damage to truck was result of such process.

6. Insurance ⇐424

Where insured was sent a "certificate of insurance" which was actually a copy of first page of policy of insurance and certificate of insurance contained none of insuring agreements, exclusions or conditions of policy, which was delivered by insurer to lienholder, insured was not bound by exclusions contained in that portion of contract sent to lienholder. West's Ann. Insurance Code, § 383.5.

7. Insurance ⇐651(3)

In action by insured to recover cost of repairing truck which he contended was damaged as result of an upset covered by policy, first page of which was sent to insured and which contained none of insuring agreements, exclusions or conditions of policy, which was sent by insurer to lien-

holder, court did not err in ruling that specimen policy was not admissible for all purposes.

Ericksen & Ericksen and Robert H. Kroninger, Oakland, for appellant.

McDonald, Brunsell, Brethauer & Walters, Oakland, for respondent.

WAGLER, Presiding Judge.

[1] Plaintiff, as insured, brought suit against the defendant, as insurer, to recover the cost of repairing his truck which he contends was damaged as the result of an "upset." Judgment was for plaintiff and defendant appeals.

In April 1956, plaintiff purchased a 1951 ten-wheel dump truck from Cook Brothers Truck and Equipment Company. At the same time he purchased insurance coverage on said truck from the defendant.

Thereafter plaintiff received through the mail from the defendant a "Certificate of Insurance" which specified coverage for "bodily injury liability," "property damage liability," *"collision or upset,"* and fire and theft. This certificate also contained a "loss payee" clause providing that any loss due to collision or upset, fire or theft, was payable to the lien holder (Cook Brothers Truck and Equipment Company) to the extent of its lien. The certificate was actually a copy of the first page of a policy of insurance which was on a date not disclosed by the record delivered to the lien holder. The "Certificate of Insurance" contained none of the insuring agreements, exclusions or conditions of the policy.

On August 15, 1956 while engaged in hauling fill to the Oakland Army Base, plaintiff was required to back off the road approximately 50 feet onto fill which had previously been dumped. The plaintiff's version of what happened thereafter is contained in a statement written on August 16th by the Claims' Agent of the defendant and signed by the plaintiff. This statement reads as follows: "I backed the truck into position and started the hydraulic hoist to dump the load. When the bed got half-way up, the earth under the right rear wheel gave way from the weight and caused the right rear wheel to sink into to about 2 or 3 inches from the *axel.* This put a strain on the frame and the weight of the load in the bed caused the frame of the bed to break and the bed itself fell or was twisted off to the right." The plaintiff who was the only witness to the occurrence gave substantially the same version at the trial. There was, however, additional testimony to the effect that when plaintiff got out of the truck to see what had happened, the right rear wheels, all four of them were in the earth. The left wheels, all five of them were off the ground ten to twelve inches and the only thing that was preventing the truck from tipping over was the right rear corner of the truck bed. The subframe of the truck was sheared off and the hoist rod was broken.

Upon this evidence, the trial court found that the truck "lost its equilibrium by the right wheels settling into said soil and said truck was thereby caused to suffer an upset." Judgment was rendered in the sum of $697.50.

The defendant offered in evidence a specimen of the policy which had been delivered to the lien holder for the purposes of establishing that the loss was one not covered by the terms of said policy. The trial court admitted the specimen policy in evidence for the "limited purpose" only of permitting the defendant to show what the terms of the complete policy were, making it clear that he did not consider the exclusions of the policy binding upon the plaintiff because same had never been delivered to the plaintiff and because plaintiff was unaware of its provisions.

Appellant assigns as grounds for reversal:

(1) Insufficiency of the evidence to support the finding of "upset."

(2) If there was an upset, it was caused by a "mechanical breakdown" and therefore coverage was excluded by paragraph r., of the policy, which reads as follows:

"This policy does not apply to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure unless such damage is the result of other loss covered by this policy."

(3) Error on the part of the trial court in ruling that the specimen policy was not admissible for all purposes.

[2,3] The rules governing the construction of insurance policies of all kinds have been succinctly stated by the Supreme Court of this State as follows: "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. * * * If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. * * * If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against * * * the amount of liability * * * or the person or persons protected * * * the language will be understood in its most inclusive sense, for the benefit of the insured." Continental Casualty Co. v. Phoenix Construction Co., 46 Cal.2d 423, 437, 296 P.2d 801, 809, 57 A.L.R.2d 914.

[4] Obedient to the foregoing rules of construction, the Courts have consistently held that in the absence of express language in the policy to the contrary a vehicle must be deemed to have suffered an "upset" once it loses its equilibrium and the overturning process has commenced and proceeded beyond the power of those in charge of the vehicle to stop its progress. It is not necessary that the vehicle turn bottom side up or, for that matter, even over on its side. Carl Ingalls, Inc. v. Hartford Fire Ins. Co., 137 Cal.App. 741, 31 P.2d 414; Jack v. Standard Marine Ins. Co., 33 Wash.2d 265, 205 P.2d 351, 8 A.L.R.2d 1426; Radella v. Bankers Mutual Fire Ins. Co. of Lancaster, 165 Pa.Super. 633, 70 A.2d 407; Ferguson v. Farm Bureau Mutual Ins. Co., Inc., 171 Kan. 679, 237 P.2d 234; Home Service Casualty Ins. Co. v. Barry, Tex.Civ.App., 277 S.W.2d 280; Mercury Ins. Co. v. Varner, Tex.Civ.App., 231 S.W.2d 519; Moore v. Western Assur. Co., of Toronto, 186 S.C. 260, 195 S.E. 558.

Since, in the instant case, not only the truck bed but the vehicle itself lost its equilibrium and would have tipped completely over had not one corner of the truck bed come to rest on the soft earth, the only logical conclusion to be reached was that reached by the trial court, to-wit, that the damage to the vehicle was the result of "upset."

[5] Appellant's second contention cannot stand for two reasons: First, all of the evidence points clearly to the fact that the process of upsetting came first and that the damage to the truck was the result of this process. Secondly, even if the sequence of events were reversed, the defendant could not escape liability by virtue of paragraph r. of the policy excluding loss due to mechanical breakdown because this exclusion was not binding on the plaintiff.

Section 383.5 of the Insurance Code of this State at the time in question provided in part as follows: "Every contract of insurance against hazards incident to ownership, maintenance, operation and use of motor vehicles shall be embodied in a document. The original or a true copy of such document shall be delivered to each owner. * * * 'Owner' as used in this section means any person who is named as an insured in such contract of insurance or document, or in a loss payable clause therein, and, whether or not he is named therein, the vendee, pledgor, or chattel mortgagor of a motor vehicle where insurance contracts subject to this section are procured with respect to the motor vehicle by or on behalf of either party to the purchase, pledge, or mortgage."

In Frieze v. West American Ins. Co., 188 F.2d 331, 335, the United States Circuit Court (Eighth Circuit) had before it a problem almost identical to the one here presented. The Court, referring to Section 383.5 supra, there said, "* * * the State of California has adopted as the public policy of that State the requirement that the document constituting the original policy or a true copy thereof shall be delivered to each 'owner' in order that fraud or mistake in connection with the transaction of insurance covering motor vehicles be prevented. * * * we must reach the conclusion that a cardinal purpose of the statute was to acquaint the assured with all of the terms of the contract of insurance as a necessary incident to the prevention of fraud or mistake concerning the coverage and the conditions attached to the coverage. It should follow, we believe, that the entire contract of insurance must be included in the 'true copy' required, and that one who has failed to follow the statutory requirement and acquaint another party to the contract with the terms of the contract in the manner required by the California statute may not enforce against the other a condition not disclosed in the manner required by the statute."

[6, 7] For the same reasons we hold that the exclusions contained in the complete contract of insurance are not binding on the plaintiff herein. It follows that the ruling of the trial court on the admissibility of the entire contract was proper.

One further point, however, requires consideration. The amount of the plaintiff's repair bill was $927.50. The certificate of insurance contained a "$250 deductible" provision. Yet judgment was rendered in favor of plaintiff for $697.50. It follows (and this plaintiff concedes) that the judgment should be reduced to the sum of $677.50.

As so modified, the judgment is affirmed.

Neither party to recover costs.

LEDWICH and HOYT, JJ., concur.

50 Cal.2d 289

Thomas EISTRAT, Plaintiff and Appellant,

v.

Karl A. CEKADA, Defendant and Respondent.

L. A. 24915.

Supreme Court of California, In Bank.

May 9, 1958.

Action for conversion of lumber taken from the property of plaintiff. From an adverse judgment and order of the Superior Court, Los Angeles County, Morton L. Barker and Leon T. David, JJ., the plaintiff appealed. The Supreme Court, Shenk, J., held that the rejection of plaintiff's offer of proof as to the interpretation and application of restraining order in bankruptcy on the ground that the order was clear and unambiguous on its face was error.

Judgment reversed.

Opinion 319 P.2d 383, vacated.

1. Limitation of Actions ⇐55(5)

Generally a cause of action accrues immediately upon the commission of the act of conversion.

2. Limitation of Actions ⇐104½

The running of the statute of limitations is suspended during any period in which plaintiff is legally restrained from taking action to protect his interests. West's Ann.Code Civ.Proc. § 356.

3. Limitation of Actions ⇐111

Under restraining order enjoining all persons from commencing or continuing any suit against bankrupt or from interfering with the debtor until final decree of the bankruptcy court, plaintiff claiming lumber purchased by defendant from receiver in bankruptcy in November 1949 was by the face of the order prevented from filing an action by defendant after purchase of lumber, and plaintiff's cause of action against defendant for conversion of lumber was not barred by the three year statute of limitations where it was commenced within three years after dissolution of the restraining order. West's Ann.Code Civ. Proc. §§ 338, subd. 3, 356; Bankr.Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.

4. Bankruptcy ⇐111, 391(3⅛)

Upon the filing of a petition in bankruptcy, the bankruptcy court acquires exclusive jurisdiction over the bankrupt and his estate and may restrain any suit to recover a debt which might be dischargeable therein.

5. Evidence ⇐450(2)

Where restraining order enjoined all persons from commencing or continuing any suit against the bankrupt or from interfering with debtor until final decree of bankruptcy court, rejecting plaintiff's offer of proof as to interpretation of restraining order with respect to plaintiff's right to commence an action against bankrupt in order to avoid application of the statute of limitations on ground that order was clear and unambiguous on its face and did not require a reference to extrinsic evidence to determine its meaning was error. West's Ann.Code Civ.Proc. §§ 338, subd. 3, 356; Bankr.Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.

Thomas Eistrat, in pro. per.

Samuel S. Adler, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the defendant in an action for damages for the conversion of lumber taken from the plaintiff's property in Tulare County. The trial court held that the action was barred by the statute of limitations and the propriety of that ruling is the principal question for determination on the appeal.

On June 24, 1949, one Tom G. Jones filed a petition in bankruptcy in the United States District Court under chapter XI of

the Bankruptcy Act, 11 U.S.C.A. § 701 et seq. He claimed title to certain lumber and the right to operate a sawmill on the plaintiff's property free from interference by the plaintiff. He obtained an order from the referee in bankruptcy which provided as follows: "[A]ll persons be, and they hereby are, enjoined and stayed until final decree herein, from commencing or continuing any suit against Tom G. Jones, doing business as Jones Mill and Lumber Company, the above named debtor and the said Thomas Eistrat is further restrained and enjoined from interfering with the debtor in the possession of his property and in the operation of the debtor's mill and lumber business."

On July 15, 1949, the plaintiff's motion to dissolve the restraining order was denied but a surety bond was ordered in the plaintiff's favor to indemnify him against loss from the operations of the debtor.

On September 29, 1949, the plaintiff, joined by his wife Elma, filed a petition in the bankruptcy proceeding to reclaim the property here involved. Final action on that petition was postponed. In November 1949 the defendant Cekada paid the receiver in bankruptcy $588 for whatever right, title or interest the receiver had therein and took possession of the lumber in question. On April 25, 1951, the court again denied a motion by the plaintiff to dissolve the restraining order but did order the dissolution of that portion of the restraining order which related specifically to the plaintiff's interference with the possession of the real property and the operation of the mill and lumber business thereon. Finally, on October 1, 1951, the plaintiff's petition to reclaim the property was granted and the restraining order dissolved in its entirety.

In making its order of October 1, 1951, granting the petition to reclaim and dissolve the restraining order, the bankruptcy court made findings from which it concluded that neither Tom Jones, the receiver in bankruptcy nor the trustee had any right, title or interest in the real property of the plaintiff or in "any of the logs, lumber or timber located thereon or removed from said real property"; that the trustee should deliver over to the plaintiff all proceeds from the sale of the lumber, "without prejudice to such right or rights as the [plaintiff] may have against such person or persons or any of them."

On November 28, 1951, after the dissolution of the restraining order, the plaintiff made a demand on the defendant for the return of the lumber. The demand was refused on December 10, 1951. The present action was commenced on September 30, 1954, which was within three years from and after the dissolution of the restraining order and of the demand and refusal.

The defendant's answer pleaded the three year statute of limitations provided for in section 338, subdivision 3, of the Code of Civil Procedure. The trial court concluded that the restraining order issued in the bankruptcy proceedings merely restrained the plaintiff from commencing any action against the bankrupt Jones, and did not prevent the plaintiff from commencing an action against the defendant Cekada or against anyone other than the bankrupt. The court found and concluded that the defendant purchased the lumber in question from the bankrupt's estate on November 22, 1949, and that the plaintiff's cause of action arose on that date; that the plaintiff had knowledge thereof about December 1, 1949, and that the complaint filed on September 30, 1954, was barred by the three year statute of limitations.

[1–3] It is the general rule that such a cause of action accrues immediately upon the commission of the act of conversion. Bell v. Bank of California, 153 Cal. 234, 94 P. 889; Rose v. Dunk-Harbison Co., 7 Cal. App.2d 502, 505–506, 46 P.2d 242. Normally the statute of limitations begins to run at that time. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 430, 116 P.2d 37, 136 A.L.R. 800. However, the running of the statute is suspended during any period in which the plaintiff is legally restrained from taking action to protect his interests. Code Civ.Proc. § 356; Wolf v. Gall, 174 Cal. 140, 145, 162 P. 115.

[4] Upon the filing of a petition in bankruptcy the bankruptcy court acquires exclusive jurisdiction over the bankrupt and his estate and may restrain any suit to recover a debt which might be dischargeable therein. Ex parte Baldwin, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020; Jones v. Alton & S. R. Co., D.C., 5 F.Supp. 532. In the present case the restraining order as above set forth prohibited all persons from commencing "any suit against Tom G. Jones" and further restrained the plaintiff specifically "from interfering with the debtor in the possession of his property * * *." The intent of the first portion of the order is clear but the meaning of that portion which in broad general terms prohibited the plaintiff "from interfering with the debtor in the possession of his property" is not so explicit. However, in keeping with the power and purpose of the court to stay collateral proceedings in other courts pending the outcome in bankruptcy, it should be assumed that under the order the court would not condone the commencement of an action by the plaintiff against the receiver. It should also be assumed that the court intended that the commencement of any suit against an assignee of the receiver, in the discharge of his duties in bankruptcy, would constitute an interference with the debtor in the possession of his property. Just what conduct on the part of the plaintiff would constitute the prohibited interference is not as certain as it should be. But it is sufficiently certain to put the plaintiff on notice that a lawsuit against the bankrupt or anyone coming into possession of the bankrupt's assets in due course of the bankruptcy proceedings would be undertaken at the peril of probable sanctions for contempt. The plaintiff asserts that the several federal judges who presided at the various hearings in the bankruptcy proceedings construed the restraining order as preventing him from commencing an action while the order was in effect. He offered to prove at the trial of the present action that by resorting to the record in the bankruptcy proceedings he could conclusively demonstrate that he was prohibited from commencing the present action against the defendant Cekada until the restraining order should be dissolved.

The defendant contends that the second portion of the restraining order relates only to physical interference with the debtor's possession of the property involved, and that the order of April 25, 1951, removed all physical restraint. That order provided that the restraining order "be and it hereby is dissolved insofar as it restrains or enjoins the said Thomas Eistrat from interfering with the debtor-bankrupt in the possession of the real property in the County of Tulare, State of California, and insofar as it restrains or enjoins Thomas Eistrat or Elma Eistrat from entering upon the said real property or interfering with the operation of the debtor-bankrupt's mill and lumber business on said real property." It is obvious that the order of partial dissolution did not remove all restraints imposed upon the plaintiff, but only those relating to the realty in Tulare County and to the operation of the sawmill located thereon. It did not allow the plaintiff generally to interfere "with the debtor in the possession of his property" as prohibited by the original order. The fact that it continued other restraints in effect could reasonably lead to the conclusion that those restraints were other than those relating to mere physical possession. In any event the order of April 25, 1951, served to make the meaning of the basic order all the more uncertain.

[5] The plaintiff's offer of proof from the record in the bankruptcy proceeding as to the interpretation and application of the restraining order in that proceeding was rejected on the ground that the order was clear and unambiguous on its face and that it did not require a reference to extrinsic evidence to determine its meaning. The plaintiff claims that the court's refusal to admit his evidence was prejudicially erroneous. This contention must be sustained.

Finally, the plaintiff contends that the defendant failed to comply with statutory procedures in filing his cost bill. Since the judgment must be reversed the order for

costs will likewise stand reversed. The item of costs on trial will therefore await a further determination in the case.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.



50 Cal.2d 283

In the Matter of the ESTATE of Edward L. LEDBETTER, Deceased.

Mark WOOD, as Administrator, etc., Petitioner and Appellant,

v.

John D. LUTON, as Guardian of Kathryn Ledbetter, a Minor, Contestant and Respondent.

L. A. 24596.

Supreme Court of California, In Bank.

May 9, 1958.

Proceeding by a guardian on behalf of decedent's minor daughter to surcharge administrator of her father's estate with attorney's fees stipulated to be paid out of the sum awarded the estate in compromise settlement of a wrongful death action against the United States. From an order and judgment of the Superior Court, Los Angeles County, Joe Raycraft, J., surcharging the administrator on final account, he appeals. The Supreme Court, Spence, J., held that the surcharge of the administrator's account was improper under the circumstances.

Order surcharging the account reversed.

Opinion, 316 P.2d 694, vacated.

1. Executors and Administrators ⇐82

Where order of the probate court instructing administrator to sign a stipulation and conclude settlement of a case against the United States was appealable but no appeal was taken, the order became final. West's Ann.Prob.Code, § 1240.

2. Executors and Administrators ⇐236

The statute providing that an attorney for the administrator may apply to the court for an allowance of his fees and that the court shall make an order requiring an administrator to pay such attorney out of the estate such compensation on account of services rendered up to that time is permissive and a proceeding pursuant to the statute is not the exclusive means by which a court may authorize an allowance for attorney's fees. West's Ann.Prob.Code, § 911.

3. Executors and Administrators ⇐234

Where probate court authorized settlement of wrongful death action against the government pursuant to stipulation for compromise approved by the federal court and no appeal was taken from the probate order which became final, administrator who deducted attorney's fees from settlement awarded the estate was not subject to surcharge on the final account, notwithstanding there was no proceeding under the statute for allowance of attorney's fees, since such a proceeding is not the exclusive means for authorizing such an allowance, and since the prior order of the probate court had effect of making the claimed apportionment of attorney's fees, though it was inartfully drawn. West's Ann. Prob.Code, §§ 578a, 588, 911, 1240; 28 U.S. C.A. §§ 2677, 2678.

Pat A. McCormick and Lyle C. Newcomer, Los Angeles, for appellant.

Rubin & Small, Beverly Hills, and Gene L. Rubin, Los Angeles, for respondent.

SPENCE, Justice.

The administrator appeals from that portion of an order surcharging him with $1,376 on his final account and ordering him to deposit said sum in the account of the estate. He contends that the probate court improperly ordered such surcharge in view of a prior order authorizing his compromise and settlement of a wrongful death claim. The record sustains his position.

Decedent and other members of his immediate family were killed when a United States Air Force jet plane crashed into decedent's home. The administrator commenced an action in the federal court against the United States seeking damages on behalf of the estate. In due course a stipulation in settlement of the claim was negotiated with the United States Attorney. That stipulation provided, among other things that: (1) the United States of America would pay plaintiff, the administrator, the sum of $6,880, which would be "inclusive of costs, interest and attorney's fees, and in full settlement and compromise" of all claims arising out of said accident; (2) the stipulation would be presented to the federal court for approval; (3) the administrator would petition the probate court "for the appropriate authority to enter into the * * * Stipulation * * * and furnish to the defendant a certified copy of the Order of such authority"; (4) there would be paid to the administrator's attorney "out of but not in addition" to the amount of the total settlement of $6,880, the sum of $1,376 "as and for attorney's fees for services rendered" in connection with said action; and (5) upon receipt by the administrator and his counsel of the sums indicated, the administrator, through his counsel, would file a dismissal of the action.

On May 21, 1956, upon a petition for instructions filed by the administrator (Prob.Code, § 588), the probate court made the necessary order. Following the preliminary recital that " * * * the court being fully advised in the premises, finds that it is for the best interest of the estate that the offer of the United States to settle the suit * * * be accepted and the suit dismissed, upon payment to the administrator of the sum of $6,880.00 *as more particularly set forth in the stipulation for compromise attached to the petition herein* * * *," the court "ordered * * that the petitioner * * * as administrator of the estate shall, upon receipt by him from the United States of America of the sum of $6,880.00, file a Dismissal with Prejudice in that certain suit * * *" in the federal court. (Emphasis added.) The order and stipulation were presented to the federal court and the terms of compromise were there approved. 28 U.S.C.A. §§ 2677–2678. Accordingly the administrator received $5,504 from the United States for the estate account, his attorney received $1,376, and the administrator filed the dismissal.

In settling the administrator's final account in the estate, the probate court found that the administrator, while authorized to settle the suit in the federal court for the sum of $6,880, had accounted for only $5,504, and that his attorney had received the remaining $1,376 as attorney's fees, though "no order of this court has authorized or allowed such payment." It was upon this basis that the probate court made the surcharge of $1,376.

The adminstrator contends that the surcharge is improper because he had complied with the court's order in negotiating the settlement as above recited. The terms of settlement included the allowable 20% attorney's fees in cases of compromise under the Federal Tort Claims Act. 28 U.S.C.A. § 2678; McConville v. United States, 2 Cir., 197 F.2d 680, 684, certiorari denied 344 U.S. 877, 73 S.Ct. 172, 97 L.Ed. 679. The stipulation for compromise expressly provided for the division of the $6,880 settlement on this basis, 80% or $5,504 payable to the administrator and 20% or $1,376 payable to his attorney. A copy of this stipulation was attached to the administrator's petition for instructions. While the probate court ordered the administrator to settle the federal suit upon receipt of the $6,880, that amount was specifically noted in the preliminary recital of the order as payable according to the terms of the stipulation attached to the petition. Thus it appears that the probate court, with full knowledge of the provisions of the stipulation effecting the apportionment of the $6,880 so as to allow the 20% attorney's fees or $1,376, approved the settlement on that basis. There consequently remained but $5,504 that was payable di-

rectly to the administrator under the settlement and for which he was accountable to the estate. The federal court approved the compromise of the federal suit on the basis of (1) the stipulation, which the probate court had authorized the administrator to sign, and (2) the probate court's order recognizing its terms. Accordingly, the United States Attorney caused the two checks to be made as authorized—one for $5,504 payable to the administrator and the other for $1,376 payable to his attorney.

[1] Respondent, with notice of the hearing on the petition for instructions, raised no objection to the proposed terms of settlement of the federal suit. The order instructing the administrator to sign the stipulation and conclude the settlement was appealable. Prob.Code, § 1240. No appeal was taken and that order became final. In re Estate of Lucas, 23 Cal.2d 454, 463, 144 P.2d 340. Then five months later the petition for settlement of the administrator's final account was heard. It was only in the course of these proceedings that any question was raised as to the propriety of the apportionment of the $6,880 settlement.

[2, 3] Respondent contends that the surcharge of $1,376 on the administrator's account was proper because the payment of attorney's fees may not be authorized in proceedings by the administrator for instructions. He argues that "the use of petitions for instructions by executors or administrators, pursuant to Section 588 of the Probate Code, is limited to those matters where no other or different procedure is provided by statute." Policy Memoranda of Los Angeles County Probate Court, 1955, § 209; In re Estate of Thramm, 67 Cal.App.2d 657, 155 P.2d 119. He claims that the correct procedure for obtaining an allowance upon attorney's fees from an estate in probate is found in section 911 of the Probate Code, citing In re Estate of Pailhe, 114 Cal.App.2d 658, 666, 251 P.2d 76; In re Estate of Pardue, 57 Cal.App.2d 918, 922, 135 P.2d 394; and In re Estate of Herbst, 26 Cal.App.2d 249, 251, 79 P.2d 139. Admittedly, there was no proceeding here under that section. But section 911 is only a permissive statute providing that an "*attorney* [for the] * * administrator * * * *may* apply to the court for an allowance upon his fees" and the "court shall make an order requiring the * * * administrator to pay such attorney out of the estate such compensation, *on account of services rendered up to that time* * * *." (Emphasis added.) The cited cases do not hold that a proceeding pursuant to this section is the *exclusive* means by which a court may authorize an allowance for attorney fees. Neither those cases nor the section apply to the situation where the administrator is seeking authority to compromise a wrongful death claim under the Federal Tort Claims Act in accordance with the applicable federal statutes (28 U.S.C.A. §§ 2677–2678), including an appropriate allowance for attorney's fees as part of the terms of that settlement. In this connection, the administrator cites section 514 of the above-cited Policy Memoranda of the Los Angeles Probate Court, stating that the "distribution of * * * damages for wrongful death may be determined by the court on a petition filed pursuant to Section 578a * * * or on petition for instructions pursuant to Section 588 of the Probate Code." In Re Estate of Siberell, 132 Cal. App.2d 332, 282 P.2d 209, the probate court, pursuant to section 578a of the Probate Code, authorized the executrix to compromise a wrongful death claim for a stated amount, with apportionment of the proceeds including the allowance of attorney's fees.

There can be no question as to the jurisdiction of the probate court here to apportion the proceeds of settlement in its order of instructions to the administrator for settlement of the federal suit. It is further clear that the prior order of the probate court had the effect of making the claimed apportionment of the attorney's fees. Admittedly, the order instructing the administrator to settle the federal suit was "inartfully drawn." As the ad-

ministrator concedes, it would have been better form had "the order spelled out" more clearly that the administrator "was to file a dismissal with prejudice when he had received the sum of $5,504.00 and when his attorney had received the sum of $1,376.00 as attorney's fees" in concluding the settlement. But the manner of payment of the total settlement of $6,880, as recited in the order, was unquestionably to be made as "particularly set forth in the stipulation for compromise attached to the petition" for instructions. After the administrator had acted as authorized by the probate court, the order surcharging him in the amount of $1,376 for attorney's fees cannot be sustained, as it is inconsistent with the prior order which had become final. See In re Estate of Lucas, supra, 23 Cal.2d 454, 463–464, 144 P.2d 340.

That portion of the order surcharging the administrator with the sum of $1,376 and ordering him to deposit said amount in the account of the estate is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



160 Cal.App.2d 123

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Manuel DIAZ, Frederico Munoz and Wilber J. Nobriga, Defendants,

Frederico Munoz, Defendant and Appellant.

Cr. 5856.

District Court of Appeal, Second District, Division 1, California.

May 6, 1958.

Rehearing Denied May 26, 1958.

Hearing Denied July 2, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Charles F. Smith, J., for robbery, and he appealed. The District Court of Appeal, White, P. J., held that trial judge had committed no prejudicial error when he refused to make inquiry into results of lie detector test administered to defense witness.

Affirmed.

See also 153 Cal.App.2d 572, 314 P.2d 756.

1. Criminal Law ⇐1159(2, 4)

Weight to be given evidence and credibility of witnesses are questions for sole and exclusive determination by trier of facts, and latter is not required to accept testimony of witness as true though it stands uncontradicted where trier of facts determines that such testimony lacks verity.

2. Criminal Law ⇐351(5)

Testimony that defendant had been seen in company of his codefendant at a gasoline station, and that he had slouched down in automobile in which he was seated while under observation of two of victims of robbery, was properly received in evidence as tending to show consciousness of guilt on defendant's part.

3. Criminal Law ⇐304(1)

Courts are permitted to take judicial notice of customs and everyday happenings of contemporary life.

4. Criminal Law ⇐254

Viewing premises is wholly within discretion of trial court; and, on record presented, in robbery prosecution, trial judge could not be charged with abuse of discretion in declining to view premises where robbery occurred. West's Ann.Pen.Code, § 1119.

5. Criminal Law ⇐260(11)

In robbery prosecution, trial judge committed no prejudicial error when he refused to make inquiry into results of lie detector test administered to defense witness.

6. Criminal Law ⇐260(11)

In robbery prosecution, sufficiency of identification was question of fact for trial judge, and his finding in that regard, being

supported by substantial, though contradicted, evidence, would not be disturbed.

7. Robbery ⇐24(1)

Robbery conviction was sustained by evidence.

8. Criminal Law ⇐918(5)

Trial judge's remarks, as to his reasons for rejecting testimony of two of defendants' witnesses, indicated no such prejudice and bias on his part as would require granting new trial in robbery prosecution.

Frederico Munoz, in pro. per., and Joseph M. Rosen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, the above named defendants were charged in three counts with the crime of robbery. The basis for the three counts involved the presence of three people at the time of the robbery and from each of whom money was taken by force and through fear upon the part of the victims. The three defendants pleaded not guilty, waived trial by jury and were by the court found guilty as charged in the three counts. The court found the crime to be robbery of the first degree. Defendant Munoz' motion for a new trial was denied and he was sentenced to state prison. From the judgment of conviction and the order denying his motion for a new trial, defendant Munoz prosecutes this appeal.

The following is a fair statement of the factual background surrounding this prosecution. On April 24, 1956, Carl Smith, his wife Helen Smith, and Carl's brother, Clifford Smith, were residing together in a house at Harbor City, in Los Angeles County. Mrs. Smith had retired shortly after 9:00 p. m., and Carl and Clifford Smith were watching television in the living room of their home. In addition to the light emanating from the television screen, the living room was illuminated by a lamp located atop the television cabinet and containing a 100-watt bulb.

At approximately 9:35 or 9:40 p. m. the front door burst open and two men came in, each with a gun in his hand. They wore dark glasses and one of them had a band-aid on his face, but they were not masked. They closed the door, approached Carl and Clifford Smith, informed them that this was a holdup, and ordered them to get on the floor. When Carl Smith did not comply immediately, one of the men drew a knife, poked it at him, and kicked him in the shins. Carl thereupon joined his brother on the floor.

One of the intruders quickly pulled down the window shades in the living room. The hall light was turned on, and the other man ran into Mrs. Smith's bedroom, ordered her to remain quiet, then returned to the living room. The brothers were ordered to produce their billfolds, but only Clifford did so, Carl stating that he did not have his with him. Clifford's billfold, containing approximately fifty-five dollars, was taken by one of the robbers. Carl was then bound and left lying in the bathroom; Clifford was bound and left on the hallway floor. Every light in the house was turned on at this time. Subsequently, adhesive tape was placed over the eyes of the two brothers, and thereafter Clifford could see nothing. Carl, however, was still able to see out of one eye.

The same man who had previously entered Mrs. Smith's bedroom returned and bound her. Thereafter, she was able to see very little, but could hear "almost everything".

Later, Carl and Clifford Smith each heard the front door close again, and shortly thereafter they heard the voice of some third person in addition to the voices of the two strangers who were already in the house. The two brothers thereafter heard the sound of drawers and cabinets being opened and the contents dumped out, and they also heard the three voices conversing in Spanish. At that point Carl

Smith, who was able to see despite the tape which had been placed about his eyes, noticed, for the first time that evening, Wilber Nobriga, a person who had formerly worked for Mr. Smith and who had been in the latter's home on an errand on a prior occasion. Nobriga twice passed the door to the bathroom where Carl Smith was lying, and Mr. Smith was positive as to his identity.

The intruders remained in the Smith household until about 11:45 p. m. Shortly before they left, Mrs. Smith heard a car, which had apparently been parked up the street, approach the front of the house. She then heard the car door slam and heard the vehicle drive away.

Mrs. Smith was the first to get free of her bonds; she phoned the police. As soon as the police arrived, the Smiths related the events of the evening to them, and Carl Smith informed them that Wilber Nobriga was one of the men involved.

Defendant Munoz (appellant) testifying as a witness in his own behalf denied that he was a participant in the robbery here in question, but was unable to recall where he was on the evening of the robbery. In answer to a question, "I want to ask you what you were doing on April 4th of this year at about 9:30 that night?" he replied, "If I could only remember, I wouldn't be here." He did testify that on that date, "I must have been in San Pedro". That he was then living there with his mother, brothers and sisters, and was "going to the barber college".

Mike Diaz, a defense witness, testified that he was acquainted with defendant Munoz. That he, Diaz, and two other men, none of whom were the defendants herein, committed the robbery with which we are here concerned. When asked, "Who were the persons that entered that home with you?" the witness replied, "I am not able to mention any names as far as these persons are concerned." When pressed for a reason why he was "not able to mention any names", the witness replied, "Well, I would say that my life wouldn't be worth a nickel". The witness Diaz was cross-examined by the deputy district attorney and interrogated at great length by the trial judge, the latter of whom subsequently stated, "After all, the manner in which he (the witness) suggests the job was pulled and the reason for the late arrival for one (of the robbers) is exactly identical with the People's theory in this case". During the course of the interrogation of the witness Diaz by the court, it was brought out that the former and the three defendants here involved were together in the county jail, that he first mentioned his complicity in the aforesaid robbery about a month and a half prior to the trial. The witness Diaz testified in detail as to the kind and location of furniture, television set, etc., in the house of the victims which accorded with testimony given by them. At the conclusion of his examination of the witness, the trial judge stated, "I might say as a preliminary, that I am satisfied that this man is either the world's most consummate liar or else he was present in this house at the time this crime was committed. * * * I might observe for the benefit of Mr. Major (counsel for defendant Munoz) in particular, that if we consider the motives that quite possibly activate this man in connection with his present confession coupled with his announced reasons for refusing to name the other participants in the crime, we arrive at the conclusion which reacts unfavorably to the present defendants because despite the fact that there are a lot of television programs wherein real rough and tough gangsters are out killing people who inform on them, I don't think that we can classify Mike Diaz as a gangster. I think he is just a cheap hoodlum, if you want my opinion of it, and this asserted statement that somebody is going to kill him, that comes right from television programs so far as I am concerned."

Victor Verdugo, as a defense witness, testified that he was identified and "picked out" in a police "line-up" by a man and a woman as one of the robbers present at the Smith home. The record reveals that a comparison of the features of the witness and those of defendant Munoz indicates that

the witness had a "thin face" as contrasted with the "wide face" of defendant Munoz.

[1] In his opening brief which was filed by appellant in *pro. per.*, it is first contended that the testimony of Mike Diaz completely "exonerated appellant". This is quite true if the testimony of Diaz is believed, not by the appellate tribunal, but by the duly constituted arbiter of the facts. Under our law, the weight to be given evidence, and the credibility of a witness are questions for sole and exclusive determination by the trier of facts. And, the latter is not required to accept the testimony of a witness as true though it stands uncontradicted where the trier of facts determines that such testimony lacks verity (People v. Woods, 75 Cal.App. 2d 246, 248, 170 P.2d 477; People v. Silva, 119 Cal.App.2d 421, 426, 259 P.2d 74). In the instant case, the judge who tried the case stated unequivocally that he disbelieved the testimony of Mike Diaz and gave his reasons therefor, when in his summation of the evidence he said, in part: "* * * as to Mike Diaz's story, the evidence is uncontradicted that prior to the time when these three defendants were arrested, he was offered a chance to get a free ride, let's call it, with reference to any other crimes of which he might be guilty if he would confess to them and so forth. He confessed to two different crimes which had nothing to do with the particular crime with which he was charged at that time. He had a chance for a free ride with the assurance that any information he gave would be held in confidence and so forth. At that time he did not see fit to unburden himself of this confession with reference to his alleged participation in the Smith robbery.

"After the arrest of his brother and his two friends, he comes forth with this tale. * * * In any event, considering the testimony with reference to the things he observed in the house, it seems clear to the Court that the story which Mike Diaz tells is fashioned out of whole cloth with this possible exception, that he may have participated in this robbery along with the three defendants in Court. That I do not know; but in any event, things which should have been plainly obvious to a person who ransacks a house for two and a half hours seems to have missed Mike entirely." We cannot say that the cogent reasons advanced by the trial judge for his disbelief of the testimony of Mike Diaz are lacking in either logic or reasonableness.

Appellant's next contention in his opening brief that no corpus delicti wsa proven as to the alleged robbery of Carl Smith is without merit. Appellant's argument that there was no proof that anything was taken from Mr. Smith is refuted by the record wherein appears the following:

"Q. Without your going through this item by item * * * could you tell me what your immediate, that is, yours and Mrs. Smith's, *overall* loss was, if it was in dollars and cents. A. Yes. About six hundred. A little bit over six hundred.

* * * * * *

"Q. Was any of this property *taken from you* with your permission * * *? A. No. None of it at all." (Emphasis added.)

Equally untenable is appellant's next claim that the deputy district attorney was guilty of prejudicial misconduct, by asking "leading and suggestive questions". In support of his claim appellant refers us to the questions above set forth, and which were asked during the examination of Carl Smith, one of the victims. No objection was made to the questions at the trial and indeed they cannot be characterized as either leading or suggestive of the desired answer. The case of People v. Baker, 147 Cal.App.2d 319, 305 P.2d 97, and People v. Bentley, 131 Cal.App.2d 687, 690, 281 P. 2d 1, relied upon by appellant, do not aid him. Primarily, they have to do with inadmissible statements volunteered by a witness.

[2] Appellant next predicates prejudicial error on his claim that the trial judge considered the fact that the former was seen at a gasoline station in the company of his co-defendants, as an "implied admission" of guilt. Nowhere in the record do we find that the trial judge used the fore-

going phrase as referring to the question of appellant's identification. Testimony that appellant was seen in the company of his co-defendant at a gasoline station, and that he slouched down in the automobile in which he was seated when he was under observation of two of the victims of the robbery was properly received in evidence as tending to show a consciousness of guilt on appellant's part (People v. Dabb, 32 Cal.2d 491, 500, 501, 197 P.2d 1). Moreover, in view of the direct and positive evidence indicating appellant's complicity in the crime, it was not necessary for the trial judge to resort to a theory of "implied admissions" to warrant a reasonable conclusion of guilt.

[3] In his opening brief appellant next contends that the trial judge erred in taking "judicial notice" of "the type of living quarters that people of Mexican nationality have and would be familiar with". The use of the term "judicial notice" occurred during the trial while the judge was narrating his reasons for disbelieving the aforesaid testimony of Mike Diaz, and wherein the former stated: "The bedroom (in the Smith residence) has three painted walls and one papered wall. That's something thats so unusual, I mean the Court would have to take *judicial notice* of the fact that few Mexican families go in for that type of decoration. That is a very unusual decoration and I am sure that he would have noticed it had he been there." (Emphasis added.) While courts are permitted to take judicial notice of the customs and everyday happenings of contemporary life, it is manifest that use of the criticized terms, in the instant case, in no way prejudiced appellant.

[4] The next complaint of appellant is that the trial judge abused his discretion in refusing the former's "seasonable and reasonable request" that the court view the interior of the Smith home. While Section 1119 of the Penal Code authorizes the trier of facts to view the premises in which the offense was allegedly committed, it makes such action contingent upon "the opinion of the court", that such view is proper. The authorities are uniform in holding that such a viewing of the premises is wholly within the discretion of the trial court (People v. Hood, 140 Cal.App.2d 585, 588, 589, 295 P.2d 525; People v. Kepford, 10 Cal.App.2d 128, 130, 51 P.2d 429; People v. Howard, 28 Cal.App. 180, 181, 151 P. 754). In the case at bar, a detailed and comprehensive word-picture of the Smith home and its furnishings was furnished by the testimony of Mrs. Smith and other witnesses. Under the facts and circumstances present in the case at bar, the trial judge did not abuse his discretion when he declined to view the premises.

[5] The trial judge committed no prejudicial error when he refused to make inquiry into the results of a lie detector test administered to Victor Verdugo, a witness for the defense. In determining the verity of the witness Verdugo, the trial judge was not required to probe into the lie detector test because the reliability of such a test, as a method of proof, has not been established and is quite doubtful (People v. Wochnick, 98 Cal.App.2d 124, 128, 219 P.2d 70). Although not required so to do, the trial judge gave his reasons for disbelieving the testimony of the witness Verdugo, viz., that the latter was a convicted felon, and that he was not satisfied with Verdugo's testimony concerning the lie detector test: "It is just inconceivable to me that a man should be subjected to a lie detector test to determine whether or not he is involved in a given crime without questions being asked covering the specific details of the crime all the way through. That is the only conceivable way that I can see that they could give a lie detector test. I suspect that that was done and Mr. Verdugo's statement that he was not asked about any of the swack and so forth is false."

In his closing brief filed by court-appointed counsel, appellant elaborates upon the contention made in the opening brief, that the evidence is insufficient to support the judgment of conviction, and that the trial judge was guilty of prejudice and bias.

As to the insufficiency of the evidence, appellant concedes that it is a rule of law, as announced in People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778, 779, that "* * * where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof * * *, the court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (Citing cases.)" However, in the case now engaging our attention, appellant asserts, that as a matter of law, the evidence is insufficient to support a reasonable conclusion that he was one of those who committed the robbery in the Smith household. To support this claim, appellant challenges the substantiality of the testimony identifying him as one of the participants in the robbery. Conceding that he was positively identified appellant insists that the victims had little opportunity to make an identification. That certain inconsistencies appear in the testimony of Clifford Smith as given at the trial and what he stated at the preliminary examination. That Carl L. Smith, another of the victims, identified, in a police line-up, one Victor Verdugo as being one of the robbers. We are directed to the testimony at the trial describing the difference in facial features of Victor Verdugo and appellant. The latter further argues that it is a fair inference from the evidence that Mrs. Helen Smith was with her husband when the erroneous identification of Verdugo was made at the police line-up.

[6, 7] While the alleged variances or inconsistencies in the testimony of Clifford Smith and the claimed weakness of the testimony identifying appellant undoubtedly afforded opportunity for a persuasive argument to the duly constituted arbiter of the facts against the reliability of such testimony, we are unable to say, as a matter of law, that the evidence in its entirety was not sufficient to support the conviction of appellant. The question of whether his identification was sufficient was one of fact for the trial judge and where, as here, his finding was supported by substantial, though contradicted evidence, it will not be disturbed (People v. Newman, 102 Cal.App.2d 302, 305, 227 P.2d 470). As to the sufficiency of the identification of an accused in a criminal case, the rule is thus stated in People v. Farrington, 213 Cal. 459, 463, 464, 2 P.2d 814, 815, "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support

the conviction. People v. Erno, 195 Cal. 272, 283, 232 P. 710." On the record presented to us, we cannot say that this is such a case.

[8] Finally, appellant contends that the trial judge was prejudiced and biased against the defendants at the trial, by reason of which they were denied that fair and impartial trial guaranteed them by law. In this regard, appellant directs our attention to the remarks of the court when the motion for a new trial was being heard, and the court, referring to the testimony of the witness Mike Diaz, said: "I might say that there is one real good way that you gentlemen could certainly get a new trial and this is all you have to do is get Mike to name the accomplices; that's all. It's a real simple thing and I am sure that these gangbuster TV shows and so forth are real nice and these big tough Chicago and New York gangters are rough boys, but Mike convinced me of nothing, that he is involved in any gangs of that type. So if I were you, I would just get brother Mike to just say it was Joe Blow and somebody else and we will stop everything and do a little investigating." And again, in the same proceeding on motion for a new trial, when, with reference to the testimony of the witness Victor Verdugo, the trial judge remarked: "Is the lad about whom you are speaking the lily white boy who was cleared on a lie detector test and he knew nothing about anything, is that the man you are talking about?" We perceive no prejudicial misconduct in the foregoing. The trial judge, on hearing of the motion for a new trial, in answer to argument by counsel for the defendants, was merely stating his reasons for rejecting the testimony of two witnesses who testified for the defendants.

For the foregoing reasons, the judgment and the order denying defendant Munoz' motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

160 Cal.App.2d 234

Harold J. THOMAS, on behalf of himself and all other stockholders of Summers Gyroscope Company, Plaintiff and Appellant,

v.

SUMMERS GYROSCOPE COMPANY, Thomas O. Summers, Jr., Odell S. McConnell, Merritt Dustin, Frank G. Kranz, and Dorothy Lindt, also known as Dorothy Barton, Defendants,

Summers Gyroscope Company, Thomas O. Summers, Jr., Odell S. McConnell, Merritt Dustin, and Dorothy Lindt, also known as Dorothy Barton, Respondents.

Civ. 22361.

District Court of Appeal, Second District, Division 3, California.

May 8, 1958.

Stockholder's derivative action for benefit of corporation and on behalf of himself and other stockholders. The defendants answered and moved that stockholder be required to furnish security. The Superior Court of Los Angeles County, Arthur Crumm, J., entered order requiring stockholder to furnish security in the amount of $31,000 and upon failure to furnish security, action was dismissed and stockholder appealed from judgment of dismissal. The District Court of Appeal, Parker Wood, J., held that evidence in hearing on motion to require the furnishing of security supported finding of court that there was no reasonable probability that prosecution of any of the causes of action would benefit defendant corporation or its security holders.

Affirmed.

1. Corporations ⇐214

In stockholder's derivative action for the benefit of defendant corporation, himself and other stockholders based on alleged fraudulent conduct in increasing compensation to person who had assigned all his patents to corporation in consideration of corporate stock and other payments, evidence in hearing on motion to require stockholder

to post security amply supported ruling of court that there was no probability that prosecution of any of the causes of action would benefit defendant corporation or its security holders. West's Ann.Corp.Code, § 834.

2. Corporations ⇐214

In stockholder's derivative action for benefit of corporation, himself, and other security holders based on alleged fraudulent conduct in increasing compensation to person who had assigned all his patents to corporation in consideration of stock and other payments, record disclosing the complexity of trial and necessary preparation therefor showed that trial court did not err in determining amount of security to be furnished by stockholder to be $31,000. West's Ann. Corp.Code, § 834.

Clark, Trau & Langworthy, Howard M. Langworthy, Van Nuys, and William Douglas Sellers, Pasadena, for appellant.

Frank P. Doherty, Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiff, as an owner of stock in the defendant Summers Gyroscope Company (a corporation), commenced this stockholder's derivative action for the benefit of the corporation, and on behalf of himself and the other stockholders. The defendants answered the complaint. The defendants (except defendant Kranz) made a motion that the plaintiff be required to furnish security as provided in section 834 of the Corporations Code. Affidavits in support of, and in opposition to, the motion were filed. Plaintiff requested permission to present oral evidence in addition to the affidavits. Oral evidence was presented by plaintiff and defendants. The court adjudged, among other things, that there is no reasonable probability that the prosecution of any of the causes of action will benefit the defendant corporation or its security holders. The court ordered that plaintiff furnish security in the aggregate amount of $31,000 within a specified time. The plaintiff failed to furnish the security within that time and, upon motion of defendants, the action was dismissed. Plaintiff appeals from the judgment of dismissal.

Appellant contends that there was no substantial evidence to support the trial court's ruling with respect to "Demands 2 and 14, Counts 1 and 6." There were five causes of action in the original complaint, filed December 2, 1955. In June, 1956, the complaint was amended to include a sixth cause of action. No contention is made on appeal as to causes of action 2, 3, 4, and 5.

Section 834 of the Corporations Code provides, in part: "* * * (b) In any such action [stockholder's derivative action] * * * the corporation or such defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security as hereinafter provided. Such motion may be based upon one or more of the following grounds: (1) That there is no reasonable probability that the prosecution of the cause of action * * will benefit the corporation or its security holders; * * * At the hearing upon such motion, the court shall consider such evidence, written or oral, by witnesses or affidavit * * *. If the court determines * * * that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security to be furnished by the plaintiff * * *. If the court * * * makes a determination that security shall be furnished * * * the action shall be dismissed * * * unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court."

Prior to the incorporation of Summers Gyroscope Company in January, 1946, Thomas O. Summers, Jr., who was an inventor of aircraft, gyroscopic, and navigational instruments, was conducting a manufacturing business, owned by him, known as Summers Instrument Company. He was the owner of patents pertaining to such instruments. He had about 14 employees in

the business, and he had completed government contracts amounting to more than $100,000 during "the present year" preceding the formation of the corporation. At the time the present action was commenced there were about 700 employees, and the corporation had done a gross business of approximately $23,000,000 during the 10 years of its existence. The 10 original stockholders of the corporation were Mr. Summers and persons (including plaintiff Mr. Thomas) who were associated in some manner with him in the Summers Instrument Company. The assets of the Summers Instrument Company were sold by Mr. Summers to the corporation, Summers Gyroscope Company; and Mr. Summers granted to the corporation the exclusive license to use all his inventions for 20 years. Mr. Summers received 60,000 shares of stock of the corporation.

The first cause of action included allegations, as follows: that as consideration for the 60,000 shares of stock Mr. Summers entered into a license agreement with the corporation on April 17, 1946, whereby he granted to the corporation for 20 years the exclusive license on all his inventions, then or thereafter, owned by him, and the corporation agreed to pay him a license fee (royalty) of 1 per cent "upon all products made embodying license *inventions*"; that on May 3, 1946, the directors, for the purpose of increasing the amount of money taken by Mr. Summers from the corporation, above his salary of $500 a month and the royalty of 1 per cent under the license agreement of April 17, 1946 (1 per cent on products made by use of inventions), proposed that Mr. Summers be given additional consideration, and it was agreed that, in consideration of a waiver by Mr. Summers of the royalty of 1 per cent under the license agreement, the corporation should pay him, in addition to his regular salary, 1 per cent of the *gross amount of money received* from the corporation's business transactions; that prior to February 2, 1953, for the purpose of further increasing the amount of money received by Mr. Summers from the corporation, and at a time when he was receiving a salary of $15,000 or $25,000 a year, the directors and Mr. Summers entered into the execution of a plan for the purpose of giving him a greater share of the corporation income and to deprive the shareholders of their rights therein; the plan included the cancellation of the exclusive license agreement of April 17, 1946, under which Summers was to receive 1 per cent royalty on products made by use of inventions (which royalty was waived during the time 1 per cent of the *gross sales* was being paid), and the plan included the substitution of a new agreement by which Summers would receive a royalty of 3 per cent, instead of 1 per cent, on the gross sales of the corporation's products; a further purpose of the plan was to deprive the corporation of its ownership rights in the patents and to return the ownership of the patents to Summers without any consideration from him; the corporation and Summers entered into an agreement on February 2, 1953, whereby they cancelled the license agreement of April 17, 1946; pursuant to said plan and conspiracy the corporation and Summers entered into another agreement on February 2, 1953, entitled "Patent Agreement for Executive Officers," for the purpose of paying Summers 3 per cent of the gross sales, instead of 1 per cent royalty on the products made by use of the patents; in further execution of the plan the corporation and Summers, on August 3, 1953, entered into an agreement whereby Summers purported to sell to the corporation two patents in which the corporation already had exclusive rights under the agreement of April 17, 1946; after the execution of the agreement of August 3, 1953, Summers received a royalty of 3 per cent in addition to the 1 per cent of the gross amount received by the corporation; the individual defendants in violation of their fiduciary obligations made use of their power of management for the personal gain of Summers to the injury of the shareholders; the purported agreements of February 2 and August 3, 1953, should be

rescinded and the license agreement of April 17, 1946, should be reactivated; that the money made by the corporation has been diverted so that the corporation has not at any time made a dividend payment, while during that time Summers has received grossly excessive payments, including salary, a commission of 1 per cent of the gross sales of the corporation, and (since August 3, 1953) a royalty of 3 per cent of the selling price of the corporation's products, which payments to Summers have totaled in excess of $175,000 a year since 1953; the facts alleged were unknown to plaintiff until they were discovered by his attorney in preparing for this action.

The sixth cause of action (amendment to complaint) included allegations, as follows: on February 12, 1946, Summers presented to the directors an inventory of the assets of the Summers Instrument Company, and he then offered to assign to the corporation all of said assets, subject to liabilities, together with certain patents and applications for patents, and he represented that the assets and inventory, less the liabilities, had a net value in excess of $60,000; the board accepted the offer, and no determination was made by the board of the value of the assets; on April 6, 1946, the corporation filed an application with the Corporation Commissioner for permission to issue and sell shares of stock; in the application it was represented that the corporation would acquire from Summers, doing business as Summers Instrument Company, "[all of the assets of the Summers Instrument Company, of which Thomas O. Summers, Jr., is sole owner], including certain Letters Patent, designs, engineering drawings, blueprints, dies, lathes, milling machines, etc.," and said application included a balance sheet; one of the items of the balance sheet was entitled "Inventories" and it comprised two items, namely, raw materials, and work in process; the value of those items, according to the sheet, was $66,654.27; the actual cost of those items was $5,995.34 and not $66,654.27, a difference of $60,659.03; said amount of $66,654.27 was not the fair market value of the inventory but was a figment of the imagination of Summers; the directors failed to check the alleged valuation by use of an independent appraiser or otherwise, and instead the directors adopted a resolution to purchase the assets from Summers; as a result of the action of the directors and their failure to obtain an appraisal by expert appraisers, the corporation did not receive adequate consideration for the shares of stock issued to Summers; said acts of defendants were in violation of their fiduciary obligations as directors, and those acts were for the personal gain of Summers to deprive the shareholders of their rights; said facts were unknown to plaintiff until they were discovered by his attorney in preparing for this action; that promptly upon discovering the facts plaintiff made demand upon the corporation, under section 834 of the Corporations Code, by sending the demand to Summers, as president; defendants refused to comply with the demand; about August 1, 1955, the corporation declared a stock dividend of 150 per cent; as a result of that dividend, Summers received 90,000 shares of the corporation stock, based upon his then title to 60,000 shares wrongfully obtained as above alleged; since Summers was not entitled to said 60,000 shares, because of his failure to provide consideration therefor, he was not entitled to any benefit therefrom including the 150 per cent stock dividend; Summers should be required to return the 90,000 shares and the 60,000 shares to the corporation.

Appellant argues, with respect to the first cause of action, that since the license agreement of April 17, 1946, was cancelled on February 2, 1953, Summers was not in a position thereafter to waive the royalty payment of 1 per cent provided for in that agreement, and since Summers was entitled to 1 per cent of the gross sales only during the time he waived the royalty of 1 per cent, he was not entitled to 1 per cent of the gross sales after February 2, 1953, when the royalty agreement was cancelled. They argue further that if Summers in-

sisted on taking 1 per cent of the gross sales, he was not entitled to the 3 per cent of the gross sales which was paid after August 3, 1953; that if the corporation bought the patents on August 3 it should not pay a license fee thereafter for the use of its own patents or pay a fee in lieu of a license fee.

Appellant argues, with respect to the sixth cause of action, that there was no acceptable evidence that the inventory of the Summers Instrument Company had a value of $66,654.27; that since Summers had paid less than $6,000 ($5,995.24) for the things (war surplus material) listed in the inventory, and since no impartial appraisal was made of those things, the inventory value was inflated; that "if the inflated value of the inventory be reduced from $66,654.27 to $5,995.24 that the net worth of the Summers Instrument Company is reduced from $60,000.00 to a negative $659.03 and Mr. Summers is seen to have turned in no consideration for the 60,000 shares of stock issued to him on the basis of a fictitious $60,000.00 net worth."

Defendants filed nine affidavits in support of the motion to require plaintiff to furnish security. Five of the persons who made affidavits, and five persons who did not make affidavits, were called as witnesses by the plaintiff. Some of the affidavits are long and include many details. The oral testimony, including the discussions made in connection therewith, comprise 810 pages of reporter's transcript.

There was evidence on behalf of defendants that Summers waived, and did not receive, 1 per cent royalty on invention products while he was being paid 1 per cent on gross sales.

With respect to the cancellation of the license agreement (which provided for 1 per cent royalty on inventions), Mr. Odell McConnell, who was one of the organizers of the corporation and had been a director and the general counsel for many years (until April, 1956), stated in his affidavit and also testified, in part, as follows: the provision in the license agreement that the corporation might assign the right to use the inventions without the consent of Summers was inadvertently placed therein; it was intended that the corporation should not have the right to assign such rights without the consent of Summers; there was never any plan or suggestion that the corporation would assign or sublet any of the patents without the consent of Summers; in 1946 when the corporation was beginning and there was no assurance of success, it would have been unfair to Summers for the corporation to have the right to assign or sublet the right to use the inventions without the consent of Summers; after the corporation had expanded rapidly and there were many employees, he (witness) was of the opinion that the license agreement should be modified; that in his opinion the corporation should have more control over the patents and it was bad public relations and an unwise policy for the corporation to give Summers the right to have assigned to him all the inventions of the employees of the corporation; under the license agreement, it was more difficult to obtain financing; that it was against the interest of the business, if in case of bankruptcy, the patents should go to Summers; these were the cardinal reasons the directors cancelled the license agreement and entered into the Patent Agreement for Executive Officers (under which Summers received 3 per cent of the amount of sales).

With respect to the cancellation of the license agreement, Mr. Geague, a patent attorney, stated in his affidavit and also testified that it was his advice to the corporation that the license agreement be cancelled and that a substitute plan be entered into; he objected to the license agreement because it provided in effect that all inventions by employees and others connected with the corporation should be assigned to Summers; such provision would tend to destroy the initiative and incentive of the employees to invent and improve inventions; he (witness) submitted to the corporation a proposed agreement which he thought should be substituted in place of

the license agreement; the final draft of the agreement (dated February 2, 1953) is in two parts—one of which is the agreement to cancel the license agreement, and the other is the Patent Agreement for Executive Officers; those were the agreements entered into as of the date of February 2, 1953; the advantages for the corporation by reason of the Patent Agreement for Executive Officers are that (1) all inventions of the employees became the property of the corporation, (2) the corporation was given the option to purchase the inventions of employees, and (3) upon the exercise of the option, the corporation became the owner and was not a licensee; he (witness) drafted the agreement of August 3, 1953, whereby Summers assigned two patents to the corporation, but he (witness) did not determine the 3 per cent of the sales price, as set forth in the agreement; the 3 per cent matter was determined by Mr. Stotsenberg, a certified public accountant.

One of the patents which was assigned to the corporation by Summers, under the agreement of August 3, was sold to the Garrett Corporation for $350,000.

Mr. Jawetz, a partner in the stockbroker firm of Daniel Reeves & Company, stated in his affidavit that in his opinion 3 per cent of the gross sales price of an item covered by a patent is a reasonable price to be paid for a patent.

Mr. Summers, president of the corporation, testified that when he transferred the Summers Instrument Company as "a package deal" to the Summers Gyroscope Company, he agreed to give the corporation a license to use his patents, but he insisted on having a provision in the agreement that no assignment of the patent rights should be assigned without his consent; he insisted on that provision because he had no assurance that the company would not go bankrupt and he felt that if it went bankrupt he should have his patents; such a provision was beneficial to the corporation at the beginning of its operations when all the inventions had been made by him, but later when there were several hundred employees, and other persons started to make inventions, it was not a good provision for the corporation; the other employees did not like the idea of their inventions being assigned to the president of the corporation, and brokerage firms did not want to sell the corporation's stock if the corporation had a license agreement whereby in the event of reorganization, the patents would revert to Summers; the sale of the patent to Garrett Corporation for $350,000 would not have been possible under the old license agreement because he would not have consented to the sale; he was not enthusiastic about the sale to Garrett, but the board of directors overruled him and virtually forced him to sell his patents.

With respect to the consideration for the 60,000 shares issued to Summers it is to be noted (1) that plaintiff alleged in the first cause of action that the consideration was the license agreement of April 17, 1946, pertaining to all of Summers' inventions and the payment of 1 per cent of the sale of products which were made by use of the inventions; and (2) that the plaintiff alleged in the sixth cause of action that the consideration consisted of an inventory of assets of the Summers Instrument Company (war surplus material), less liabilities, together with patents.

In the application for a permit to issue certificates of stock, it was stated that the corporation would acquire from Summers Instrument Company all the assets, including letters patent, designs, engineering drawings, blueprints, patterns, dies, lathes, milling machines, machine tools, inventory of stock, contracts, orders, and all business now conducted by Summers including good will. It was also stated therein that the corporation would obtain from Summers an exclusive license agreement for the manufacture and sale of all products containing any and all of the inventions.

The permit for issuance of certificates of stock stated that the corporation was authorized to sell and issue to Summers not

to exceed 60,000 shares as consideration for the assignment and tranfer of the business and assets described in the application for a permit.

Mr. McConnell stated in his affidavit and also testified that in 1945 and 1946 he did not have expert detailed information respecting the exact character of the inventory of the war surplus material, but from his knowledge of the business and activities of the Summers Instrument Company and of Summers, he (witness) had sufficient knowledge to cause him to believe that the material was of a very substantial monetary value; he paid $10,000 cash for 10,000 shares of the stock; the original board of directors consisted of Thomas O. Summers, Jr., president; Odell S. McConnell, vice-president; and Dorothy Lindt (now Dorothy Barton), secretary and treasurer; at the first meeting of the board, a resolution was adopted authorizing the application for a permit to sell and issue shares of its common stock of the par value of $1 per share as follows: "To Thomas O. Summers, Jr., 60,000 shares in consideration of the sale and assignment by Summers to the corporation of all the business and assets subject to the liabilities of the Summers Instrument Company; * * * To Harold J. Thomas [plaintiff herein], 6,000 shares in consideration of payment to the corporation of $6,000 cash * * *"; at the time of entering into the agreement with Summers, he (witness) was of the opinion, and he is now of the opinion, that the assets of the Summers Instrument Company were of the fair value of a sum substantially in excess of $60,000 as of that date; that from his discussions with Summers and other persons connected with the instrument company, he considered that Summers was of the belief and conviction that the value of the assets of the instrument company was greatly in excess of $60,000; the transaction between Summers and the corporation was a single transaction, and it was not made up of separate units; the transaction was that Summers would transfer to the corporation, subject to liabilities, the assets of the instrument company, its going business, its contracts, and would enter into the license agreement with the corporation; that plaintiff (Mr. Thomas) knew for 10 years that the 60,000 shares of stock were issued to Summers for such consideration, and plaintiff knew that substantially all the production of the corporation was based solely on the inventions and patents of Summers; plaintiff was employed on a fee basis by the instrument company prior to 1946, and he continued as chief draftsman of the corporation until the severance of his connection with the corporation in 1953.

Manny Cohen stated in his affidavit that he sold the war surplus material to the Summers Instrument Company in 1945 and in January, 1946; the material included gyro motors, magnet assemblies, rotor assemblies, commutator lamination assemblies, and the like; when he purchased that material from the Schwein Engineering Company, he received from that company a typed inventory showing the part numbers and their costs which was in excess of $300,000; at the end of the war in 1945 the government began terminating many production contracts, and at that time there was a lull in the general trading in surplus material because no one knew how much surplus material would be worth; after he had sold the material to the instrument company he had many inquiries for such material but he had no further supply of it.

Mr. Clark stated in his affidavit and also testified that he was employed by the instrument company prior to the incorporation; he has been employed by the corporation since February, 1946, except for two short periods of time; at the time the instrument company acquired the surplus material he helped inspect, unload, and count the material; he prepared a schedule setting forth the material acquired, and in that schedule he set forth the value of each unit as it appeared in the inventory of the Schwein Engineering Company; the schedule indicates that the total material transferred to the corporation had a value of $228,083.96; also shown on the schedule was a list of materials actually used by the corporation in the production by the corporation, and as indi-

cated in the schedule the value of such material was $160,154.88; a balancing machine, which was included in the schedule, would cost the corporation approximately $7,000 in the open market; as a result of the corporation having this material, it was not necessary to go to the expense of tooling or designing: among his duties as plant manager for the corporation, he was responsible for going into the open market and purchasing material similar to the surplus material; from his experience in such purchases, he is of the opinion that the market price per unit as set forth in the schedule represents the reasonable market value of said material.

Mr. McConnell testified that war surplus material is sometimes sold for a fraction of its true value.

Mr. Summers testified that he sold all the assets of the instrument company to the corporation, which included all the contracts with the government, all drawings, designs, tooling, machinery, the right to use all his inventions, and the good will; he gave the corporation "a complete package" for 60,000 shares of the corporation; the only appraisals that were made were made by the various persons who were purchasing stock, and they looked at the inventory, equipment, and products, and they satisfied themselves; plaintiff, who was one of them and was Summers' best friend then, helped in judging the value; plaintiff had worked for Summers as an engineer at the American Telephone Company; he (witness) paid approximately $6,000 for the surplus material.

Mr. Jawetz, the stockbroker above referred to, testified that his investigation showed that the corporation reinvested in the business practically all of its earnings and profits; a company of that type is known as a "growth company"; such a company is one that continually reinvests its earnings in order to expand and develop new products; the interest of Daniel Reeves & Company in the corporation was that it was a growth company; in effecting a distribution of the stock Daniel Reeves & Company advised its customers not to expect a dividend for at least five years.

The corporation declared and paid a stock dividend of 150 per cent in August, 1955, and plaintiff received such dividend. After the dividend was paid, plaintiff was the owner of 15,000 shares of stock.

There was evidence that the selling price of the stock ranged from $2 to $3 a share in April, May, June, and July, 1956.

There was evidence that the compensation paid to Summers during the years 1949, 1950, 1951 and 1952, was as follows: $12,276.06; $21,958.79; $52,214.40; and $49,411.78. In 1953 and 1954, his compensation was as follows: $93,923.34 and $113,390.33.

The amount of gross sales in 1956 was $5,740,945.

Practically all the products sold by the corporation were made by using the inventions of Mr. Summers.

[1] There was substantial evidence that the board of directors was faithful to the corporation, acted in the best interests of the corporation, and used reasonable business judgment in the exercise of its discretionary powers. There was no evidence of any fraudulent conduct on the part of the board. The evidence amply supports the ruling of the trial court that there is no reasonable probability that the prosecution of any of the causes of action will benefit the defendant corporation or its security holders. Some rules which are applicable here, regarding the rights of a minority stockholder in a derivative action and regarding the control of the corporate affairs by the board of directors, are stated in Findley v. Garrett, 109 Cal.App.2d 166, 174–178, 240 P.2d 421.

[2] Appellant contends further that the amount of security required was unreasonably high. He argues that there was no definite showing as to the time defense counsel had spent or as to the value of the time. The attorney for defendants (except defendant Kranz) stated that he had spent about two months on matters pertaining to the case. Mr. McConnell and Mr. Dustin

stated in affidavits that they believed that $3,000 each was a reasonable charge to be made by their counsel for his services in their defense. The pleadings and affidavits are long. There are many exhibits. In the present preliminary matter, pertaining to security, oral evidence was presented over a period of six days. It is apparent that a trial of the case, involving a corporation that transacted a large volume of business during the past ten years, will require extensive preparation and many days of trial. The trial judge did not err in determining the amount of security to be furnished.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



160 Cal.App.2d 47

Ruth Elizabeth HARMON, Petitioner and Respondent,

v.

Francis L. HARMON, Defendant and Appellant.

Civ. 22130.

District Court of Appeal, Second District, Division 3, California.

May 2, 1958.

Hearing Denied June 25, 1958.

Proceeding on order directing California father to show cause why an order should not be made on basis of petition filed by nonresident mother under provisions of Reciprocal Enforcement of Support of Dependents Act of Virginia for support of parties' child. The Superior Court of Los Angeles County, Elmer D. Doyle, J., ordered that father pay for support of child, and father appealed. The District Court of Appeal, Parker Wood, J., held that section of Uniform Reciprocal Enforcement of Support Act binding obligor, present in California, regardless of presence or residence of obligee, did not deny California father equal protection of law by allowing entry of order for support of nonresident child whose custody was not subject to jurisdiction of California court, even though such section deprived father of right to ask for custody of child and for other relief which would have been available if child had been before California court and denied father relief which would have been available to other fathers who were residents of California.

Affirmed.

1. Evidence ⇐35

In California hearing on order to show cause why order should not be made on basis of petition filed in Virginia under provisions of Reciprocal Enforcement of Support of Dependents Act of Virginia, court could take judicial notice of laws of Virginia. West's Ann.Code Civ.Proc. § 1875, subd. 3; Code Va.1950, § 20-88.12 et seq.

2. Divorce ⇐323
Statutes ⇐47

Where husband, who knew of wife's pending divorce action, did not contest it and several years later wife instituted action under Reciprocal Enforcement of Support of Dependents Act of Virginia to require husband, a California resident, to support parties' child, who resided with wife, and Virginia court issued certificate that wife's petition set forth facts from which it might be determined that father owed duty of support, definition in California Uniform Reciprocal Enforcement of Support Act of duty of support as including any duty imposable by any court order whether incidental to divorce proceedings or otherwise was not so vague or indefinite as to be unconstitutional as applied to facts of case, and a duty was imposable upon husband to support child even though there had never been a prior court order regarding support. West's Ann.Code Civ.Proc. § 1653(6); Code Va.1950, § 20-88.12 et seq.

3. Constitutional Law ⇐243
Parent and Child ⇐3(3)

Section of Uniform Reciprocal Enforcement of Support Act binding obligor, present in California, regardless of presence or residence of obligee, did not deny California father equal protection of law by allowing entry of order for support of nonresident child whose custody was not subject to jurisdiction of California court, even though such section deprived father of right to ask for custody of child and for other relief which would have been available if child had been before California court and denied father relief which would have been available to other fathers who were residents of California. West's Ann.Code Civ. Proc. §§ 1650–1690, 1655.

4. Constitutional Law ⇐205(3), 206(1)
Parent and Child ⇐3(3)

Provisions of Uniform Reciprocal Enforcement of Support Act allowing a nonresident petitioner to bring action in California for support of nonresident child without being subjected to jurisdiction of California courts in matter of counterclaim, cross-complaint or other affirmative relief are not unconstitutional on ground that they deny California defendant the privileges and immunities guaranteed by United States and California constitutions. West's Ann. Code Civ.Proc. § 1690; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

5. Infants ⇐78(1)

Proceeding against California father under Uniform Reciprocal Enforcement of Support Act could be brought by nonresident mother for support of nonresident minor child without appointment of guardian ad litem for child. West's Ann.Code Civ.Proc. § 1675.

6. Parent and Child ⇐3(3)

Where divorce decree was granted in ex parte proceeding when husband was not within jurisdiction of court that granted divorce, but child was residing with wife when decree was granted and had resided with her since that time, wife could bring proceeding under Uniform Reciprocal Enforcement of Support Act for support of child. West's Ann.Code Civ.Proc. § 1675.

7. Parent and Child ⇐3(3)

Mother could bring proceeding under Uniform Reciprocal Enforcement of Support Act for support for minor child against father although there was no showing that father had absconded. West's Ann.Code Civ.Proc. §§ 1650–1690.

8. Parent and Child ⇐3(3)

In proceeding under Uniform Reciprocal Enforcement of Support Act by nonresident mother against California father for support of child, evidence supported finding that father owed duty to support child. West's Ann.Code Civ.Proc. §§ 1650–1690.

9. Parent and Child ⇐3(3)

Father's assertion that he was willing and able to support his minor daughter at his domicile was not sufficient answer to petition for support of child brought by mother under Uniform Reciprocal Enforcement of Support Act, in absence of determination that father was entitled to custody of child. West's Ann.Code Civ.Proc. §§ 1650–1690.

10. Parent and Child ⇐3(3)

In action by mother under Uniform Reciprocal Enforcement of Support Act for support of child, denial of father's motion for visitation privileges with child without prejudice was not an abuse of discretion. West's Ann.Code Civ.Proc. §§ 1650–1690.

11. Parent and Child ⇐3(3)

Petition filed by mother under Reciprocal Enforcement of Support of Dependents Act of Virginia against California father and certificate of Virginia court that petition set forth facts from which it might be determined that father owed duty of support were sufficient to support California proceedings and order for support entered by California court. West's Ann.Code Civ.

Proc. §§ 1650–1690; Code Va.1950 § 20–88.12 et seq.

Weyl, Dunaway & Weyl and John A. Weyl, Hollywood, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

On February 17, 1956, Ruth Elizabeth Harmon, petitioner herein, commenced a proceeding in the Juvenile and Domestic Relations Court, in Fairfax County, Virginia, under the provisions of the Reciprocal Enforcement of Support of Dependents Act of Virginia, Code 1950, § 20–88.12 et seq. She alleged in her verified petition that she is the wife of Francis L. Harmon; they were married on June 10, 1942, in Washington, District of Columbia; she resides in Alexandria, Virginia; she and Francis are the parents of Pauline E. Harmon, who was born December 8, 1944; petitioner and Pauline are entitled to support from Francis; he never has supported them according to his means and earning capacity; Francis resides (at a specified address) in Los Angeles County, California.

The judge of said court in Virginia made a certificate which stated, among other things, that in the opinion of the judge the petition sets forth facts from which it may be determined that Francis owes a duty of support and that such petition should be dealt with according to law. Exemplified copies of the following documents were transmitted to the superior court in Los Angeles County, California: the petition; the certificate of the judge; the Code of Virginia relating to the Reciprocal Enforcement of Support of Dependents Act; the testimony of Ruth; and an affidavit of Ruth as to her inability to pay filing fee and other costs.

The superior court, in Los Angeles County, issued an order directing Francis to show cause why an order should not be made on the basis of said petition. Hearings were had, in said superior court upon the order to show cause, on March 29 and May 17, 1956. The court found that Pauline is the minor child of Ruth and Francis; the minor is residing with Ruth in Fairfax County, Virginia, and the minor is partially dependent upon Francis for support; Francis owes a duty of support of the minor; Francis resides in Los Angeles County; a reasonable amount to be contributed by Francis toward the support of the minor is $30 a month, and he has the ability to pay that amount. The court ordered that Francis pay, through the office of the probation officer of Los Angeles County, for the support of the minor $15 on the 10th and 25th days of each month commencing May 25, 1956, and that the probation officer hold all the money, so paid, pending the decision on appeal.

Defendant Francis L. Harmon appeals from said order of May 17, 1956.

At the hearings in Los Angeles County, Francis was represented by his counsel, Mr. John A. Weyl; and Ruth was represented by the District Attorney.

At the hearing on March 29, the defendant Francis testified, under section 2055 of the Code of Civil Procedure, as follows: he is employed by the Department of Water and Power of the City of Los Angeles, and his take-home pay is $292 a month (later it was said the amount was $394 a month); his daughter, Pauline, is 11 years of age; Ruth deserted him on December (September) 25, 1946, and he has been separated from her since that time; at that time he was living in Michigan, and Ruth took Pauline away from him without his knowledge and consent; Ruth obtained a divorce in the District of Columbia; he did not contest the divorce action; he has remarried; he has sent a few checks, now and then, for the support of Pauline; he sent checks in February and January, 1956, and December, 1955, in the amounts of $20, $10, and $25, respectively. At that hearing, the attorney for Francis requested a continuance in

order that he might have an opportunity to submit written interrogatories which he desired to ask Ruth, who was in Virginia. Upon stipulation, it was ordered that the interrogatories be copied in the reporter's transcript. The transcript, which included the interrogatories, was sent to the Virginia court.

At the beginning of the said hearing, defendant made a motion to quash the service of process, as to him, upon the ground that no duty of support was imposed upon him under section 1670 of the Code of Civil Procedure, and that the provisions of said section were unconstitutional in that they deprive him of property without due process of law, and that the services of the prosecuting attorney and the use of public money, in such a matter, are in contravention of the laws of California. He also objected to the proceedings on the grounds (1) that the initiating papers did not show that the Virginia court had determined the amount that should be paid for support, and (2) that the petitioner (Ruth) was not a bona fide resident of Virginia but was a resident of the District of Columbia. The motion was denied.

At the hearing on May 17, 1956, the interrogatories and Ruth's answers thereto were in the file of the case and were before the court. The attorney for defendant stated that the amount of defendant's take-home pay was $394 a month instead of $292 as shown by the transcript. Defendant's attorney renewed his motion to quash service of process, and he stated that the Reciprocal Enforcement of Support Act was unconstitutional in several respects. (The specifications regarding unconstitutionality were the same as those presented on this appeal, as hereinafter referred to.) The motion to quash was denied.

Some of the testimony of Ruth, as shown by the interrogatories and her answers, was as follows: she has resided in Alexandria, Virginia, one year and seven months; the divorce decree, which was obtained in Washington, D. C., did not provide for alimony or child support; she is employed by the Internal Revenue Service (in Washington, D. C.) as a clerk-typist; her take-home pay is $2,800; in September, 1946, Francis took Pauline from the home of Ruth and Francis, in Maryland, to the home of Francis' mother in Grand Rapids, Michigan; she (Ruth) received a telegram from Francis (stating that he and Pauline had gone to his home in Michigan, and asking Ruth to bring Pauline's things); after Ruth had been in Grand Rapids two days she took Pauline and left Grand Rapids; Francis was in Michigan at his mother's home when Ruth last saw him; she intends to reside permanently in Virginia; she did not move to Virginia for the purpose of filing the present proceeding; her present status is that of divorcee.

At the hearing on May 17, defendant testified that he and Ruth were married on June 10, 1942, in the District of Columbia; a few months thereafter they moved to Maryland where they lived about four years; on September 22, 1946, he left Maryland and went to Grand Rapids; he took Pauline with him; he sent a telegram to Ruth, advising her to come to Grand Rapids; Ruth came there the next day; one afternoon while he was away from his mother's home in Grand Rapids, Ruth left Grand Rapids and took Pauline with her; four days later Ruth told him by telephone that she was in Washington, D. C.; he has not seen Ruth since she left Grand Rapids; in October, 1946, he went to Guam to work on a project for the Navy, and then he wrote to Ruth stating that when the Navy assigned a house to him she should come to Guam; she ignored the letter; after he had been in Guam 18 months, he went to Hawaii and obtained a position in a shipyard; he asked Ruth to come there, but she did not come; he has been in Los Angeles since October, 1951; while in Guam he received a document from the court in Washington; he could not go to Washington to contest the divorce action; when he arrived in Los Angeles, she had

obtained a divorce; from November, 1944, to April, 1946, he sent several checks in various amounts, ranging from $20 to $40, to Ruth; he has not supported Ruth since 1946; he has been able and willing, at all times, to support Pauline provided she is at his domicile; he has sent gifts and money to Pauline at Christmas; the approximate amount of his monthly expenses is $425.

The Reciprocal Enforcement of Support Act will be referred to herein as the Act.

[1, 2] Appellant asserts that the provisions of the Act (sections 1650 to 1690, inclusive, of the Code of Civil Procedure) are unconstitutional in that section 1653, wherein the "Duty of support" is defined, is so vague and indefinite that men of common intelligence must guess as to its meaning. Section 1653, subdivision (6), provides: "'*Duty of support*' includes any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise." Section 1670 of said code provides: "Duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee." Appellant argues that since the evidence shows that there has never been a prior court order regarding support, no duty is imposed upon him by law or court order, and therefore any order made in this proceeding as to him must rest on a duty imposable by law. He argues further that since Ruth has deprived him of the custody of the child, the duty to support the child rests with Ruth, and therefore no duty is imposable by law upon him in California to support the child. He argues further that since no duty of such support is imposable in California, and since it must be presumed (in the absence of evidence as to the law of Virginia) that the law of Virginia is the same as the law of California, no such duty is imposable upon him in Virginia. Appellant's further statement that the California court could not take judicial notice of the laws of Virginia is not an accurate statement. Section 1875 of the Code of Civil Procedure of California provides, in part: "Courts take judicial notice of the following facts: * * * 3. * * * the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states." Subdivision (6) of section 20–88.13 of the Code of Virginia is the same as subdivision (6) of section 1653 of the Code of Civil Procedure of California, except that in the Virginia code the word "legal" precedes the word "separation" which is near the end of the sentence (thereby reading "judicial legal separation"). The provisions of subdivision (6) of said section 1653 are not so vague or indefinite that by reason thereof they are unconstitutional, as applied to the facts in the present matter. Ruth obtained a divorce from defendant in Washington, D. C., several years ago, and at that time defendant was in Guam and he knew of the pendency of the action, but he did not contest it. Pauline has resided with Ruth since 1946 and was residing with her at the time of the divorce. A duty was imposable upon defendant to support his minor child.

[3] Appellant asserts that the Act is unconstitutional in that it denies him the equal protection of the laws of California. He argues that since he has never been a resident of Virginia, any attempt, under the provisions of section 1670 of the Code of Civil Procedure of California, to subject him to the laws of Virginia is a denial of the protection of the laws of California; and that the theory that he is being subjected to the laws of California only and that the Virginia court is merely assisting in procedure (as argued in other cases) is unrealistic. He argues further that the Act (section 1655 of the Code of Civil Procedure) denies him the equal protection of the laws by purporting to

allow the entry of an order for the support of a nonresident child whose custody is not subject to the jurisdiction of the court; that said section deprives him of the right of asking for the custody of the child and for other relief which would be available if the child were before the California court, and denies him relief which is available to other fathers who are residents of California. In Smith v. Smith, 125 Cal.App.2d 154 at page 169 [270 P.2d 613, at page 624], it was said: "The equal protection clause does not preclude the states from resorting to classification, but only requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated will be treated alike. * * * The support law operates as to persons in this state on the same basis. The classification of certain persons as being entitled to support is no different from support statutes which operate between residents of the same state. The purpose of the classification is a reasonable one and it has a fair and substantial relation to the object of the law. The support law provides a reasonable classification when tested in the light of the traditional judicial application of the equal protection clause." This contention is not sustainable.

[4] Appellant also contends that the Act is unconstitutional in that it denies him the privileges and immunities guaranteed by the United States and California Constitutions. He argues that the Act (referring to section 1690 of the Code of Civil Procedure) allows a nonresident petitioner to bring an action in California without being subjected to the jurisdiction of California courts in the matter of a counterclaim, cross-complaint, or other affirmative relief. In Landes v. Landes, 1956, 1 N.Y.2d 358, 153 N.Y.S.2d 14, 19, at page 19, 135 N.E.2d 562, it was said: "Reciprocal enforcement of a support order aimed at this primary parental obligation may not be avoided or excused by resort to the immunities and privileges clause of the Federal Constitution * *." This contention is not sustainable.

[5] Appellant asserts that this proceeding cannot be maintained in behalf of the minor unless the minor is a party to the proceeding. Section 1675 of the Code of Civil Procedure of California provides: "A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian ad litem." Cases wherein a mother was petitioner in proceedings for orders for support of minor children are: Smith v. Smith, 125 Cal.App.2d 154 [270 P.2d 613]; Whittlesey v. Bellah, 130 Cal.App.2d 182 [278 P. 2d 511]; and Smith v. Smith, 131 Cal.App. 2d 764 [281 P.2d 274]. This contention is not sustainable.

[6] Appellant asserts further that such a proceeding as the present one cannot be brought by a person who does not have legal custody of the minor, and cannot be brought when there has been no adversary proceeding concerning the custody of the child. Section 1675 of the Code of Civil Procedure does provide, as above shown, that a complaint on behalf of the minor may be brought by a person having legal custody of the minor. Appellant argues to the effect that since the divorce decree was granted in an ex parte proceeding, when he was not within the jurisdiction of the court that granted the decree, it would appear that Ruth, the mother, who obtained the divorce decree and who filed the petition herein for support of the child, did not have legal custody of the minor. Pauline was residing with her mother when the decree was granted and has resided with her since that time. This contention is not sustainable.

[7, 8] Appellant asserts that such a proceeding as this one cannot be maintained under circumstances where the wife departs from the marital domicile and moves to another jurisdiction. He argues that the purpose of the Act is to obtain support for wives and children who have been abandon-

ed, and where a father absconds to another state. He argues further that since Ruth left him and took the child with her, and since he chose a reasonable place or mode of living and Ruth has failed to conform thereto, he cannot be considered in the class of an absconding father. It was Ruth who obtained the divorce. The record does not show upon what ground the divorce decree was granted. The testimony of Ruth, as shown on the document herein, dated November 10, 1955, and entitled "Testimony of Petitioner," states that "Non-support" led to the separation from Francis. Defendant relied on the divorce decree when he remarried. It does not appear herein that the question has been determined as to whether he deserted her or she deserted him. The material question herein is whether defendant owes a duty to support his daughter. There is no requirement that as a condition to bringing a proceeding under the Act there be a showing that the obligor has absconded. In Smith v. Smith, supra, 131 Cal.App.2d 764 at page 770 [281 P.2d 274, 278], it was said: "The Acts in question [Uniform Reciprocal Enforcement Acts] are not limited to cases where an obligor flees the jurisdiction of an initiating state." In the present case the evidence was sufficient to support the finding that defendant owes a duty to support his daughter.

[9] Appellant asserts that a father who is entitled to the custody of a minor child, and who is willing and able to support the child at his domicile, cannot be required to furnish support for the child outside the father's home. There has been no determination that the defendant is entitled to the custody of the child. Defendant's assertion that he is willing and able to support his daughter at his domicile is not a sufficient answer to the petition herein.

[10] Appellant asserts that the trial judge abused his discretion in not allowing him visitation privileges, with the child, during summer vacation. Appellant states in his brief that, after the hearing on May 17, he made a motion to reopen the matter for a further hearing and to modify the order of May 17 so that he might have reasonable visitation privileges with his child and might have the child with him during summer vacation. His brief also states that the motion was denied without prejudice. It does not appear that the judge abused his discretion.

[11] Appellant asserts that the initiating papers were not sufficient to constitute a cause of action or to support the proceedings or order herein. His argument is that the petition was not in the name of the child; that the petition alleged that Ruth is the wife of Francis, whereas it was shown by her answer to an interrogatory that she obtained a divorce in 1950; and that the certificate transmitted from the Virginia court does not show, in the blank space provided therefor, the amount needed for support. The point with reference to the child not being named as a party to the proceeding has been discussed hereinabove. It was not necessary that the Virginia judge state in the certificate the amount required for support. At the hearings in California, evidence was presented as to Ruth's income, the expenses and needs of Pauline, and the income and expenses of defendant. The petition, and the certificate of the Virginia court, were sufficient.

Defendant was not denied due process of law, or the equal protection of the laws, or the privileges and immunities guaranteed by the United States and California Constitutions. U.S.Const. Amend. 14; Const. art. 1, § 13.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, as Trustee of its John Brockman Trust No. S-5453, Plaintiff and Respondent,

William P. ROGERS, Attorney General of the United States, as successor to the Alien Property Custodian, Defendant and Appellant,

Edmund G. Brown, Attorney General of the State of California, et al., Defendants and Respondents.*

Civ. 22407.

District Court of Appeal, Second District, Division 1, California.

May 5, 1958.

Hearing Granted July 2, 1958.

Suit by trustee of an inter vivos trust for declaratory relief for instructions regarding distributions to be made of funds impounded for the account of German nationals and for compensation and manner of apportionment. From part of a judgment of the Superior Court of Los Angeles County, Philbrick McCoy, J., the Attorney General of the United States as successor to the Alien Property Custodian appealed. The District Court of Appeal, Fourt, J., held that under the terms of the trust containing benefit provisions for German nationals and which were impounded due to the war and vesting orders in the attorney general as successor to Alien Property Custodian, was not entitled to participate in the income or corpus of the trust and that the attorney general was not entitled to attorney's fees.

Judgment affirmed.

1. Trusts ⇐112

Trial court properly construed all provisions of inter vivos trust together so as to give effect to the entire document.

2. War and National Defense ⇐12

In proceeding for construction of an inter vivos trust, German nationals who were beneficiaries and whose interest had been vested in the attorney general under the Trading With the Enemy Act were proper parties. Trading With the Enemy Act, § 1 et seq., 50 U.S.C.A.Appendix, § 1 et seq.; Executive Order No. 8389, 12 U.S.C.A. § 95a note.

3. Wills ⇐440

A will or other dispositive instrument must be given effect in accordance with the language of the donor as found in the language of the instrument.

4. War and National Defense ⇐12

Where trustee was unable to deliver shares to German nationals due to the war and regulations under Trading With the Enemy Act, provisions of trust disclosed donor's intent to provide for distribution of shares which could not be paid to the beneficiaries whether Germans or Americans and to provide against an anticipatory confiscation of the shares of the German nationals in event of a second war with Germany. Trading With the Enemy Act, § 1 et seq., 50 U.S.C.A.Appendix, § 1 et seq.; Executive Order No. 8389, 12 U.S.C.A. § 95a note.

5. War and National Defense ⇐12

Where terms of an inter vivos trust containing provisions for payments to German nationals provided that if for any of the reasons stated there was a failure of the trust or an inability of the trustee to pay, the trustee should distribute the shares to the "beneficiaries" in accordance with certain provisions and payment to German beneficiaries was impossible due to the war and vesting under Trading With the Enemy Act, true intent of trustor as concerned certain beneficiaries required the insertion of the word "other" before the word "beneficiaries" in order to carry out the intent of the trustor.

6. War and National Defense ⇐12

Under terms of an inter vivos trust containing provisions for payment of benefits to German nationals which could not be made because of the war and vesting under Trading With the Enemy Act, payment to the attorney general of the "vested

* Opinion vacated 330 P.2d 811.

interests" of the German nationals as they became due and payable did not constitute payment to such beneficiaries so as to permit vesting in the Alien Property Custodian under Trading with the Enemy Act. Trading With the Enemy Act, § 1 et seq., 50 U.S.C.A.Appendix, § 1 et seq.; Executive Order No. 8389, 12 U.S.C.A. § 95a note.

7. Trusts ⇐140(3)

Terms of an inter vivos trust established that the donor intended that the gift-over in case payment could not be made to designated German beneficiaries was to apply to secondary as well as primary beneficiaries.

8. War and National Defense ⇐12

Under terms of an inter vivos trust containing provisions for benefits for German nationals which could not be paid due to the war and which were seized under the Trading With the Enemy Act, provisions of the declaration of trust effectively deprived the attorney general of any right to participate in the income or corpus of the trust where the trustor provided adequately for the distribution of all shares of both the income and corpus which could not for any reason be paid or distributed to beneficiaries whether Germans or Americans.

9. Appeal and Error ⇐880(3)

In suit to construe an inter vivos trust containing provision for German and American beneficiaries, attorney general as successor to the Alien Property Custodian was not entitled to complain as to the judgment as it pertained to American beneficiaries where none of the Americans were appellants and the attorney general was in no position to take advantage of errors, if any, affecting other parties.

10. Trusts ⇐268

In suit to construe an inter vivos trust containing provision for German and American beneficiaries, attorney general as successor to the Alien Property Custodian was not entitled to attorney's fees where his purpose was not to sustain the trust but rather to destroy a part of its terms and his position was antagonistic to a definite segment of the beneficiaries.

11. Trusts ⇐268

In suit to construe an inter vivos trust, the attorney general as successor to the Alien Property Custodian being a public officer whose compensation is fully provided for was not entitled to attorney's fees.

Dallas S. Townsend, Asst. Atty. Gen. of the United States, Director, Office of Alien Property, Laughlin E. Waters, U. S. Atty., Arline Martin, Asst. U. S. Atty., Southern Dist. of California, Los Angeles, Mary Eschweiler, Atty., Office of Alien Property, San Francisco, George B. Searls, Irwin A. Seibel, Marbeth A. Miller, Attys., Dept. of Justice, Washington, D. C., for appellant.

Brady, Nossaman & Walker, and Walter L. Nossaman, and Charles M. Walker, Los Angeles, for respondent Security-First Nat. Bank.

Ernest C. Griffith, Los Angeles, for respondents Bell, Raithel and du Von.

Fleming, Robbins & Tinsman, Los Angeles, for respondent Edith Brockman.

C. O. Heffernan, San Leandro, for respondents Horoney and others.

Blase A. Bonpane, Los Angeles, for respondent Margaret Bruchmann.

Charles E. Burch, Jr., San Diego, and Robert L. Moore, Los Angeles, Oscar W. Fehsel, Los Angeles, of counsel, for respondents Horace Mann and others.

Sollo, Graham & Califf, Morris D. Coppersmith, Hirsch & Rosenblatt by Leonard B. Hirsch, Beverly Hills, for respondents First Nat. Bank of Rock Island, Conservator of Mildred Bruckmann, incompetent, and Herman Rimmerman, public administrator C.T.A. of estate of Elizabeth Brockman, deceased.

Morris Lavine, H. A. Gebhardt, Los Angeles, for respondent German Beneficiaries.

FOURT, Justice.

This is an appeal from parts of a judgment entered upon a complaint for declaratory and other relief by the trustee of an *inter vivos* trust.

The facts are not in dispute. The Security-First National Bank of Los Angeles (hereinafter referred to as the "trustee") is the trustee of a trust created July 21, 1922, by *inter vivos* transfer.

The trust instrument was skillfully prepared and provided in part that the properties subject to the trust, among others, were the Robinson Building and the Brockman Building in downtown Los Angeles, and certain ranch properties in Los Angeles county, personal effects and certain stocks and bonds. The trustor reserved a life estate in the trust property, and at his death the furnishings, equipment and personal effects located at specified parcels (the ranch and 28th Street properties) were given to Margaret Thompson. The Robinson and Brockman buildings were, upon the trustor's death, to be held in further trust for the benefit and ultimate ownership of his nieces and nephews and their issue, and the residue could be converted into cash to the extent necessary to provide for certain (1) death taxes, (2) $200,000 in a fund for Margaret Thompson and her issue, or if none to the beneficiaries theretofore particularly named, (3) $145,000 to certain named individuals and (4) $1,000 to each member of a class of persons, with abatement provisions if there should be insufficient funds to make payment in full, and (5) the residue, if any then existed, to two charities.

The death taxes were paid in 1925 and 1926, the Thompson fund was set up in December, 1925, payments of the amounts to the named individuals and classes of persons were made in 1925 and 1926, and distribution of principal and income to the two charities was made in the aggregate amount of $361,300. Administration of the Robinson and Brockman buildings, carried by the trustee at $5,056,540 and $2,176,000, respectively, has continued to the present time. Receipts from the two last named properties from January 1, 1925 to October 31, 1953, were $4,351,874.07.

Certain paragraphs of the trust are set forth substantially in full herewith, namely paragraphs IX, XII, XIII and XVI:

"IX

"From and after the demise of said Trustor, the two parcels of real property hereinbefore particularly described under and designated as 'Parcel No. 1' and 'Parcel No. 2,' respectively, together with the respective leases thereon, to J. W. Robinson Company, a corporation, and to Shirley C. Ward, an individual, respectively, shall be held in further trust hereunder, subject to the powers of the Trustee hereinbefore expressed, until both of said parcels of real property are finally distributed, as hereinafter provided, but until so finally distributed, all the net rents, incomes and other profits shall be collected and received therefrom and after the deduction of all the charges, expenses and trustee's fees, as hereinabove provided, shall be paid quarter-yearly in equal parts, and share and share alike, to each of the following named nephews and their widows, and nieces of said Trustor for and during their respective lives, to-wit:

"Heinrick Bruchmann, the Trustor's nephew, now residing at Vilbel, Germany;

"Theodor Bruchmann, the Trustor's nephew, of Schlesian, Germany;

"Miss Helene Bruchman, The Trustor's niece, of Erbach, Germany;

"Mrs. William Lenz, the Trustor's niece of, Darmstadt, Germany;

"Mrs. Andreas Weigand, the trustor's niece, of Darmstadt, Germany;

"Anton Bruchmann, the Trustor's nephew, now or late residing in Brooklyn, N. Y.

"Friedrich Bruchmann, the Trustor's nephew, now or late residing in Bakersfield, California; (all the foregoing being children of said Trustor's deceased brother, Friedrich Bruchmann);

"Mrs. Lizzie Russell, of No. 915 West 30th Street, Los Angeles, California; and Mrs. Margaret Mann, *noth* now or late residing in Albuquerque, New Mexico,

(both being the Trustor's nieces, and the children of his deceased brother, Adam Bruchmann);

"Phillip Brockmann, Miss Margaret Brockman, Fred Brockman, Charles Brockman, Mrs. Gertrude Horoney, Mrs. Eva Horoney, and William Brockman, residing Rock Island, Illinois (all being the Trustor's nephews and nieces, and the children of his deceased brother, Jacob Brockman);

"Mrs. Margaret Raithel, Mrs. Gertrude Kerr, Phillip Scherer, Fred Scherer, Miss Katie Scherer and Miss Mary Scherer, all of Rock Island, Illinois, and George Scherer, of Moline, Illinois, being nephews and nieces of the Trustor and the children of his deceased sister, Mrs. Margaret Scherer, also Mrs. Barbara Scherer, widow of the Trustor's deceased nephew, Jake Scherer of Rock Island, Illinois.

"In the event of the death of any nephew at any time, either prior to the date of this Declaration of Trust, or hereafter and during the term hereof, leaving a widow and no issue him surviving, the said Trustee shall pay to such widow, so long as she lives, and does not remarry, all of the net income from said Trust to which her deceased husband would have been entitled had he lived, but from and after her demise or remarriage, whichever event shall happen first, this trust not having sooner terminated, as hereinafter provided, the share of said income to which such deceased nephew would have been entitled had he lived, shall be paid to and increase the income of the other beneficiaries of this trust pro rata and in accordance with their respective interests in such income.

"If any of said nephews shall either heretofore or hereafter die, leaving a widow and also leaving issue him surviving, the whole share of said income which would have gone to such nephew, had he survived, shall be paid wholly to his widow during the life of this trust, but only so long as such widow lives and remains unmarried. From and after the first happening of either her death or remarriage, during the life of this trust, such income shall during the remainder of the term of this trust, be paid to the issue of such deceased nephew, share and share alike, but upon the principle of representation.

"In the event of the death of any of said nieces during the term of this trust, leaving a lawful issue of her body surviving, and in case of a deceased nephew leaving no widow, but issue surviving, the share of said net income from said trust estate which would have gone to the decedent, had he or she lived, shall thereafter go and be paid equally, share and share alike, to the then living lawful issue of any one of *them* who may be then deceased, such issue taking their deceased parent's share, upon the principle of representation, or if there be no such issue living, it shall go to the survivors or survivor of said nieces and nephews, and the issue of any one deceased, such issue taking upon the principle of representation.

"This trust in favor of said Trustor's nieces and nephews and as to the two parcels of real property above described as 'Parcels Nos. 1 and 2,' shall continue and remain in full force and effect for and during the lives of all of Trustor's said nieces and nephews and during the life of the last living or survivor of them, but it shall in any event cease and determine upon and at the time of the death of the last or longest living of the said nieces and nephews, and shall, in no event, extend or continue beyond said time, anything to the contrary herein notwithstanding, except for the purpose of final distribution and settlement by the Trustee.

"Upon and at the final termination of this trust as to said 'Parcel No. 1' and 'Parcel No. 2,' said Trustee shall thereupon convey, transfer, assign, set over and deliver the whole of said Parcels Nos. 1 and 2, together with the leases thereon and all undistributed net incomes and rentals therefrom, or any other property into

which they or either of them may have been converted, equally, share and share alike, to and amongst the then living lawful issue of the bodies of all of the said above mentioned nieces and nephews, such issue taking amongst themselves, on the principle of representation, or if none of such issue be then living, then said Trustee shall convey the same to said Trustor's next then living heirs-at-law, according to the laws of succession of the State of California, then in force, excluding, however, said Charles Ott and all of his assigns and heirs-at-law."

"XII.

"All of the cash and property, real and personal, which shall remain in the residue trust estate after all of the foregoing provisions of this trust having been fully met, and all funds thereinabove mentioned fully provided and all other property conveyed and transferred as above specifically provided in this trust, said Trustee shall pay therefrom so far as same may be sufficient, the following sums to the following persons, to-wit:

(hereat were named fourteen designated legatees)

* * * * * *

"(15) To Charles Ott, Whose last place of residence known to the Trustor was Silver City, New Mexico, the sum of Ten Thousand Dollars ($10,000.00), upon the express condition precedent, however, that he shall execute to said Trustee in such form as it shall require, a full, absolute and unconditional quit-claim, release, discharge and relinquishment of all his rights, titles, interests, claims and estates of every kind or nature in any amount which he may have or claim in and to the trust estate or to any of the Trustor's estate, or in and to any property which he may own at the time of his demise, and if he shall not execute such quit-claim, release, discharge and relinquishment in consideration of receiving said sum of Ten Thousand Dollars ($10,000.00), said Trustee shall not pay said sum to him, nor any other sum or property in the trust estate directly or indirectly, nor in any event or contingency whatever, and said sum of Ten Thousand Dollars ($10,000.00) shall become a part of the residuum of the trust estate hereinafter mentioned and disposed of.

"Said Charles Ott was legally adopted by said Trustor, but left his home when about fourteen years of age on his own accord and against the said Trustor's wish, and returned to the home of his natural parents. At the time of leaving said Trustor's home, said Charles Ott resumed his natural parent's name, has never sought or received any help, assistance or benefit from said Trustor, has been undutiful and disrespectful to him, and is not entitled to any consideration or participation in said Trustor's property, nor under this Trust. * * *

* * * * * *

"If sufficient property to pay in full the said amounts shall not remain in the residue of the trust estate after all other provisions in this trust have been fully met, said Trustee shall rotably abate, diminish or reduce the above sums directed to be paid to the beneficiaries in this Paragraph mentioned. If, however, any moneys or property shall remain in said residue of the trust estate after the payment in full of all the sums above provided, said Trustee shall at the time of the demise of said Trustor, convey, transfer and deliver the same equally, share and share alike, to the Los Angeles Orthopaedic Foundation, and the Little Sisters of the Poor, of Los Angeles, both charitable corporations organized under the laws of the State of California."

"XIII.

"*It is an express term and condition of this trust,* and a *limitation* upon the right, title, interest, estate, income or moneys payable to each and every beneficiary hereunder that such rights, titles, interests, estates and incomes of each and every beneficiary shall not be subject to assignment, pledge, mortgage, hypothecation, attachment, execution, judgment, anticipa-

tion or other disposition or impairment, nor shall the same pass to or be paid to any receiver, trustee or officer in bankruptcy, *or appointed by any court or otherwise,* but same shall be payable, transferable and deliverable *solely, only and exclusively* to each and every beneficiary hereinabove specifically designated and named, according to the terms of this trust, *personally, solely and individually,* and the *personal receipt therefor* from the herein designated beneficiaries entitled to the same shall be a *condition precedent* to the payment or delivery thereof by said Trustee." (Emphasis added.)

"XVI.

"*If* and in the event that this trust shall, for any reason, or at any time prior to its final termination fail, in whole or in part; *or said Trustee shall be unable, for any reason whatsoever,* to pay any portion of the net income and/or the trust estate, in accordance with the terms hereof, and to the beneficiaries hereinabove designated and entitled to receive the same, said Trustee shall, at the time of the failing of this trust, in whole or in part, or its inability to pay the income and/or principal, in whole or in part, to the beneficiaries designated herein and entitled to receive the same, in accordance with all the express terms of this trust, *forthwith convey, transfer and deliver such part of the income and/or trust estate so failing, to the beneficiaries* and in accordance with all the provisions hereinabove specifically named, *set forth and expressed in Paragraph IX* of this Declaraction of Trust, *anything to the contrary in this trust notwithstanding.*" (Emphasis added.)

The trustor died in 1926. Of the twenty-four named Paragraph IX beneficiaries, seven are still living. Five of the twenty-four were citizens and residents of Germany, and all five are now deceased. Three of the five left surviving issue, now living, who are citizens or residents of Germany. The other two German beneficiaries left no surviving issue.

Mrs. Thompson, the income beneficiary of the Paragraph XI trust is still living, but without issue. She was 63 years of age in 1953.

Since April 3, 1940, the trustee has not paid any income to any of the German beneficiaries, either because of interrupted communications due to war conditions, or due to the provisions of Executive Order 8389, as amended, or because of the vesting orders issued in 1949 and 1952 by the Attorney General with respect to the trust. The trustee has impounded such funds and as of October 31, 1953, the trustee held sums in the accounts of the German beneficiaries aggregating about $275,000.

The trial court found with reference thereto as follows:

"From April 3, 1940 and continuously thereafter, plaintiff, either because of interrupted communications due to war conditions or to the provisions of Executive Order 8389 as amended (Finding XII), or because of the provisions of Vesting Orders 13539 and 19000 (Finding XI), has not paid, and until June 24, 1953 has been unable to pay, any portion of the net income of the Trust in accordance with the terms of the instrument declaring the Trust and to the beneficiaries therein designated and entitled to receive the same, insofar as said beneficiaries are German nationals. Instead, the Trustee has impounded such income and has accounted therefor, as of October 31, 1953, by holding for disposition according to the Judgment in these proceedings the balances shown in Impound Accounts described in subparagraphs (1) through (10) of Finding X."

In 1949 and 1952, the Attorney General, acting under the authority of the Trading With the Enemy Act (40 Stats. 411, as amended, 50 U.S.C.A.Appendix, § 1 et seq.), executed Vesting Orders Nos. 13539 and 19000 respectively. Under these orders he vested in himself "for the benefit of the United States * * * all right, title, interest and claim of any kind or character whatsoever" of the German beneficiaries

"in and to and arising out of or under" the trust.

On July 29, 1952, the trustee filed its complaint for declaratory relief asking, among other things, for instructions regarding the distribution to be made of the funds which had been impounded for the account of the German nationals, and for compensation and the manner of apportionment.

On June 24, 1953, General License No. 101 was issued (18 Fed.Reg. 3687; 8 C.F.R. § 511.101). The General License removed the foreign funds freezing controls over transactions and property previously blocked by Executive Order 8389, 12 U.S.C.A. § 95a note, with some exceptions with which we are not here concerned. General License No. 101 did not purport to have any effect upon property which had already been vested by the Attorney General.

By a stipulation the parties agreed to certain matters and agreed to disagree on certain others, and submitted the matter to the court for answer. If it is determined that no interest in the trust was vested in the Attorney General, it then becomes unnecessary for this court to comment or pass upon many of the matters determined by the trial court, for the Attorney General is the only appellant.

[1] The trial court properly construed all of the provisions of the trust together, so as to give effect to the entire document.

The appellant contends that the fact that beginning in 1940 and thereafter, payments could not be made to the German beneficiaries did not cause their interests to fail, and the Attorney General sets forth (a) that neither the interruption in communications, the "freeze" order, the outbreak of war, nor the Trading With the Enemy Act brings about a failure of an existing trust or of an interest in a trust merely because it is for the benefit of an enemy beneficiary; (b) that Paragraph XIII is a common spendthrift provision and nothing more; (c) that Paragraph XVI does not impose any condition upon the interests previously created (that it is the "residuary safety valve" for gifts which otherwise failed); (d) that the judge's reading of the trust declaration required it "to perform extensive surgery on Paragraph XVI." Further, that the interests of the German beneficiaries are subject to the seizure powers conferred by the Trading With the Enemy Act; that the seizure orders were comprehensive enough to reach all of the rights of the German beneficiaries in the trust, including the right to income and corpus distributable after the end of the war; that the German beneficiaries had no standing to participate in the proceedings below on the issue of construction, and therefore were not entitled to counsel fees, and by the same token the Attorney General was so entitled to such an allowance.

Considering the matter as to whether the German nationals were necessary or proper parties, we quote from the well considered Memorandum Opinion of the trial court:

"We note without further comment that the Attorney General apparently waived the point he now raises when he filed his answer without demurring specially, and without raising the issue by his answer, assuming he could have done so.

"One of the principal issues before the court as raised by the Attorney General's answer, among others, is whether the Attorney General not only had power to, but did as a matter of law acquire all the interests the German nationals had in this trust. This is the first point argued in the Attorney General's brief * * *. His premise with respect to the right of the German nationals to appear here assumes the correctness of *his* answer to the very issue this court must decide.

[2] "We may grant that proceedings to vest enemy property in time of war are in the interest of the United States, but they are nonetheless confiscatory. As said by the Trustee in reply to the Attorney General's contention: 'To eject the vestees as parties would be to silence completely

one full set of protagonists who should be given their full day in court' * * *. Even an alien enemy belligerent charged with violations of the law of war is entitled to access to the courts on a contention properly raised under the laws of the United States. See Ex parte Quirin, 317 U.S. 1, 24–25 [63 S.Ct. 2], 87 L.Ed. 3, 10–11. So here, the German nationals must have the right to contest the Attorney General's position.

"The objection that the German nationals whose interests are involved are not proper parties and may not be heard is without merit and is overruled. See Olsen v. Superior Court, [276 P.2d 168, rehearing granted]."

The trial judge, in answering other contentions of the attorney general, set forth in his memorandum, among other things, the following, with which we agree:

"The basic question then is: What interests in the Brockman trust, either as to income or as to corpus, have been vested by the Attorney General?

"There is no substantial question here as to the powers of the Attorney General as Alien Property Custodian, as stated by him in his brief of March 17, 1954 * * *. We are here concerned with the legal effect of the Trading With the Enemy Act, as amended, and the official acts of the agencies of the Government in the exercise of those powers.

"But for the legal effect of the provisions of paragraph XIII and XVI of the Declaration of Trust, it seems clear that the Attorney General would have become entitled to the distribution of the interests of several German nationals. * * *

* * * * * *

"It is my judgment that these provisions of the Declaration of Trust effectively deprive the Attorney General of any right to participate in the income or corpus of the Brockman Trust.

[3] "All parties agree on the cardinal rule of construction, as stated by the Attorney General, that a will or any other dispositive instrument must be given effect in accordance with the intention of the donor as found in the language of the instrument. * * * This being so, the provisions of paragraphs XIII and XVI must be construed together so as to give effect to the dispositive provisions of the Declaration.

[4] "As of April, 1940, the Trustee found it impossible to deliver 'solely, only and exclusively' to them the money then payable to certain German nationals, and to take a 'personal receipt therefor' as required by paragraph XIII. In this connection it should be observed that this requirement of personal delivery is a limitation imposed on the Trustee *in addition* to the restrictions imposed on the beneficiaries with respect to the power to assign, etc. Accordingly, the Trustee created the first of the impound accounts. All payments by the Trustee to all German nationals and those claiming under them by reason of the provisions of paragraph IX of the Declaration were completely blocked by the advent of war in December, 1941, and by the regulations thereafter made pursuant to the Trading With the Enemy Act.

* * * * * *

"* * * The trust was created in 1922. Whether or not the trustor was motivated by the difficulties in transmission of funds or property to German nationals by reason of World War I is wholly beside the point, although that was quite likely the case. Reading together the provisions of paragraphs XIII and XVI and having in mind their necessary relation to paragraph IX, it seems plain that, whatever his motive, he provided quite adequately for the distribution of all shares of both income and corpus which could not for any reason be paid or distributed to any one or more of the objects of his bounty, be they Germans or Americans. In doing so he provided against the then anticipatory confiscation of the shares of the German nationals in the event of a second war with

Germany just as effectively as though he had spelled it out in precise language. Cf. Harvard Trust Co. v. Attorney General, 329 Mass. 79, 106 N.E.2d 269. No other interpretation of the language of paragraphs XIII and XVI is reasonable; the phrase 'for any reason whatsoever', in paragraph XVI would seem to be as all-inclusive as is possible in our language.

[5] "Nor did the trustor anticipate or provide for succession to the interest of any beneficiary by a stranger to the Declaration of Trust, particularly by confiscation under the war powers of the United States. Paragraph XVI provides that if for *any* of the reasons there stated there is a failure of the trust or an inability of the trustee to pay then, at the time of such failure or inability, the Trustee shall pay or distribute the share of the trust affected thereby 'to the beneficiaries and in accordance with all the provisions hereinabove specifically named, set forth and expressed in Paragraph IX of this Declaration of Trust, anything to the contrary in this trust notwithstanding'. The Trustee suggests that, in order to effectuate the true intent of the trustor as concerns the nephews and nieces under paragraph IX, the word 'other' will have to be added before the word 'beneficiaries' in the phrase from paragraph XVI quoted immediately above. * * * The Attorney General will have none of this * * *, although on at least two other occasions he seems to recognize that a proper construction of paragraph XVI calls for a recognition of persons 'other' than the German nationals as the beneficiaries entitled to take upon the happening of the condition stated in paragraph XVI precluding payment or distribution by the trustee to the German nationals. * * * The Trustee's interpretation is necessary in order to avoid an absurdity.

"The real basis for the Attorney General's whole argument appears to be that the German nationals had vested interests as donees, that is a present fixed right either of present or future enjoyment * * *, and that as Custodian he is not acting by or on behalf of the enemy beneficiaries, but 'is simply substituted for them in all respects under the trust, occupying as to all the property rights vested in him [under the Trading With the Enemy Act], precisely the same position they would have had had the vesting orders not issued' * * *. He says that 'the only question which can be raised here is whether the gifts which have been vested [in the German nationals] can be divested by virtue of the operation of a condition subsequent', such as that found in paragraph XVI. * * *

[6] "The issue thus stated must be decided adversely to the contentions of the Attorney General. If the donor's language in paragraph XIII, requiring personal receipts, and that in paragraph XVI providing for the gift-over when payment to a named beneficiary cannot be made for any reason whatsoever, are to be 'given an interpretation which will make it operative, rather than one which will render it inoperative' * * *, I find it impossible to conclude that payment to the Attorney General of the 'vested interests' of the German nationals as they become due and payable, 'as a matter of law, constitutes payment to the aforesaid [German] beneficiaries.' * * * It seems to me that those interests were effectively divested, as a matter of law, by virtue of the provisions in paragraphs XIII and XVI. The case might be otherwise only if paragraph XIII stood alone."

In our opinion the trial judge stated the matter concisely and properly and was correct in adding the word "other" in order to identify the takers of the gift-over. It is clearly implied, and makes clear the obvious intent of the trustor. There are many cases in this state to the effect that such implementation is proper. See, Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 834, 172 P.2d 501; Brock v. Hall, 33 Cal.2d 885, 206 P.2d 360, 11 A.L.R.2d 672; In re Estate of Blalock, 95 Cal.App.2d 463, 213 P.2d 100.

We are of the belief that the provisions of Paragraph XVI, when considered with all of the other terms of the trust, is not a simple "residuary safety valve," but rather is a definite part of the trustor's dispositive plan, namely, a provision for gifts-over applicable to certain interests created by Paragraphs IX and XI.

[7, 8] A thorough reading of the entire trust convinces us that John Brockman intended that the gift-over apply to secondary as well as primary beneficiaries. See, II Scott on Trusts, 2d ed. (1956), Transfer of Interest of the Beneficiary, Topic 3, Restrictions on voluntary and involuntary transfers, and particularly §§ 150, 157.4.

In the Harvard Trust Co. v. Attorney General case, supra, the decedent left a will creating a testamentary trust. Some of the beneficiaries of the trust were Germans. Article IV of the trust provided (106 N.E.2d at page 270):

"If there is any portion of the Trust Property which the Trustee is unable to distribute as hereinbefore provided I direct and charge the Trustee when such inability is established to distribute such portion of the Trust Property to my then heirs-at-law, the division to be by right of representation."

The trustee (in the Harvard case) was unable to distribute to the Germans for the reason that by virtue of a vesting order the interests of the Germans were vested in the Alien Property Custodian, the predecessor of the Attorney General. It was held that the Attorney General was not entitled to the interests of the Germans, but that their shares should be distributed to the heirs-at-law. In deciding the matter the court said in part (106 N.E. 2d at pages 271–272):

"* * * Thus there is presented for decision the question whether the German nationals were given interests which could survive the vesting order and pass to the custodian.

"Article IV makes the gift to 'my then heirs-at-law' operative upon the trustee's inability 'to distribute as hereinbefore provided.' Inasmuch as the trustee is able to make payment to the Attorney General in lieu of the German nationals there is, of course, no impediment to a physical transfer of the funds as prescribed by clause 2 of section 4 of article III. But we are of opinion that such an interpretation of the words 'unable to distribute' would not effectuate the intent of the testatrix. It seems to us that by employing these words she was anticipating events of the sort that might disable her distributees under article III from personally benefiting under the will. Though her use of words could have been more apt, we think that this interpretation carries out the general design of the will, namely, to provide for such as could personally take under the will. See McGrath v. Ward, D.C.D.Mass., 91 F.Supp. 636. A contrary construction would limit the operation of that clause to a very narrow field.

"This view is strengthened when the words 'unable to distribute' are considered in the light of the circumstances attending the execution of the will. The testatrix was of German ancestry. Her testamentary dispositions disclose a dominant purpose to benefit her German relatives most of whom resided in Germany. She had lived through World War I, during which the property of German nationals was seized under orders similar to that here involved. It is not unlikely that she knew of this. Although the war clouds had not started to gather in Europe in 1933 when the testatrix made her will, Hitler was rising to power in Germany and the international outlook was disquieting, to say the least. While she may not have actually contemplated World War II and the concomitant seizures by the Alien Property Custodian, it is not improbable that she had in mind the possibility that the objects of her bounty might be prevented from personally taking under the

will for one reason or another, and that article IV was inserted to provide for such a contingency."

The court also said (at page 272), "Cases may arise where the intent of the testator is so apparent from the will as a whole that the defect will be supplied by the court by implication in order to effectuate that intent, [citing cases], but this case is not one of them."

[9] The appellant has also indicated dissatisfaction with the judgment as it pertains to the American beneficiaries, but none of the Americans are appellants and the Attorney General is in no position to take advantage of errors, if any, affecting other parties. In re Estate of Thramm, 80 Cal.App.2d 756, 766, 183 P.2d 97.

The Attorney General has cited for our consideration the recent California cases of In re Estate of Zuber, 146 Cal.App.2d 584, 304 P.2d 247; In re Estate of Neumeister, 146 Cal.App.2d 290, 304 P.2d 67, and In re Estate of Schneider, 140 Cal. App.2d 710, 296 P.2d 45. However, in none of these cases was there a gift-over, and therefore they are not in point.

[10] As to the Attorney General's claim for attorney's fees, we deem it to be without merit. His purpose was not to sustain the trust, but rather to destroy a part of its terms and his position is antagonistic to a definite segment of the beneficiaries.

We think that he is not entitled to fees. See, In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; In re Estate of Bullock, 133 Cal.App.2d 542, 284 P.2d 960; Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327.

[11] Furthermore, appellant is a public officer and his compensation is fully provided.

We find no error in the record.

The judgment is affirmed.

WHITE, P. J., concurs.[1]



160 Cal.App.2d 362

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ignacio MARQUEZ, Defendant and Appellant.

Cr. 5993.

District Court of Appeal, Second District, Division 3, California.

May 12, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., for unlawful sale of heroin, and he appealed. The District Court of Appeal, Parker Wood, J., held that since it had been established that informer had actively participated in crime charged, it had been error to sustain objection to question, propounded to deputy sheriff on cross-examination, as to name of informer.

Reversed and remanded for new trial.

Witnesses ⇐216

Where it was established that informer had actively participated in crime

1. The opinion herewith has been signed by only two justices. The reasons for the third member of the court not participating are that prior to the time of the oral argument Justice Doran, formerly of this court, had retired, and the vacancy thereby created had not, as of that time, been filled. All counsel, excepting Morris Lavine, stipulated at the oral argument that the person who might be appointed to fill such vacancy could participate in, but not write the opinion in this case. Although a transcript of the oral argument was prepared and available to all members of the court, Mr. Lavine has, since the vacancy was filled, refused to stipulate that other than the two justices who heard the oral argument could participate in the decision.

charged (unlawful sale of heroin), it was error to sustain objection to question, propounded to deputy sheriff on cross-examination, as to name of informer. West's Ann.Health & Safety Code, § 11500.

Forno & Umann and Harry M. Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Albert Bianchi, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with the unlawful sale of heroin in violation of section 11500 of the Health and Safety Code. In a nonjury trial he was convicted. Allegations in the information that he had been convicted previously of two felonies (burglary and forgery) were found to be true. He appeals from the judgment and the order denying his motion for a new trial.

Appellant asserts that the court erred prejudicially in sustaining the prosecutor's objection to a question asked by appellant on cross-examination.

A deputy sheriff testified that on September 27, 1956, about 2:15 p. m., he was driving his automobile westerly on a street in Los Angeles; he was accompanied by a confidential informer; he (deputy) saw defendant driving an automobile easterly on the same street (approaching the deputy's automobile); when the automobiles were about 40 yards apart the deputy honked the horn of his automobile, and then the defendant stopped his automobile at the north curb; the deputy made a U-turn in the street and parked his automobile about 12 feet back of defendant's automobile; then the informer got out of the deputy's automobile and went to defendant's automobile and talked to defendant; he (deputy) saw the informer hand currency to defendant, and he saw defendant hand something to the informer; the informer returned to the officer and handed four capsules of whitish-brown powder to him; then the defendant drove away; he was not arrested until February 6, 1957; he (deputy) did not see defendant after September 27 and prior to February 6.

The deputy testified further that he had known the informer about an hour before 2:15 p. m. of said September 27; the informer was searched at the sheriff's office before they proceeded to the place where they saw the defendant; there were no objects on the informer after the search; at the time of the search the informer was still considered to be in custody of deputies at the sheriff's office; after the search the deputy (witness) gave the informer $10 in currency.

The capsules, which the informer handed to the deputy, contained heroin.

On cross-examination, the attorney for defendant asked the deputy sheriff, as follows: "Now, what is the informant's name?" The deputy district attorney objected to the question on the ground that it called for confidential information. The objection was sustained.

It was established that the informer actively participated in the crime charged. "When an informant becomes a participant in the crime charged against the defendant, he and the people lose the right to keep his identity anonymous." People v. Lawrence, 149 Cal.App.2d 435, 452, 308 P.2d 821, 831; People v. Alvarez, 154 Cal.App.2d 694, 697, 316 P.2d 1006; See, also, People v. Castiel, 153 Cal.App.2d 653, 315 P.2d 79, and People v. Williams, —— Cal.App.2d ——, 323 P.2d 824. The court erred prejudicially in sustaining the objection.

The judgment and the order denying the motion for a new trial are reversed. and the cause is remanded for a new trial.

SHINN, P. J., and VALLÉE, J., concur.

159 Cal.App.2d 823

Julius ALUISI, Petitioner and Respondent,

v.

The COUNTY OF FRESNO, Melvin A. Willmirth, Sheriff of the County of Fresno, State of California, The Civil Service Commission of The County of Fresno, State of California, and Henry L. Suderman, Earl I. Eymann, Walter H. Wiebe, Charles L. Kaiser and William Stockburger, constituting the members of said Civil Service Commission, Respondents and Appellants.

Louis R. BOYD, Petitioner and Respondent,

v.

The COUNTY OF FRESNO, Melvin A. Willmirth, Sheriff of the County of Fresno, State of California, The Civil Service Commission of The County of Fresno, State of California, and Henry L. Suderman, Earl I. Eymann, Walter H. Wiebe, Charles L. Kaiser and William Stockburger, constituting the members of said Civil Service Commission, Respondents and Appellants.

Civ. 5653.

District Court of Appeal, Fourth District, California.

April 30, 1958.

Proceedings on writs of mandate to review decision of civil service commission upholding order of sheriff discharging deputy sheriffs on charges of inexcusable neglect of duty, immorality, insubordination, and dishonesty. The Superior Court of Fresno County, Philip Conley, J., granted peremptory writs and ordered commission to rehear each case and civil service commission and others appealed. The District Court of Appeal, Mussell, J., held that where deputy sheriffs had been discharged from their positions and record of administrative proceedings contained many omissions due to defective electric transcriber, deputy sheriffs were entitled to complete record of hearing, and judgment of trial court requiring commission to rehear and consider charges against deputy sheriffs was proper.

Judgment affirmed.

1. Mandamus ⇐172

On application for writ of mandate to review an order of a local quasi-judicial body, such as civil service commission, trial court does not have right to judge the intrinsic value of evidence or to weigh it; power of the court is confined to whether there was substantial evidence before commission to support its findings. West's Ann. Code Civ.Proc. § 1094.5(c).

2. Mandamus ⇐75

Where deputy sheriffs had been discharged from their positions and record of administrative proceeding contained many omissions due to defective electric transcriber, deputy sheriffs, in mandamus proceedings to review determination of civil service commission upholding the discharges were entitled to complete record of hearing and a judgment of trial court requiring commission to rehear and consider charges against petitioners was proper. West's Ann.Code Civ.Proc. § 1094.5(c).

Robert M. Wash, County Counsel, and Spencer Thomas, Jr., Assistant County Counsel, Fresno, for appellants and respondents.

J. W. Ehrlich and Jack Miller, San Francisco, for petitioners and respondents.

MUSSELL, Justice.

In these proceedings in mandamus petitioners Louis R. Boyd and Julius Aluisi sought a judicial review in the Superior Court of the decision of the civil service commission of Fresno county unholding the order of the sheriff of said county discharging petitioners from their positions as deputy sheriffs on charges of inexcusable neglect of duty, immorality, insubordination, and dishonesty. The principal grounds upon which petitioners sought relief by way of writ of mandate were (1) That such civil service commission prejudicially abused its discretion in rendering a decision not supported by substantial evidence in the light of the whole record; and (2) That the transcript of the proceedings before the commission, filed with and incorporated by

reference in the amended petition, is incomplete, that there was material testimony missing from it, and that petitioners were not given a fair and impartial trial during the hearing held before said commission.

On September 26, 1956, petitioners were dismissed from their positions as deputy sheriffs upon orders of the sheriff charging them with inexcusable neglect of duty and specifying that on or about September 10, 1956, while assigned to patrol duty in uniform and driving an official sheriff's car, Aluisi and Boyd went to a walnut grove located on Maple Avenue near Church Avenue in Fresno county, a location out of the patrol area then assigned to them and there remained in the company of three juvenile girls until the end of their tour of duty. The orders further alleged that this trip to the walnut grove was not in the performance of any assigned duty and that the radio operator was required to call the officers on the sheriff's radio to inquire as to their estimated time of arrival at headquarters.

On November 7, 1956, the sheriff served on each of the petitioners and filed with the civil service commission an amended order in which were alleged additional charges of inexcusable neglect of duty, immorality, insubordination, and dishonesty. Appeals from these orders were filed with the civil service commission and an extensive hearing was conducted thereon by it. On December 27, 1956, the commission rendered its findings and decision upholding the sheriff's amended orders for removal on all the specifications of misconduct charged except that of immorality. Petitioners then filed the present proceedings for review of the decision of the commission.

The record presented to the trial court shows that due to unavailability of a competent shorthand reporter at the time set for the hearing, the civil service commission used an electrical device for the purpose of recording the proceedings and as a result the typewritten record of the proceedings is incomplete. The record of the proceedings is contained in petitioners' exhibits numbers one, two and three, purporting to be a record of the testimony received before the commission. These exhibits were supplemented by copies of writings used at the hearing. The record also contains the affidavit of Henry A. Hunter, secretary of the civil service commission certifying "that the foregoing transcript contains a full, true and correct transcript of the recorded testimony and proceedings made upon Soundscriber discs Nos. 1 to 30 during the hearing in the foregoing entitled matter *with the exception of such portions as were inaudible because of a defect in the discs or were indistinguishable because of two or more persons talking at the same time or because of disturbing noises picked up by the recorder.*" (Emphasis added.) This certificate was attached to exhibit number one. The inaccuracies and incompleteness of the balance of the recording is shown clearly by the affidavit of Lawrence F. Curneen, an experienced transcriber who attempted to furnish a detailed transcript from discs thirty-one to sixty-one. His affidavit is as follows:

"Lawrence F. Curneen, being first duly sworn deposes and says:

"That he is a competent transcriber; that he is employed by Earl Christiansen and Associates, Reporters; that he was furnished with discs Nos. 31–61, which were electrical transcripts of the proceedings before the Civil Service Commission, wherein a hearing was held on the appeals of Louis R. Boyd and Julius Aluisi; *that said records were incomplete and contained numerous flaws and omissions, and because of said flaws and omissions, and because portions of the said testimony were inaudible, it was impossible to make a complete transcript of the proceedings; that petitioners' Exhibits Nos. 2 and 3 in evidence herein were prepared by your affiant, and for the reasons herein contained, they are incomplete.*" (Emphasis added.)

The trial court found, inter alia, that the records or discs which were furnished to the transcribers were incomplete and contained numerous flaws and omissions and, because

of such flaws and omissions and because portions of said testimony were inaudible, it was impossible to make a full and complete transcript of the proceedings; that because a complete and accurate record of the evidence was not made and preserved by the commission, petitioners were denied due process of law, and that the court is without the whole record and cannot perform its duty in reviewing the evidence in the manner and form required by law; that the transcript, as evidenced by petitioners' exhibits numbers one, two and three, is materially incomplete and that there is testimony missing therefrom which is necessary and material in trying the issue of whether the decision of the commission was supported by substantial evidence at the hearing, and that said transcript does not contain a substantially complete record nor a whole record as required by law. Judgment was entered ordering the issuance of a peremptory writ of mandate requiring the commission to set aside and annul its decisions and ordering it to rehear and reconsider the case of each and both of petitioners within a reasonable time. Respondents-appellants herein, on appeal from the judgment, claim that the trial court erred in refusing to review the record before it and that the findings are not supported by the evidence.

[1] The rule is well settled that on an application for a writ of mandate to review an order of a local quasi-judicial body such as the civil service commission in the present case, the trial court does not have the right to judge the intrinsic value of the evidence or to weigh it. The power of the court is confined to whether there was substantial evidence before the commission to support its findings. Damiani v. Albert, 48 Cal.2d 15, 17, 306 P.2d 780.

Section 1094.5 of the Code of Civil Procedure prescribes the procedure on hearings for the writs of mandate herein. Subsection (c) of said section reads as follows:

> "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

In 2 California Jurisprudence 2d, section 100, page 188, it is said that inasmuch as procedural due process in administrative adjudications requires that the proceedings be subject to judicial review, a record of the proceedings adequate to enable a court to pass upon the validity of the administrative action is required; that due process requires the preservation of a record of adjudicative administrative proceedings affecting vested rights is further indicated by the statutory provision for a judicial review of the evidence in such proceedings. Citing Code Civ.Proc. § 1094.5(c).

In Nishkian v. City of Long Beach, 103 Cal.App.2d 749, 752, 230 P.2d 156, it was held that in proceedings before an administrative body, which are quasi-judicial in nature, witnesses should be sworn and examined, and a record made, upon which reviewing courts may be enabled to determine whether substantial evidence was or was not considered by the quasi-judicial body, and that the proceedings should be conducted in a quasi-judicial manner at least.

In 2 California Jurisprudence 2d, section 230, page 383, it is said that while the courts of this state have applied the statute (Code Civ.Proc., sec. 1094.5) without enlarging upon the significance of the phrase "in the light of the whole record", its addition seems at least to require the court to examine the whole record and allow a petitioner to point out anything favorable to him therein, instead of following the old rule which required it only to see that the record contained substantial evidence to

support the ruling under review and left it free to disregard the rest of the record.

In Housman v. Board of Medical Examiners, 84 Cal.App.2d 308, 313, 190 P.2d 653, 655, 192 P.2d 45, the court said:

> "Under subdivision (c) of section 1094.5, the court is limited to a determination of whether the board's findings are 'supported by substantial evidence in the light of the whole record.' The court must then, if the record is present, on the hearing of the order to show cause, examine the record. This does not mean that the entire board record must necessarily be read in open court; but a fair and full opportunity must be given petitioner to point out in the record the matters that he claims show the arbitrary action of the board."

In Garvin v. Chambers, 195 Cal. 212, 225, 232 P. 696, 702, in reviewing the ruling of a civil service board discharging a policeman for dereliction of duty, the court said, "The safeguards which are ordinarily provided and invoked to protect reputation and rights in courts of justice should in substance be observed in proceedings of the character here under consideration."

[2] In the instant case the whole record was not prepared and petitioners were therefore unable to point out in it the matters which they claimed show arbitrary action of the civil service commission.

Appellants argue that there is no absolute duty on the part of the civil service commission to make a complete and verbatim transcription of the testimony at the hearing and that the record herein contains sufficient substantial evidence to support the decision of the commission. However, the commission found that the evidence was not sufficient to sustain the charges of immorality of petitioners. The testimony relied upon by the commission to sustain the findings as to the other charges contains many omissions of questions and answers, particularly those relating to duties of petitioners who were deprived of their permanent civil service status by the findings of the commission. The finding of the trial court that the record of the administrative proceeding which was before it was inadequate to enable it to pass upon the validity of the administrative action is supported by the record. Under the particular facts and circumstances of the instant case it appears that petitioners were entitled to a complete record of the hearing and that the judgment of the trial court requiring the commission to rehear and reconsider the charges against petitioners was proper.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



160 Cal.App.2d 174

Ernest W. McCAIN, Plaintiff and Appellant,

v.

John SHERIDAN, W. A. Cannon, Leo A. Viano, Carl Lyford, James Kenny, Robert Miller, D. J. Bradley, Clarence Erickson, Ed. J. J. McKeegan, City Council of the City of Richmond, Personnel Board of the City of Richmond, Charles Brown, Chief of Police of the City of Richmond, Edwin S. Howell, City Manager of the City of Richmond, Defendants and Respondents.

Civ. 17762.

District Court of Appeal, First District, Division 2, California.

May 7, 1958.

Hearing Denied July 2, 1958.

Action on petition for writ of mandate to compel plaintiff's reinstatement as a member of the police department. From a judgment of the Superior Court, County of Contra Costa, Wakefield Taylor, J., the plaintiff appealed. The District Court of

Appeal, Draper, J., held, inter alia, that where a shortage occurred in records division of police department, and a policeman with others in the department requested that a lie detector test be administered to them and he was told by expert administering tests that some people were not sufficiently responsive for polygraph testing and that if he proved to be one of those further testing would not be effective, and in fact card "test" was a trick for purpose of finding whether in attempt to evade further testing policeman would falsify the number he had in fact chosen, and examiner testified that policeman did so testify, whereupon policeman refused to take further tests, order of chief of police that he complete the tests was reasonable and policeman's refusal to obey such order amounted to insubordination and unofficerlike conduct warranting his discharge.

Affirmed.

1. Criminal Law ⇐388

The results of lie detector tests are inadmissible in evidence on trial of a criminal case, whether offered by the prosecution or the defense.

2. Evidence ⇐150

The results of lie detector tests are inadmissible on trial of a civil case.

3. Criminal Law ⇐351(1)

A suspect's willingness or unwillingness to take a lie detector test is inadmissible at trial.

4. Municipal Corporations ⇐189(1)

A member of the police force must be above suspicion of violation of the very laws he is sworn and empowered to enforce since efficiency of the system of administration of justice depends, in large part, upon police officers' faithful discharge of the trust reposed in them.

5. Municipal Corporations ⇐185(1)

A policeman's tenure of office may be terminated for derelictions far less serious than violation of the criminal statutes governing the citizens generally, and a policeman may be discharged for violation of a rule which requires prompt payment of his debts, and even exercise of constitutional right against self-incrimination may constitute unofficerlike conduct and be ground for discharge.

6. Municipal Corporations ⇐185(1)

Where a shortage occurred in records division of police department, and a policeman with others in department requested that lie detector test be administered to them and he was told by expert administering tests that some people were not sufficiently responsive for polygraph testing and that if he proved to be one of those further testing would not be effective, and in fact card "test" was a trick for purpose of finding whether in attempt to evade further testing policeman would falsify the number he had in fact chosen, and examiner testified that policeman did so testify whereupon policeman refused to take further tests, order of chief of police that he complete the tests was reasonable and policeman's refusal to obey such order warranted his discharge.

Pelletreau, Gowen & Moses, William P. Moses, San Pablo, for appellant.

Thomas M. Carlson, City Atty. of City of Richmond, Robert Collins, Asst. City Atty., Richmond, for respondents.

John W. Collier, City Atty. of City of Oakland, Mark B. Shragge, Deputy City Atty., Oakland, for City of Oakland amicus curiae.

DRAPER, Justice.

Petitioner (termed "plaintiff" in his petition for writ of mandate) had been a police officer of the City of Richmond for 14 years, and in 1956 held the rank of sergeant. He was assigned to the Records Division of the department May 6, 1956. Among the duties of that division was

the receipt of cash bail. On May 14 it developed that $263 cash bail, received May 5 and presumably placed in the cash drawer on that day, was missing. On May 18 a like amount was found to be missing. The $526 shortage was the subject of newspaper stories. Seventeen employees of the Police Department were assigned to the Records Division and had access to the cash drawer where bail money was kept. By petition to the police chief dated May 21, signed by all 17, these employees referred to the "adverse publicity," stated their belief "that we are all equally suspected of appropriating the missing funds," and concluded by "strongly urging that a full scale investigation, including the use of the latest scientific aids, be employed at once in an earnest effort to establish the innocence, or guilt, of each of the undersigned * * *"

Petitioner was the third signer of this document. Although he testified that he did not know what the petition was when he signed it, he conceded that on the same afternoon he signed, he presented the petition to the officer whose signature is the fifth upon the document, and told that officer that the petition was a request that the signers be given a lie detector test. Upon receipt of the petition, the chief arranged with an expert, not connected with the department, for the giving of the test, and ordered that the signers take it. Petitioner reported for his first polygraph (lie detector) test June 11. A second test was ordered for petitioner and several others on June 16. In this test, the machine was set up, the necessary attachments to the person of petitioner were made, and he was told that seven cards, each bearing a number visible to him but not to the examiner, would be shown to him. He was to choose one card, and the machine would show whether his statement of the number he chose was correct. He was also told that some people are not sufficiently responsive for polygraph testing, and that if he proved to be one of these, further testing would not be effective. In fact, this "test" was a trick. The cards were so arranged that the examiner could tell, without observing the faces of the cards, what number had been chosen by petitioner. The intent was to find whether, in an attempt to evade further testing, petitioner would falsify the number he had in fact chosen. The examiner testified that petitioner did so falsify. When informed of this result, petitioner removed the equipment attached to his arm, and, when the examiner spoke of further testing, petitioner asked to leave, and refused to submit to any further test. Later, the police chief ordered petitioner to complete the polygraph test, and offered to arrange such a test by another examiner. Petitioner refused, and said he would have absolutely nothing more to do with a lie detector.

Petitioner was dismissed from the Police Department June 22, 1956. He appealed to the Personnel Board. After public hearing, the dismissal was sustained, and the City Council sustained that action. By this proceeding, petitioner sought writ of mandamus requiring his reinstatement and payment of salary from date of his dismissal. The case was submitted to the trial court upon the transcript of the hearing before the Personnel Board. Writ was denied, and petitioner appeals.

The sole question presented is whether appellant's refusal to comply with the chief's order to complete the polygraph test constitutes "insubordination, disobedience, * * * (or) conduct unbecoming a police officer." Refusal to carry out a valid order concededly would be ground for dismissal. Appellant, however, argues that the order to take the test was unreasonable and invalid because the results of the test could not be admissible in evidence for or against appellant.

[1–3] Beyond question, the results of lie detector tests are inadmissible in evidence on the trial of a criminal case, whether offered by the prosecution (People v. Aragon, 154 Cal.App.2d 646, 316 P.2d 370; People v. Wochnick, 98 Cal.App.2d 124, 219 P.2d 70), or the defense (People v. Porter, 99 Cal.App.2d 506, 510, 222 P.2d

151). Nor are such results admissible on trial of a civil case (Gideon v. Gideon, 153 Cal.App.2d 541, 546, 314 P.2d 1011). Similarly, a suspect's willingness or unwillingness to take such a test is inadmissible at trial (People v. Carter, 48 Cal.2d 737, 752, 312 P.2d 665).

[4, 5] However, a member of the police force must be above suspicion of violation of the very laws he is sworn and empowered to enforce. The efficiency of our system of administration of justice depends, in large part, upon police officers' faithful discharge of the trust reposed in them. Christal v. Police Commission, 33 Cal.App. 2d 564, 567, 92 P.2d 416. Neither their number nor their arms will long sustain them in upholding the law if only the ultimate sanction of force is available to them. Rather, they can perform their duties only if they merit the trust and confidence of the mass of law-abiding citizens. Whatever weakens that trust tends to destroy our system of law enforcement. Accordingly, the courts have long recognized that a policeman's tenure of office may be terminated for derelictions far less serious than violation of the criminal statutes governing citizens generally. He may be discharged for violation of a rule which requires prompt payment of his debts. Cleu v. Board of Police Commissioners, 3 Cal.App. 174, 84 P. 672; see, also, Irwin v. City of Los Angeles, 3 Cal.App.2d 495, 39 P.2d 851. Even exercise of the constitutional right against self-incrimination may constitute unofficerlike conduct and be ground for discharge. Christal v. Police Commission, supra, 33 Cal.App.2d 564, 92 P.2d 416.

[6] By his written request that the test be administered to him, appellant evinced desire to obtain whatever benefit such apparent willingness might yield in diverting the investigation to others. The order that he complete the test he had himself requested seems in no way an unreasonable departmental regulation. Such tests are recognized as having some value in investigation, even though they are not yet sufficiently reliable to be admitted in evidence. People v. Aragon, supra, 154 Cal.App.2d 646, 658, 316 P.2d 370; 39 Cal.L.R. 439. We do not suggest that appellant's refusal to obey the order is any evidence of guilt or of knowledge of the identity of the guilty party. We do hold that, in the light of his sworn duty to aid in the investigation of crime, the order that he complete the test he had requested was reasonable. Appellant's refusal to obey that order impeded the investigation of a criminal offense and amounted to insubordination and unofficerlike conduct, thus warranting his discharge.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.



160 Cal.App.2d 28

The PEOPLE of the State of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

Anthony G. LAGISS, Defendant and Appellant.

No. 17791.

District Court of Appeal, First District, Division 1, California.

May 2, 1958.

As Corrected on Denial of Rehearing May 29, 1958.

Hearing Denied June 25, 1958.

Condemnation proceedings by Department of Public Works. From judgment of Superior Court, County of Contra Costa, Hugh H. Donovan, J., awarding landowner $10,000 for property condemned for highway purposes, landowner appealed. The District Court of Appeal, Bray, J., held that defendant's answer was sufficient to allege defense of fraud, bad faith and abuse of discretion on part of Highway Com-

mission in passing resolution reciting need for entire parcel, and failure to allow landowner to prove such facts constituted error.

Reversed.

1. Stipulations ⇐17(3)

Minute order of court cannot enlarge terms of a stipulation actually made between the parties.

2. Stipulations ⇐14(10)

Where parties in condemnation of land for highway purposes stipulated as to the existence of resolution duly and legally passed laying out public necessity, resolution was not enlarged by minute order showing that landowner stipulated not only as to fact of resolution but as to necessity for taking of entire parcel, and stipulation as made did not preclude landowner from attacking anything other than the fact that resolution was duly adopted.

3. Eminent Domain ⇐68

Statute reciting that Highway Commission resolution declaring public interest and necessity is conclusive evidence of public necessity of proposed improvement, that real property described is necessary therefor and that proposed improvement is planned or located in a manner which will be most compatible with greatest public good and least private injury, does not preclude court from determining whether use described in resolution is a public use in fact, and truth of findings declared in resolution are not immune from judicial inquiry if tainted by fraud, bad faith or abuse of discretion. West's Ann.Streets & High.Code, § 103.

4. Eminent Domain ⇐192

To present issue of alleged fraud, bad faith or abuse of discretion in condemnation of lands, such issue must be pleaded and bare allegations as to fraud, bad faith or abuse of discretion are not sufficient, since specific facts constituting such fraud, bad faith or abuse of discretion must be pleaded.

5. Eminent Domain ⇐192

Answer of landowner to proceedings to condemn land for highway purposes was sufficient to allege defense of fraud, bad faith and abuse of discretion on part of Highway Commission in contending that entire parcel of land was needed.

6. Eminent Domain ⇐196

In proceedings to condemn land for highway purposes, court committed error in refusing to admit landowner's offer of proof of facts allegedly showing fraud, bad faith and abuse of discretion on the part of Highway Commission in passing resolution declaring that the whole of the parcel was necessary.

7. Eminent Domain ⇐196

Where it is sought to condemn land for highway purposes proof respecting fact that portions of property are not suitable or adaptable for highway purposes or are in excess of property needed for proposed improvement is important only where it can be shown that Highway Commission has acted in bad faith or abused its discretion. West's Ann.Streets & High.Code, §§ 104, 104.1, 104.3, 104.6.

8. Pleading ⇐417

Ordinarily, filing of an amended answer constitutes a waiver of any error of court in dealing with prior answers.

9. Pleading ⇐426(2)

Where landowner in condemnation proceeding had filed answer containing allegations of fraud, abuse of discretion or bad faith on part of Highway Commission and the court refused to allow him to prove claim of bad faith and landowner then filed another amended answer without allegations of fraud, abuse of discretion or bad faith, which was identical with prior answer as it existed before court struck from it the allegations of bad faith, filing of amended answer did not, under circumstances, constitute a waiver of error by court in striking allegations of bad faith.

10. Appeal and Error ⇐233(1)
Trial ⇐412

An appellant, in order to preserve objection on appeal, need not make a formal objection once his position is made clear to the court, and he may introduce responsive evidence to explain or offset erroneously admitted evidence without waiving objection to introduction of evidence.

11. Trial ⇐412

Party may offer rebuttal evidence on issue in response to evidence admitted over his objection that it is outside the issues and may cross-examine on inadmissible matter without waiving his objection to its admissibility.

John A. Nejedly, Walnut Creek, for appellant.

Robert E. Reed, Holloway Jones, Jack M. Howard, Harry C. Miller, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment in a condemnation action awarding him $10,000 for property condemned for highway purposes.

Questions Presented.

1. Did defendant stipulate that the taking of the entire parcel was necessary?

2. Did defendant's answer plead a cause of defense?

3. Did the court err in denying defendant's offer of proof that the Highway Commission was acting in bad faith?

4. Did the filing of the third amended answer in effect waive error in sustaining of demurrer to prior answers?

Record.

After adoption by the California Highway Commission of the resolution of public interest and necessity required by section 102, Streets and Highways Code, this action was brought to condemn for highway purposes (among lands of other defendants not interested in this appeal), a parcel of land in Contra Costa County belonging to defendant. Defendant answered, denying that the whole of the parcel was needed by plaintiff for highway or any public purpose. The answer set up a description of a portion of the parcel which defendant alleged only was needed. He further alleged that the commission in passing its resolution acted in bad faith and abused its discretion in that it knew or should have known that only a portion of the parcel was needed for any public purpose; that it is apparent from the face of the complaint that only the portion between the highway lines shown on the map was necessary and that there are no plans for or possible use of the remainder of said parcel; that the commission and the department had no independent knowledge of the public necessity in acquiring all of said parcel and that its acquisition was for the sole purpose of depriving defendant of compensation justly due him, also to harass him, as plaintiff well knew defendant wished to retain that portion of the parcel not needed for the public improvement, and to coerce defendant into accepting a sum for the taking substantially less than the fair market value of the land actually needed for the improvement.

A motion to strike the allegations of the answer concerning bad faith was granted and a demurrer to the answer sustained with leave to amend. Defendant filed an amended answer containing the same allegations as the first answer. Again plaintiff moved to strike these allegations and the motion was granted.

Defendant then filed a second amended answer containing the same allegations plus one to the effect that plaintiff determined to take the property for the purpose of harassing defendant as plaintiff submitted to defendant "a stipulation in which the plaintiff would acquire only the above described portion of said parcel provided that the defendant would waive any rights to severance damage from the taking of only a portion of the larger parcel. * * *" Again, a motion to strike these allegations was granted.

On the first day of the trial, in chambers, defendant stated he desired to file a third

amended answer, and made an offer of proof that an employee of the Right of Way Section of the Division of Highways would testify that the taking of the entire parcel was not necessary for the public right of way, that a portion of it was not needed and that the employee and a counsel for the division offered to stipulate that the property not needed for the public right of way would be excluded from the action provided defendant would stipulate that no severance damages would be claimed. The court denied the offer on the theory that the defendant could not go behind the resolution. Thereupon, after striking out of the third amended answer, at the court's order, an allegation that the portion of the parcel actually required was of the value of $35,000, and the value of the portion not needed was $18,000, and inserting the figure of $53,000 as the value of the parcel sought to be condemned, that answer was filed. It contains no allegations of bad faith or that the entire parcel was not needed, other than a denial of the allegations of the complaint.

1. Stipulation.

[1, 2] At the end of the proceeding in chambers defendant stipulated to "the fact of the existence of the resolution duly and regularly passed laying out the public necessity." Thereupon plaintiff stated that it would not offer the resolution in evidence. This admittedly was the only stipulation on the subject. Unfortunately, the minutes of that day went way beyond the stipulation as made. They show that defendant stipulated not only to the fact of the passing of the resolution but that he stipulated to the necessity for the taking of the entire parcel for highway purposes and to other matters which would preclude defendant from raising the question herein considered. Obviously a minute order may not enlarge the terms of a stipulation as actually made. Plaintiff's contention that we are bound by the minute order's purported interpretation of the stipulation rather than by the stipulation itself is not well founded. The stipulation as made did not conclude defendant from attacking anything other than the fact that the resolution was duly adopted.

2. Answer.

Before determining the effect of the court's denial of defendant's offer of proof, it is necessary that we determine the validity of defendant's plea of bad faith and lack of public purpose in the proposed use.

[3] Section 103, Streets and Highways Code, declares that the commission's resolution declaring the public interest and necessity is *conclusive* evidence (a) of the public necessity of the proposed improvement, (b) that the real property described is necessary therefor, and (c) that the proposed improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury. This, of course, does not preclude a court from determining whether the use described in the resolution is a public use. Nor is the truth of the findings declared in the resolution immune from judicial inquiry if tainted by fraud, bad faith or abuse of discretion. City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal.App.2d 762, 777, 304 P.2d 803; People ex rel. Dept. of Public Works v. Schultz Co., 123 Cal. App.2d 925, 941, 268 P.2d 117; People v. Thomas, 108 Cal.App.2d 832, 835–836, 239 P.2d 914.

[4] To present such an issue, one must plead it. People ex rel. Dept. of Public Works v. Schultz Co., supra, 123 Cal.App. 2d 925, 941, 268 P.2d 117, and cases there cited. "* * * bare allegations as to fraud, bad faith, abuse of discretion and that the California Highway Commission was acting in excess of its authority" are not sufficient. People v. Thomas, supra, 108 Cal.App.2d 832, 836, 239 P.2d 914, 917; County of Siskiyou v. Gamlich, 110 Cal. 94, 98, 42 P. 468. "* * * specific facts constituting fraud, bad faith or abuse of discretion" must be pleaded. People v. Thomas, supra, 108 Cal.App.2d at page 836, 239 P.2d at page 917. Here defendant did plead such facts as that the commission knew that only a portion of the land was

needed for a public purpose, that it included the whole parcel knowing that he wanted to use a portion of it, that it did it to coerce him into taking less than the fair market value of the property.

[5] When defendant alleged that the commission acted in bad faith and abused its discretion by passing the resolution reciting a need for the whole of this parcel when it knew there was no need for a portion of it and had no plans for its use and did so to harass the defendant (and the other similar allegations recited earlier in this opinion), he clearly and specifically pleaded fraud, bad faith and abuse of discretion.

The court erred in striking from defendant's answers the allegations above mentioned and in sustaining demurrers thereto. This brings us to—

3. Defendant's Offer of Proof.

[6] As defendant should have been permitted to plead his charge of bad faith, abuse of discretion and lack of public purpose, so should he have been permitted to prove the same. In City of La Mesa v. Tweed & Gambrell Planing Mill, supra, 146 Cal.App.2d 762, 304 P.2d 803, the trial court refused to permit evidence similar to that contained in defendant's offer of proof, to be admitted on the theory that it was inadmissible because made in negotiation for compromise. The reviewing court stated (146 Cal.App.2d at page 777, 304 P.2d at page 812): "Evidence of facts tending to show fraud and bad faith on the part of the city were admissible in this action as proof of the allegations contained in the defendants' amended answer, even though the events related occurred during negotiations to effect a compromise seeking acquisition of the 40-foot strip in question. The honesty and good faith of the city was not an issue in controversy at the time of these negotiations, and it made no admissions with respect thereto in order to effect a compromise. The fact that statements are made or incidents take place during negotiations to effect a compromise, does not justify exclusion of evidence relating to the same if such evidence otherwise is admissible. [Citations.] It would not be competent to admit an offer of compromise as such; however, 'the declaration therein of facts involved in the controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, are admissible against the party making them.' [Citation.] Plaintiff's objection properly was overruled."

[7] The evidence offered comes within the above ruling. Whether such evidence showed merely an offer of compromise or an indication that the action of the commission was in bad faith would be determined at the trial after the exact testimony is given. As a matter of pleading it is the averments in the complaint as to the amount of land necessary for the use that controls (People v. Milton, 35 Cal.App.2d 549, 553, 96 P.2d 159), and the mere fact that the map attached to the complaint indicates that the right of way to be used does not cover the entire parcel does not show that the entire parcel is not needed for the public purpose. Moreover, "The contention that the portions of the property not included within the right of way lines of the highway are not suitable or adaptable or in excess of property needed for the proposed improvement raises no issue since it was for the commission to determine the necessity for the acquisition of property sought to be condemned. County of Siskiyou v. Gamlich, 110 Cal. 94, 98, 42 P. 468." People v. Thomas, supra, 108 Cal.App.2d at page 836, 239 P.2d at page 917. Such facts become important only where it can be shown that the commission acted in bad faith or abused its discretion. See Los Angeles County Flood Control Dist. v. Jan, 154 Cal. App.2d 389, 316 P.2d 25.

We have no record of the proceedings at the trial to determine what issues were raised. Plaintiff in its brief says it has authority to take the entire parcel under sanction of section 104.1. Whether it officially proposed to do so, its complaint herein does not inform us. For aught that appears in the record, the state may have claimed it needed the so-called "ex-

cess" portion of defendant's parcel (that portion which lies outside of the lines of the proposed highway, shown on the maps attached to the complaint) for purposes specified in section 104 of the Streets and Highways Code (for parks, for support of trees or for drainage), for purposes mentioned in section 104.3 (conveyance with reservations concerning further use and occupation) or in section 104.6 (for future needs), or for other uses sanctioned by other provisions of law. That, doubtless, on a new trial will develop when defendant submits his evidence of fraud, bad faith and abuse of discretion, if plaintiff still claims good faith and tenders evidence on that issue.

If at the trial the state invokes section 104.1 as justification for the taking of the "excess" portion, it will need to show that such portion of defendant's parcel is "of little value to" him or that leaving title thereto in him will "give rise to claims or litigation concerning severance or other damage." § 104.1. Perhaps it would have to prove both. The "or" between the two quoted phrases may mean "and." (We express no opinion on this subject.) Such issue would, we think, be justiciable. It goes to the question whether the proposed taking is for a public use. That determination depends upon the facts in each case. For example, a strip of land of the size here involved (segment in shape, and being 1,566 square feet—the entire parcel sought to be condemned contains 7,272 square feet) might or might not be "of little value to its owner." The determination of such a question cannot be left to the conclusive say-so of an administrative agency of the condemning body, when the question of fraud, bad faith and abuse of discretion is in issue. The defendant conceivably might show a valuable use for a strip the size of that here involved, a potentially important factor in determining whether the taking of this strip would be a taking for the use defined in section 104.1, in case the state in due course and upon the record invokes that section.

These are all matters to be determined at the trial.[1] "* * * the mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, as a matter of fact, the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use." Stratford Irr. Dist. v. Empire Water Co., 44 Cal.App.2d 61, 67, 111 P.2d 957, 961.

4. Waiver.

[8, 9] As above stated, defendant filed a third amended answer in which there were no allegations of fraud, abuse of discretion or bad faith. Ordinarily this would have constituted a waiver of any error of the court in dealing with prior answers. Gale v. Tuolumne Water Co., 14 Cal. 25, 28; Brittan v. Oakland Bank of Savings, 112 Cal. 1, 2, 44 P. 339. Technically, there was before the court at the trial now no pleading of fraud, etc. However, here defendant had tried unsuccessfully three times to get his defense before the court. His prior answers alleged the value of the property to be taken as $35,000, on the basis that it was only the property which defendant alleged was necessary to be taken. He desired, when the court had refused to allow him to prove his claim of bad faith, to allege the value of the whole parcel, and it was for this purpose that the third amended answer was filed. It was identical with his second amended answer as that answer existed after the court had stricken from it the allegations of bad faith, etc.

The wiping out of prior pleadings is not always the effect of filing amended pleadings. The court in Redington v. Cornwell, 90 Cal. 49, 60–61, 27 P. 40, 43, holding that a prior complaint can be considered in

1. Defendant contends that section 104.1 is unconstitutional. Until a trial is had wherein the application of the section becomes an issue, the question of constitutionality cannot be properly raised.

determining when an action was filed, stated: "It has been said in a number of cases that an amended pleading supersedes the original, but I think a careful examination of those cases will show that it was only intended to *decide* that the amended pleading superseded the original for certain specified purposes, and only to the extent of the amendment. Beyond this, whatever may have been said is mere *dictum*. But in none of the cases has it been even said that the original is not a part of the judgment roll; nor has it been decided that an original complaint is superseded for the purposes of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment. For the purpose of determining these questions, and perhaps others that may arise which often become material on appeal, the amended complaint can by no possibility supersede the original." See also Gray v. Hall, 203 Cal. 306, 310, 265 P. 246. There is apparently no magic in the rule, and the effect of the filing of the amended pleading depends upon the situation presented by the particular case.

Plaintiff argues that no exception should be made here because the defendant had other alternatives than the course he took. Defendant, who, in view of the court's rulings, needed to amend his answer in order to allege a value for the whole property (his prior answers merely alleged the value of only the portion of the parcel which he contended was needed) could have added to the third amended answer the matter which the court had ruled out, and thereby could have obtained another adverse ruling. Such procedure would have been cumulative merely to what had gone before. The desirability, from any point of view, of including the thrice-stricken allegations, has not been suggested. There is no possibility that plaintiff was misled as to the defendant's position, or that defendant, in adopting the procedure that he did, intended to waive his right to object to the court's rulings.

[10, 11] There are various cases where, in regard to errors occurring during the course of the trial, an appellant does not have to risk all in order to preserve an objection on appeal but may engage in defensive conduct. Thus he need not make a formal objection once his position is made clear to the court. Leibman v. Curtis, 138 Cal.App.2d 222, 225, 291 P.2d 542, 292 P. 2d 270. He may introduce responsive evidence to explain or offset erroneously admitted evidence without waiving the objection to introduction of the evidence (Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 310, 288 P.2d 989); he may offer rebuttal on an issue in response to evidence admitted over objection that it is outside the issues (De Roulet v. Mitchel, 70 Cal.App.2d 120, 125, 160 P.2d 574); he may cross-examine on inadmissible matter without waiving his objection to its admissibility (Jameson v. Tully, 178 Cal. 380, 384, 173 P. 577; see also 3 Witkin, California Procedure, pp. 2258, 2260). These cases, involving the countering of possibly prejudicial error by defensive action, seem more applicable to the present case than the rule evolved from waiver of formal objections to pleading by amendment of the pleading.

Under the circumstances of this case the filing of the third amended answer did not constitute a waiver of defendant's right to present the defense herein discussed, inasmuch as defendant should have been permitted to present that defense.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Rose LUCAS, Defendant and Appellant.

Cr. 3404.

District Court of Appeal, First District, Division 2, California.

May 12, 1958.

Rehearing Denied June 11, 1958.

Hearing Denied July 9, 1958.

Defendant was convicted of manslaughter. The Superior Court, City & County of San Francisco, Walter Carpeneti, J., entered judgment and an order denying a new trial, and the defendant appealed. The District Court of Appeal, Draper, J., held that alleged misconduct of prosecutor was not prejudicial to defendant, where jury found defendant guilty of lesser included offense of manslaughter on evidence, which would have warranted conviction of a greater offense, and it was difficult to believe that defendant could have been acquitted.

Judgment and order affirmed.

1. Criminal Law ⇐1171(2)

Statement by prosecutor in opening statement that he expects to prove a certain matter, which he does not later prove, does not constitute prejudicial misconduct, in absence of a positive showing of a deliberate attempt to misstate the case.

2. Criminal Law ⇐1171(1)

Generally, criticisms of defense counsel by prosecutor are not grounds for reversal of judgment, in absence of a showing of prejudice to defendant.

3. Criminal Law ⇐327

In a criminal case, the prosecution has a heavy burden of proof.

4. Criminal Law ⇐1171(1)

In determining whether misconduct of prosecutor has prejudiced the defendant, District Court of Appeal, on appeal, may look to the strength of the proof of guilt.

5. Homicide ⇐116(6)

Threats alone, unaccompanied by some act which induces in defendant a reasonable belief that bodily injury is about to be inflicted, does not justify a homicide.

6. Homicide ⇐115

Danger, which justifies homicide, must be imminent, and a mere fear that danger will become imminent is not enough.

7. Homicide ⇐244(1)

Evidence that defendant admitted to police that she first shot at the unarmed deceased while he was seated, that one bullet through body of deceased indicated that bullet was fired while deceased was falling, and that one or more shots struck deceased from the rear tended to establish circumstances weighing strongly against contention that self-defense justified the homicide.

8. Criminal Law ⇐1171(1)

In homicide prosecution, alleged misconduct of prosecutor was not prejudicial to defendant, where jury found defendant guilty of lesser included offense of manslaughter on evidence which would have warranted conviction of a greater offense, and it was difficult to believe that defendant could have been acquitted.

9. Criminal Law ⇐781(5)

Where trial court fully and correctly instructed jury in homicide prosecution as to distinction between confession and admission, and left to jury questions whether confession had been made, and, if so, whether it was true, instructions that only a voluntary confession can be considered by the jury did not amount to an instruction that statement given by defendant to police was a confession, rather than an admission.

Nathan Cohn, Lawrence Shostak, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Jack Berman, Deputy Dist. Atty., San Francisco, for respondent

DRAPER, Justice.

Defendant was indicted for the murder of her husband. A jury found her guilty of manslaughter, and she appeals from judgment entered upon that verdict and from order denying new trial.

Defendant and decedent, a highway patrolman, had been married 23 years. Defendant testified that the marriage had been an unhappy one, that in the last 5 years decedent had been drinking heavily, and had choked her at least two or three times a month. They had a quarrel the evening of December 3, 1956, and she called the police. The next night, she stayed with a neighbor until midnight. When she returned home, her husband was asleep. She saw a loaded revolver on the dresser in his room, removed the bullets from the gun and placed it in a drawer. The next evening, December 5, defendant and decedent had another argument. Mrs. Lucas testified that he threatened to kill her. She called the police, who arrived, talked with the two parties, and left. Mr. Lucas was not armed. Her testimony is that she then went to the kitchen; decedent again told her to get out and threatened to kill her; she let the dog out and started to prepare dinner; decedent, who remained in the living room, continued to call threats to her; she went to the bedroom, got the revolver from the drawer, loaded it with the five shells she had removed the previous evening, and returned to the living room carrying the gun. She then testified:

> "* * * he was sitting down in the living room and I walked into the little hall near where he was sitting and I said to him, I says, 'Joe, I can't go on like this, we can't go on like this any longer. I have to talk to you, and,' I says, 'I don't want you to kill me' * * * And with that he went to get up and I just remembered just moving back, stepping back and then he came with his arms out at me and I just thought he was going to kill me * * * and then the gun just seemed to go off."

On appeal, it is conceded that defendant fired the gun. All five shells were fired, and four bullets struck decedent. He died shortly after.

As is apparent from the testimony quoted above, it was defendant's contention that she shot in self-defense when decedent rose from his chair and advanced upon her, with arms reaching toward her. There was oral testimony of three statements made by defendant to police shortly after the shooting, in which she said that decedent was in the chair when the first shot was fired, and that he then started to get up from the chair and she fired the remaining four shots at him.

At the time of the argument immediately preceding the shooting, the two grown sons of defendant and decedent were downstairs in the family home with friends. Mrs. Lucas admitted that she was not so fearful of attack by her husband when her sons were home. She testified that she did not know the boys were present, although she also testified that she planned to prepare dinner for them, and one son testified that he had quieted a slightly earlier argument between his parents.

Defendant's principal contention is that the assistant district attorney who prosecuted this case was guilty of misconduct which prejudiced her case. More than 30 pages of the opening brief are required to detail the asserted instances of misconduct. It would serve no purpose to list them all here.

[1] It is argued that the prosecutor, in his opening statement, improperly told the jury that he expected to prove five matters which he did not prove by the evidence introduced. Upon three of these issues, there was evidence from which the jury could infer the facts as claimed by the prosecution. The fact that defendant is unwilling to draw such inferences does not show misconduct. One statement, that defendant on December 3 told police officers that she "would file a civil action" is but collateral. The opening statement did say that "the pictures will show" that the

final shot was fired into decedent's head while he lay on the floor. In fact this was not established, but was disproved by evidence produced by defendant. However, there is no showing that the erroneous statement by the prosecutor was made in bad faith. In the absence of a positive showing of a deliberate attempt to misstate the case, such a remark cannot constitute prejudicial misconduct. People v. Alexander, 41 Cal.App.2d 275, 282, 106 P.2d 450, 916. Appellate courts recognize that such an overstatement reacts against the party making it, and thus often is not prejudicial to the opposing party. People v. Berryman, 6 Cal.2d 331, 336, 57 P.2d 136, and cases there cited. In the case at bar, defense counsel made effective use of the overstatement in his argument, quoting the opening statement and pointing out to the jury the respects in which the proof fell short of sustaining its assertions.

During the prosecutor's argument, defendant cried out that he was lying. A recess was taken, and, when argument was resumed, the prosecutor began to comment upon this incident. The court, of its own motion, stopped this argument and instructed the jury to disregard it. Later, the prosecutor said that there was "no evidence of mourning" on the part of defendant. No objection was made. Defendant urges these incidents as prejudicial misconduct. Defendant relies upon People v. Pette, 54 Cal.App. 333, 370, 202 P. 51. The facts of that case differ from those of the case at bar. Here defendant took the witness stand, where Mrs. Peete did not. Here defendant interrupted the argument by comment audible to the jury. In any event, the decision in People v. Peete, although it termed the prosecutor's conduct "reprehensible," held there was no reversible error because there had been no objection, and the error was one which could have been cured by admonition. Here the admonition was given, in the one instance, by the court upon its own motion. In the other instance, no objection was made. Thus, on the authority of the very case cited by defendant, the error must be held not prejudicial.

The substantial majority of the remarks assigned as misconduct were directed against defense counsel, rather than defendant. Full review of the extensive transcript reveals that both counsel frequently reverted to the ancient form of trial by champion, making the issue a personal quarrel between them. The trial court twice cited both counsel for contempt. It is true that the assistant district attorney was more often the aggressor in these flurries, and his conduct was often overzealous or in poor taste. The trial judge, however, was constantly alert to these deviations from the proper course. His firmness quickly ended the diversions of counsel. He was prompt and decisive in sustaining defense objections and in admonishing the jury to disregard the statements of counsel for the People whenever objection was made, and in some cases where it was not. In his instructions to the jury, he fully advised them to look solely to the evidence and not to the statements of counsel in determining the facts.

[2] In general, criticisms of defense counsel are not grounds for reversal of judgment, in the absence of a showing of prejudice to defendant. People v. Rickman, 67 Cal.App.2d 711, 714, 155 P.2d 374. The decision in People v. Podwys, 6 Cal.App.2d 71, 44 P.2d 377, is not applicable. There the opinion does make reference to criticisms of the public defender by the district attorney. However, the prosecutor also argued that he had not sought and would not seek to convict an innocent man. Also, the closeness of that case was evidenced by the fact that in the previous trial the jury had disagreed after a full day's deliberation.

[3] In a criminal case, the prosecution has a heavy burden of proof. The likely tendency of such diversionary tactics as attacks upon defense counsel, at least where he fends off the attacks as adroitly as in our case, is to distract the jury's attention

from the proof by which the prosecution must convince the jury beyond a reasonable doubt, thus prejudicing the prosecution rather than the defense.

[4–7] In determining whether misconduct has prejudiced the defendant, we may look to the strength of the proof of guilt. People v. Byrnes, 84 Cal.App.2d 64, 70, 190 P.2d 286. The only defense is that the killing was justifiable because committed in self-defense. But threats alone, unaccompanied by some act which induces in defendant a reasonable belief that bodily injury is about to be inflicted, do not justify a homicide. People v. Lynch, 101 Cal. 229, 35 P. 860. The danger which justifies homicide must be imminent (People v. Turner, 86 Cal.App.2d 791, 195 P.2d 809) and a mere fear that danger will become imminent is not enough (People v. Taylor, 4 Cal.App. 31, 37, 87 P. 215). Thus defendant's admissions to the police that she first shot when the unarmed decedent was seated militate strongly against her defense. Also, the evidence shows that the course of one bullet through decedent's body indicates that it was fired while he was falling, and it is undisputed that four shots struck decedent. There is also evidence that one or more shots struck decedent from the rear. Since measures of self-defense cannot continue after the assailant is disabled, these circumstances weigh strongly against the contention that self-defense justified the killing. People v. McGann, 194 Cal. 688, 697, 230 P. 169; People v. McCurdy, 140 Cal.App. 499, 503, 35 P.2d 569.

[8] Full review of the record convinces us that defendant suffered no prejudice from the misconduct of the prosecutor. The jury found her guilty of the lesser included offense of manslaughter, upon evidence which would have warranted conviction of a greater offense. On the whole record, it is difficult to believe that defendant could have been acquitted. The conduct of the prosecution is by no means to be condoned. Had it been successful, reversal would be required. However, we agree with defense counsel's statement to the jury that the prosecutor's conduct "helped my case immeasurably." Under all the circumstances, the misconduct was not prejudicial to defendant.

[9] Defendant also complains that the court instructed the jury that only a voluntary confession can be considered by the jury. The contention is that this amounted to instructing that the statements given by defendant to police were confessions, whereas defendant contends they were but admissions. However, the court fully and correctly instructed the jury as to the distinction between confession and admission, and left to the jury the questions whether a confession had been made, and if so whether it was true. There was no error. People v. Gardner, 147 Cal.App. 2d 530, 538, 305 P.2d 614.

Judgment and order denying new trial affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



160 Cal.App.2d 359

James N. ROUTH, Plaintiff and Appellant,

v.

PALM OIL COMPANY, a California corporation, W. H. Easley, Palm Oil Company and W. H. Easley, a co-partnership, Doe I, Doe II and Doe III, Defendants,

Palm Oil Company, a California corporation, and W. H. Easley, an individual, Respondents.

Civ. 22641.

District Court of Appeal, Second District, Division 3, California.

May 12, 1958.

Action to recover money. From a judgment for defendant and from an order denying the motion of plaintiff for a new trial in the Superior Court of Los Angeles.

County, George Francis, J., the plaintiff appeals. The District Court of Appeal, Vallée, J., held that the evidence sustained judgment that the plaintiff had been paid in full; that a motion for new trial to impeach the credibility of the witness of defendant was properly denied; and that the order denying a new trial was not appealable.

Appeal from the order dismissed. Judgment affirmed.

1. Appeal and Error ⇐110

An order denying a new trial is not appealable.

2. Appeal and Error ⇐1071(1)

In an action for money, alleged fact that finding that defendants were not general partners was unsupported by evidence was harmless, where the court found that the plaintiff had been paid in full.

3. Appeal and Error ⇐1010(1)

Where the plaintiff challenges the sufficiency of evidence to support findings that he was paid in full in an action for money, plaintiff must demonstrate that there is no substantial evidence to support the challenged findings.

4. Appeal and Error ⇐907(2)

A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.

5. Appeal and Error ⇐757(3)

It is not the province of a reviewing court to search the record to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal.

6. Appeal and Error ⇐757(3)

Where an appellant claims that some particular issue of fact is not sustained by the evidence, he must set forth in his brief all of the material evidence on the point, and not merely his own evidence, and if this is not done, the error assigned is deemed waived.

7. Payment ⇐73(1)

In action to recover money, evidence supported the finding that plaintiff had been fully paid.

8. New Trial ⇐105

A new trial will not ordinarily be granted on ground of newly discovered evidence which is merely impeaching in character.

9. Appeal and Error ⇐1015(1)

Whether a witness is sufficiently discredited to warrant the granting of a new trial is for the trial court.

10. New Trial ⇐105

In action for money, plaintiff was not entitled to a new trial on the ground that he had allegedly discovered evidence that a witness of the defendant had been convicted of felony and that hence the witness was discredited.

Theodore G. Lee, Long Beach, for appellant.

Robert E. Krause, Long Beach, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants in an action for money.

[1] The complaint alleges three separate transactions entered into by defendants with plaintiff: the first, the sale by plaintiff to defendants of an oil lease for which $7,000 was unpaid; the second, the obtaining by plaintiff for defendants of another oil lease for which defendants agreed to pay plaintiff a commission of $2,500, which was unpaid; the third, for the reasonable value of pipe and tubing sold to defendants. The court found plaintiff had been paid in full, and he appeals from the judgment and from an order denying his motion for a new trial. The order denying a new trial is not appealable and the appeal therefrom must be dismissed.

[2] Plaintiff asserts a finding that defendants were not general partners is un-

supported by the evidence. The point is of no consequence. Since the court found plaintiff had been paid in full, it is immaterial whether defendants were partners.

[3–7] Plaintiff obliquely challenges the sufficiency of the evidence to support the findings that he was paid in full. Such contention requires plaintiff to demonstrate that there is no substantial evidence to support the challenged findings. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. Plaintiff, however, recites only evidence favorable to him. It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal. Fuschi v. Vir Den, 107 Cal.App.2d 280, 283–284, 236 P.2d 829; Marson v. Rand, 107 Cal.App.2d 466, 468, 237 P.2d 18. Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence. If this is not done, the error assigned is deemed waived. Kruckow v. Lesser, 111 Cal.App.2d 198, 200, 244 P.2d 19, and cases cited. Notwithstanding plaintiff's disregard of the rules, we have examined the record. The evidence on all questions was conflicting. The attack is largely with respect to the credibility of one of defendants' witnesses, a matter with which we have no concern. There was much evidence that plaintiff was fully paid.

[8–10] In support of his motion for a new trial plaintiff filed an affidavit of his attorney which stated that about a week before the trial he inquired of the county clerk as to whether one of defendants' witnesses had been convicted of any felonies and he was told there was no record of any conviction; following the trial he made inquiries of the district attorney's office and was told the witness had been convicted of a felony; he thereupon obtained a certified copy of the judgment of conviction, which was for grand theft. A certified copy of the judgment was attached to the affidavit. Plaintiff makes a nebulous claim with respect to this matter. The most he says is that it discredited the testimony of the witness. He does not say the court erred in denying a new trial. A new trial will not ordinarily be granted on the ground of newly discovered evidence which is merely impeaching in character. Dankert v. Lamb Finance Co., 146 Cal.App.2d 499, 502, 304 P.2d 199. Whether the witness was sufficiently discredited to warrant the granting of a new trial was a matter for the trial court. The appeal borders on the frivolous.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



160 Cal.App.2d 66

Cecil M. BRITTON, Plaintiff and Respondent,

v.

Donald GUNDERSON, Leonard G. Felix, Chun King Sales, Inc., and The Chronicle Publishing Company, Defendants and Appellants.

Civ. 9337.

District Court of Appeal, Third District, California.

May 2, 1958.

Occupant of first automobile brought action against driver of second automobile and his employer and driver of truck and his employer for injuries sustained by occupant of first automobile when first automobile ran into front end of truck, which was stalled on icy highway, and which, with stalled automobile, obstructed high-

way. The Superior Court, Placer County, Leland J. Propp, J., entered an order granting occupant of first automobile a new trial, and the driver of the truck, his employer, the driver of the second automobile, and his employer appealed. The District Court of Appeal, Van Dyke, P. J., held that requested instruction of occupant of first automobile that negligence, if any, of driver of first automobile could not be "charged" against occupant of first automobile was proper and should have been given, and that Superior Court did not abuse its discretion in granting occupant of first automobile a new trial.

Order affirmed.

1. Negligence ⇐141(11)

In action by occupant of first automobile against driver of second automobile and his employer and driver of truck and his employer for injuries sustained by occupant of first automobile when first automobile ran into front end of truck, which was stalled on icy highway, and which, with stalled second automobile, obstructed highway, requested instruction of occupant of first automobile that negligence, if any, of driver of first automobile could not be "charged" against occupant of first automobile, was proper and should have been given.

2. Appeal and Error ⇐977(1)

Granting of motion for new trial rests within discretion of trial judge to such an extent that reviewing court will not interfere, unless abuse of discretion clearly appears.

3. New Trial ⇐39

In action by occupant of first automobile against driver of second automobile and his employer and driver of truck and his employer for injuries sustained by occupant of first automobile when first automobile ran into front end of truck, which was stalled on icy highway, and which, with stalled second automobile, obstructed highway, trial court did not abuse its discretion in granting occupant of first automobile a new trial because of the erroneous refusal to give requested instruction of occupant of first automobile that negligence, if any, of driver of first automobile could not be "charged" against occupant of first automobile.

4. Automobiles ⇐246(22)

In action by occupant of first automobile against driver of second automobile and his employer and driver of truck and his employer for injuries sustained by occupant of first automobile when first automobile ran into front end of truck, which was stalled on icy highway, and which, with stalled second automobile, obstructed highway, instruction on unavoidable accident was improper.

5. Automobiles ⇐246(60)

In action by occupant of first automobile against driver of second automobile and his employer and driver of truck and his employer for injuries sustained by occupant of first automobile when first automobile ran into front end of truck, which was stalled on icy highway, and which, with stalled second automobile, obstructed highway, instruction on presumption of due care on part of driver of truck and driver of second automobile was improper, where they testified fully as to their acts and conduct immediately preceding and at time of accident.

Rich, Fuidge & Dawson, Marysville, for appellants Gunderson-Chun King Sales.

Russell A. Harris, by Donald McGregor, Sacramento, for appellants Felix and Chronicle Pub. Co.

Law Offices of C. Ray Robinson, by Ronald G. Cameron, Daniel J. Higgins, Auburn, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting plaintiff's motion for a new trial in a personal injury action.

The accident which gave rise to this action occurred on a winter afternoon on a mountainous stretch of U. S. Highway 40 near Cisco Grove in Placer County. It had

been snowing and portions of the road were icy. Appellant Gunderson had been driving his truck and trailer upgrade in an easterly direction. At a point approximately 100 feet west of a sharp curve he stopped behind a stalled vehicle. Gunderson waited until the stalled vehicle was able to proceed. When it continued up the grade and around the curve, Gunderson attempted to follow, but the wheels of the truck and trailer spun. Gunderson was still stopped on the highway when appellant Felix came around the curve from the east. He testified that he did not think there was sufficient room for him to pass Gunderson's truck and trailer. Consequently, he headed his automobile into the snowbank on his right, stopping more or less opposite Gunderson's truck and at such an angle that both lanes of traffic were blocked. The highway was so obstructed when the car in which plaintiff was riding came around the curve from the east. The driver applied the brakes, but the car skidded on the icy road and crashed into the front of Gunderson's truck. Respondent was rendered unconscious and there was evidence that he sustained a concussion of the brain which aggravated a preexisting epileptic condition.

At the outset of the trial appellants stipulated that there was no issue as to contributory negligence or as to respondent's status as a guest. However, the court refused to instruct the jury that: "The negligence, if any, of the driver of the vehicle in which the Plaintiff was riding at the time and place involved in this trial may not be charged against the Plaintiff, Cecil M. Britton."

The jury returned a verdict in favor of appellants Gunderson and Felix and their employers, Chun King Sales and The Chronicle Publishing Company, who were joined as party defendants. The trial court granted respondent's motion for a new trial for insufficiency of the evidence and for error in refusing to give the above quoted instruction requested by respondent.

[1, 2] The instruction was proper and should have been given. Van Noy v. Frank, 10 Cal.App.2d 423, 424–425, 51 P.2d 1166; Krupp v. Los Angeles Ry. Corp., 57 Cal. App.2d 695, 697, 135 P.2d 424; Hoover v. Striegel, 99 Cal.App.2d 833, 839–840, 222 P.2d 963. The instruction was not erroneous because the word "charged" was used in lieu of "imputed". Appellants argue that no prejudice ensued from refusal to give the instruction as the subject therein contained was adequately covered by the instructions on negligence, proximate cause and liability. Fletcher v. Pierceall, 146 Cal.App.2d 859, 863–865, 304 P.2d 770. That argument was properly addressed to the trial court. This is not an appeal from an adverse judgment, as in the Fletcher case, but an appeal from an order granting a new trial. In Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467, the Supreme Court stated:

> "This court has recently reiterated the settled rule that the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears." See, also, Henderson v. Balcom, 145 Cal.App.2d 36, 38–39, 301 P.2d 928.

[3] No abuse of discretion "clearly appears" in the instant case. Moreover, further error appears in the record.

[4, 5] The trial court gave an instruction on unavoidable accident. Since the trial of this case the Supreme Court has held that an instruction on unavoidable accident is improper. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500, 506. In the cited case the Supreme Court held that instruction on unavoidable accident "obviously overemphasized defendants' case, and, * * * suggested to the jury that they should consider unavoidability as an issue or ground of defense separate and apart from the questions of negligence and proximate causation." Likewise improper was the instruction on the presumption

of due care. Appellants were not entitled to the presumption, as they testified fully as to their acts and conduct immediately preceding and at the time of the accident. Nunnemaker v. Headlee, 140 Cal.App.2d 666, 671–672, 295 P.2d 438; Bertoli v. Hardisty, 154 Cal.App.2d 283, 286–287, 315 P.2d 890.

The order is affirmed.

SCHOTTKY and PEEK, JJ., concur.



160 Cal.App.2d 145

In the Matter of the ESTATE of Henry Peter RONKENDORF, Deceased.

Henry A. GOTTSCHE, Appellant,

v.

ATTORNEY GENERAL OF The UNITED STATES of America and Sue H. Cloudsley, Special Administratrix, Respondents.

Civ. 9329.

District Court of Appeal, Third District, California.

May 6, 1958.

Rehearing Denied June 2, 1958.

Hearing Denied July 2, 1958.

Proceedings on motion to set aside decree distributing to attorney general property inherited by German national and vested by the attorney general. The Superior Court, San Joaquin County, Thomas B. Quinn, J., overruled the motion, and the movant appealed. The District Court of Appeal, Schottky, J., held that effect of war-terminating resolution proviso, that any property subject to provisions of Trading With the Enemy Act prior to January 1, 1947, was to remain subject thereto, had been to continue unchanged enemy status of person with respect to any property subject to Act prior to January 1, 1947; and held that even though German heir had not yet taken, on that crucial date, those steps to liquidate inherited property which were required by provisions of treaty, property could be vested by attorney general after termination of war, where circumstances had been such as to entitle heir to prolongation of time for exercising sale and withdrawal privileges afforded by treaty.

Affirmed.

1. Treaties ⇐8

Though rights secured by Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany are, in terms, a right to sell within a specified time plus a right to withdraw proceeds and an exemption from discriminatory taxation, and they are not expressed in terms of ownership or right to inherit, that is their import and meaning. West's Ann. Prob.Code, § 259; Joint Resolution Oct. 19, 1951, 50 U.S.C.A.Appendix, p. xx; Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132.

2. Treaties ⇐11

Even if reciprocal rights of inheritance required by California law did not exist at time of intestate's death, his German heirs would have rights set forth in Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany. West's Ann.Prob.Code, § 259; Joint Resolution Oct. 19, 1951, 50 U.S.C.A. Appendix, p. xx; Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132.

3. Treaties ⇐6

Outbreak of war with Germany abrogated treaty requirement that inherited property be liquidated within three years. Proclamation No. 2714, 50 U.S.C.A.Appendix, p. xxii; Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132; West's Ann.Prob.Code, § 1026.

4. Treaties ⇐8

Under treaty giving German heir to American property opportunity to sell same

and remove proceeds within three year period or a necessary extension thereof, propriety of extension and duration thereof are matters for judicial determination. Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132.

5. War and National Defense ⇐12

In proceedings on motion to set aside decree distributing intestate's estate to attorney general as vested property of German heir, evidence, on issue as to whether German heir's defeasible fee had failed before attorney general acquired interest therein, established that neither German heir nor her devisee had yet had opportunity contemplated by treaty, to sell inherited property and remove proceeds, when attorney general exercised his rights. Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132.

6. War and National Defense ⇐12

Under circumstances disclosed, in proceedings on motion to set aside decree distributing intestate's estate to attorney general as vested property of German heir, no duty existed on part of attorney general to take steps, which German heir was unable to take, to comply with treaty requirement that inherited property be sold and the proceeds removed within three year period or some necessary extension thereof. Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132.

7. Treaties ⇐11

In event of conflict between domestic law and a treaty, the latter prevails.

8. States ⇐203

Notwithstanding escheat statute, it was not material that State of California had not been made party to proceedings on administratrix' petition for distribution to the attorney general, pursuant to vesting order made in 1954, of property inherited by German national from California resident who died in 1943. Proclamation No. 2714, 50 U.S.C.A.Appendix, p. xxii; Treaty of Friendship, Commerce and Titular Rights Between United States and Germany, art. IV, 44 Stat. 2132; West's Ann. Prob.Code, § 1026.

9. War and National Defense ⇐12

Effect of war-terminating resolution proviso, that any property subject to provisions of Trading With the Enemy Act prior to January 1, 1947, was to remain subject thereto, was to continue unchanged enemy status of person with respect to any property subject to Act prior to January 1, 1947; and even though German heir had not yet taken, on that crucial date, those steps to liquidate inherited property which were required by provisions of treaty, property could be vested by attorney general after termination of war, where circumstances had been such as to entitle heir to prolongation of time for exercising sale and withdrawal privileges afforded by treaty.

10. War and National Defense ⇐12

Vesting of enemy property may only be done during period when vesting is authorized by law; but it is discretionary with attorney general as to exactly when, during such period, vesting is to be accomplished. Trading With the Enemy Act, § 1 et seq., 50 U.S.C.A.Appendix, § 1 et seq.

Manfred M. Warren, Oakland, Bernard B. Glickfeld, Howard C. Ellis, San Francisco, for appellant.

Lloyd H. Burke, U. S. Atty., San Francisco, for respondent U. S. A.

Warmke & Woodward, Stockton, for respondent Cloudsley.

SCHOTTKY, Justice.

This is an appeal from a decree determining that the Attorney General of the United States was entitled to succeed to the real property of the Estate of Henry Peter Ronkendorf and denying the claim of Henry A. Gottsche.

Henry Peter Ronkendorf, a citizen of the United States, died intestate on May 6, 1943. He was unmarried and without issue. At the time of his death he was the owner

of certain real property in the County of San Joaquin. In 1947, the administratrix of the estate informed the Attorney General that the closest living relatives of the decedent were two first cousins who lived in Germany. Thereafter, in accordance with the provisions of the Trading With the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq., by Vesting Order No. 10174 dated November 17, 1947, the interest of the German cousins in the estate became vested in the Attorney General. Subsequently, as a result of an overseas investigation another first cousin was discovered and his interest was vested by Vesting Order No. 14654 dated May 15, 1950. Thereafter, upon the administratrix' unopposed petition for distribution which set forth that the German nationals mentioned above were the heirs of the decedent and that their interest had been vested in the Attorney General, the superior court, on October 16, 1951, entered a decree of distribution in which it ordered the administratrix to distribute the estate to the Attorney General.

In March, 1952, Henry A. Gottsche, appellant herein, filed a motion to set aside the decree of distribution, and he petitioned for a decree determining to whom the estate should be distributed. Henry Gottsche is an American citizen and is a son of one of the first cousins of the decedent. On June 4, 1952, the court set aside the decree of distribution.

Thereafter, and prior to the trial on the merits of Henry Gottsche's claim, the Attorney General discovered other first cousins and a maternal aunt of the decedent, Anna Margaretha Holst. All were German nationals residing in Germany. The Attorney General also discovered that Anna Margaretha Holst had died in April, 1948, and had been survived by her husband, Henrich Amandus Holst. Upon discovering these facts, Vesting Order No. 14654 was amended on January 18, 1954, and vested the interest of all successors to Anna Margaretha Holst in the Attorney General.

The trial court found that Anna Margaretha Holst was the decedent's closest living blood relative; that she died in 1948 and was a citizen and resident of Germany at the time of her death; that her heirs, including her husband, were citizens and residents of Germany at the time of her death and were such when their interest was vested in the Attorney General on January 18, 1954. The court also found that the war with Germany was terminated as of October 19, 1951, by a proclamation of the President of the United States, No. 2950, issued pursuant to a joint resolution of Congress, Oct. 19, 1951, which provided that notwithstanding the resolution, any property or interest which prior to January 1, 1947, was subject to vesting under the provisions of the Trading With the Enemy Act or which had theretofore been vested should be subject to the provisions of that Act as if the resolution had not been adopted, 50 U.S.C.A.Appendix, p. xx; that Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany (44 Stat. 2132, 2135) was in full force and effect at all times; that at the time of the decedent's death and until her death Anna Margaretha Holst was an enemy of the United States within the meaning of the Trading With the Enemy Act; that at the time of Anna Margaretha Holst's death and continuously thereafter her heirs and next of kin were enemies of the United States within the meaning of the Act; that by virtue of the proviso of House Joint Resolution 289 the heirs of Anna Margaretha Holst, with respect to the real property in San Joaquin County, were enemies of the United States within the meaning of the Act; that the real property which decedent owned was subject to seizure after January 1, 1947, by virtue of the proviso; that it was subject to vesting in January, 1954. The court concluded from the aforementioned facts that the provisions of section 259 of the Probate Code did not deprive Anna Margaretha Holst or her heirs of the right to inherit the property; that by virtue of Article IV of

the treaty, Anna Margaretha Holst acquired the title to the real property of the decedent subject to the provisions of the article of the Treaty requiring her to sell it within the term of the treaty (three years); that by the provisions of the article the term could be reasonably prolonged if necessary; that neither Anna Margaretha Holst or her heirs had a reasonable time to sell the property; that at the time of the amended vesting order in January, 1954, the Attorney General had the authority to exercise his vesting functions; and that by such vesting order he acquired title to the real property in question and that the Attorney General was entitled to distribution of the real property.

The basic questions involved in this appeal require an interpretation of Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany. Article IV reads as follows:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of One High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

[1] The rights secured are in terms a a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. Though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953.

Appellant, Henry A. Gottsche, contends that the Attorney General has not made out a case for the passage of title from the decedent to Anna Margaretha Holst. Appellant's argument is that Anna Holst received only a qualified interest in the property and if the condition failed the remainder which was vested in appellant drew the full title to it. Appellant further argues that in order for Anna Margaretha Holst to inherit under Probate Code, section 259 (in the absence of testamentary disposition), it was necessary to prove, which allegedly was not done, the reciprocal rights of inheritance. Appellant contends that even if this was proved, then Anna Margaretha Holst had more than a reasonable time to sell, and if she did not and her interest devolved to her heirs they had more than a reasonable time to sell and therefore the defeasible fee failed before the Attorney General acquired any interest in 1954.

Respondents in reply argue: "The State of California does not restrict alien ownership but merely inheritance (Section 259, Probate Code). The limitation on the right to inherit real property, was held by the Supreme Court to have to yield to Article IV (Clark v. Allen, 331 U.S. 503 [67 S.Ct. 1431, 91 L.Ed. 1633]). Thus, Anna Holst acquired title to her inheritance. However, as she was not prohibited under California law from continuing to own the property, she was not required to sell it. Accordingly, she acquired title to the property in fee simple, which title passed to her heirs."

[2] There was no proof that at the time of Ronkendorf's death reciprocal rights existed, but even if they did not exist the heirs of Ronkendorf would have the rights set forth in Article IV of the treaty.

[3, 4] Respondents argue further that even if Anna Holst and her heirs were required under Article IV to liquidate their

inheritance, the outbreak of the war with Germany abrogated this requirement. This view is supported by a statement in Clark v. Allen, supra [331 U.S. 503, 67 S.Ct. 1436], which reads: "We assume that these provisions [prohibiting commercial transactions with German nationals] abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed."

Respondents' final contention is that even assuming liquidation was required, the trial court was justified in concluding that under the circumstances of this case the alien heirs did not have an opportunity to sell within the required period. This was the ground upon which the trial court based its decision. We believe that the memorandum opinion of the trial court ably and correctly states the law and the facts, and we adopt the following portion thereof as part of the opinion of this court:

"Conceding then that a determinable fee, defeasible on a failure to sell within the period limited, was acquired by the German heir, American claimant argues that a failure to sell has terminated the fee thus making American claimant the sole heir. According to American claimant the German heir, her devisee or the Attorney General were duty bound to proceed under the treaty within three years from and after the termination of hostilities officially on December 31, 1946 [50 U.S. C.A.Appendix, p. xxii], and in any event within five years thereafter, under Section 1026 of the Probate Code of the State of California. In default thereof the estate of the German heir or her successors ceased and the title 'sprung' to American claimant.

"As heretofore indicated, Article IV clearly contemplates a full and fair opportunity to sell the property and remove the proceeds within the period limited or a necessary extension thereof. Perhaps it should be observed that by this very procedure were the rigors of the common law prohibiting inheritance by an alien and causing escheat ameliorated. So also it is patent that a reasonable extension of the period is envisaged when necessary. Moreover the propriety of an extension and the duration thereof are matters for judicial determination. Scharpf v. Schmidt, 172 Ill. 255, 50 N.E. 182, 184; Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419, 421; Ahrens v. Ahrens, 144 Iowa 486, 123 N.W. 164, 166, Ann.Cas. 1912A, 1098.

"It is interesting to note at this juncture that the Supreme Court of the United States in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953, observes:

"'* * * since the declaration of war on December 11, 1941 (55 Stat. 796), the Act and the Executive Orders issued thereunder have prohibited the entry of German nationals into this country, have outlawed communications or transactions of a commercial character with them, and have precluded the removal of money or property from this county for their use and account. *We assume that these provisions abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed.*' (Italics added.)

"This would appear to be an adequate basis for the conclusion that the liquidation provisions of Article IV are inapplicable in view of the impossibility of compliance therewith. American claimant's contention that this language is out of context seems to have little merit when examined closely.

[5] "While the approach just suggested may well dispose of American claimant's position, it is not necessary

to predicate the conclusion reached by the court on this ground. Rather it would seem more appropriate to review the circumstances which demonstrate clearly that the German heir or her devisee have not yet had the opportunity which the law contemplates to sell and remove the proceeds. On the date of decedent's death the United States and Germany were at war. In May of 1945 hostilities ceased and a formal declaration thereof was made effective as of December 31, 1946, (Presidential Proclamation No. 2714) but it is expressly declared therein that 'a state of war still exists'. No change was made thereby in the enemy status of German Nationals nor was the general situation with respect to property restraints altered. See Orme v. Northern Trust Co., 410 Ill. 354, 102 N.E.2d 335, certiorari denied [Von Hardenberg v. McGrath], 343 U.S. 921, 72 S.Ct. 677, 96 L.Ed. 1334; In re Yokohama Specie Bank, 188 Misc. 137, 66 N.Y.S.2d 289. The German heir died in 1948 whereupon her devisee acquired the title subject, of course, to the sale and withdrawal requirements of Article IV none of which could be exercised at that time. Conditions continued unchanged thereafter until Congress passed House Joint Resolution No. 289 approved by the President on October 19th, 1951, declaring the state of war between Germany and the United States terminated. This resolution contained the following proviso:

" 'Provided, however, That notwithstanding the resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947 was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that act, including accruals to or proceeds or any such property or interest shall continue to be subject to the provisions of that act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that act of Germany or of any person with respect to any such property or interest.'

It can be seen readily that conditions remain unchanged with respect to the property and that the right of sale and withdrawal were still fully restricted. This situation continued until June 24, 1953, when License No. 101 of the Attorney General unblocked the property and removed the restrictions concerning sale and withdrawal. Now for the first time compliance with the treaty seemed possible. But, alas, the probate proceedings had been reopened and the highly confusing and complex problem of heirship remained undetermined. Obviously with heirship contested the devisee of German Heir was not yet in a position to proceed with a sale of the kind contemplated by Article IV of the treaty. While it is suggested by American claimant that a probate sale passing marketable title was possible such a statement is not really helpful. Brief reflection will disclose that a probate sale could be made only on certain conditions specified by law and although the German heir might be willing to consent to a sale not otherwise permissible, so long as heirship remained undetermined, there is no assurance that other claimants would acquiesce. In any event the pending probate proceeding renders impossible the exercise of the sale and withdrawal privileges provided for by law in the manner contemplated.

[6] "Finally, on this phase of the problem American claimant argues that the Attorney General was obligated to effect sale and that his fail-

ure so to do operated in some manner not precisely stated to defeat the title. Apparently the theory is that the Attorney General somehow stands in the shoes, so to speak, of the German heir. While there may be circumstances under which the Attorney General is authorized to take certain steps in connection with this type of property, the court's attention has been directed to no law prescribing a duty so to do. Under the circumstances this court concludes that no duty to sell existed on the part of the Attorney General. Actually then during the entire period between decedent's death in 1943 and the amended vesting order in 1954 neither the German heir nor her devisee were in a position to exercise the sale and withdrawal privileges. This circumstance made a prolongation of the time limited therefor absolutely necessary.

[7, 8] "American claimant next contends that the failure of German heir and her devisee to appear and demand the property within the five-year period prescribed by Section 1026 of the Probate Code of the State of California cut off her rights and that as a consequence title passed to the American claimant. According to American claimant the critical five-year period begins with the official cessation of hostilities on December 31st, 1946, and ends on December 31st, 1951. As pointed out by the Attorney General, Section 1026 of the Probate Code may well conflict with the provisions of Article IV of the treaty with respect to the time limited for sale and withdrawal. For example, it would seem to require the exercise of these rights within a period shorter than that required by the treaty in the event of a necessary prolongation beyond five years. It is elementary, of course, that in the event of a conflict between domestic law and a treaty the latter prevails. Clark v. Allen, supra; In re Romaris' Estate [191 Cal. 740] 218 P. [421], at [page] 422. In re Meyers Estate, 107 Cal.App.2d 799, 238 P.2d 597, 601. Even if it be assumed, however, that Section 1026 is applicable it would not appear to support the position of the American claimant. Section 1026 is an escheat statute under which no rights are conferred upon anyone but the State of California. Nor would the fact that the State of California is not a party to this proceeding seem material.

[9, 10] "Finally, it is contended that the amended vesting order of January 18th, 1954, was invalid because the Attorney General's power to vest ended with the termination of the war in October, 1951. It will be remembered that House Joint Resolution No. 289 by which the state of war was terminated provided specifically that any property subject to the provisions of the act prior to January 1, 1947, was to remain subject thereto. The effect of this proviso was to continue unchanged the enemy status of a person with respect to any property subject to the act prior to January 1, 1947. The property involved herein was enemy-owned from the date of decedent's death and its character as property subject to vesting was never altered thereafter. The power of the Attorney General to vest under these conditions seems clear. Orme v. Northern Trust Co., supra; National Savings & Trust Co. v. Brownell, No. 12217 March 3, 1955; LaDue & Co. v. Brownell, No. 11305 March 18, 1955; Here again, however, it is contended that the Attorney General did not act with requisite dispatch. Actually it would seem that vesting must be done only during a period when it is authorized by law. When during such period the actual vesting is accomplished appears to be discretionary. Here Congress has deliberately continued the power to vest and no time limitations of any

nature have been placed upon the exercise thereof. Moreover, as pointed out by the Attorney General, the facts surrounding this whole proceeding demonstrate that vesting was accomplished as quickly as the conditions created by the war and its aftermath permitted."

For the reasons hereinbefore set forth we conclude that the evidence and the law amply support the court's conclusion that Anna Margaretha Holst was the heir of decedent and that the estate acquired was not terminated by a failure to sell and withdraw the proceeds inasmuch as an extension of the time limited therefor was necessary; that the claim of appellant, the American claimant, should be rejected; that the vesting order of respondent Attorney General was timely; and that respondent Attorney General was entitled to succeed to the real property of said decedent.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



160 Cal.App.2d 70

Phil H. PHILIPS, Plaintiff and Respondent,

v.

SUN-BEST FRUIT DISTRIBUTORS, a partnership, et al., Defendants and Appellants,

Rockie Gamber, Defendant and Appellant.

Civ. 5651.

District Court of Appeal, Fourth District, California.

May 2, 1958.

Action against construction supervisor and property owners for injuries sustained when plaintiff fell into conveyor gutter in a building under construction. From adverse judgments of the Superior Court, Fresno County, Philip Conley, J., the supervisor and owners appealed. The District Court of Appeal, Griffin, J., held that where evidence showing that certain debris and materials were scattered about the immediate vicinity of the gutter was sufficient to sustain finding that supervisor and owners were guilty of negligence and that plaintiff was not contributorily negligent and that he did not assume the risk.

Judgments affirmed.

1. Negligence ⇨134(3)

In action against construction supervisor and property owners for injuries sustained by plaintiff when he fell into conveyor gutter in building, which plaintiff allegedly entered on invitation to discuss construction work with person therein, evidence was sufficient to show that plaintiff was an invitee of supervisor at time of accident.

2. Negligence ⇨134(5), 135(1)

In action against construction supervisor and property owners for injuries sustained when plaintiff fell into conveyor gutter in building under construction, evidence showing that certain debris and materials were scattered about immediate vicinity of gutter was sufficient to sustain finding that supervisor and owners were guilty of negligence and that plaintiff was not contributorily negligent and that he did not assume the risk.

3. Appeal and Error ⇨930(1)

In support of verdict in favor of plaintiff, reviewing court must assume jury adopted that evidence which is most favorable to plaintiff, even though it is in conflict.

4. Negligence ⇨67

A plaintiff is under a duty to look where he is going and to observe that which is in plain sight in front of him.

5. Negligence ⇨136(27)

Whether a person, under the circumstances, made a reasonable use of his faculties and whether danger causing injuries to him was obvious, generally, is a question for jury.

6. Negligence ⇐52

An invitor is not required to give an invitee warning or notice of an obvious danger, but is entitled to assume that invitee will see that which would be obvious to him upon ordinary use of his own senses.

7. Negligence ⇐105

One who enters an uncompleted building takes the risk of using premises in condition in which he finds them.

8. Trial ⇐142

Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury.

9. Appeal and Error ⇐1064(1)

In action against construction supervisor and property owners for injuries sustained when plaintiff fell into conveyor gutter in a building under construction, failure to read note to constructive safety order giving interpretation placed by division of administrative procedure on a certain phrase in constructive safety order, which was given as an instruction to jury, was not prejudicial.

10. Negligence ⇐124(1)

In action against construction supervisor and property owners for injuries sustained when plaintiff fell into a conveyor gutter in a building under construction, constructive safety order concerning guarding of floor openings was properly admitted on question of negligence.

11. Appeal and Error ⇐1064(1)

In action against construction supervisor and property owners for injuries sustained when plaintiff fell into a conveyor gutter in a building under construction, no prejudicial error resulted from giving instruction that if dangerous, obvious and patent defect existed in premises and plaintiff had knowledge thereof but momentarily forgot about it such forgetting was not in itself contributory negligence unless it showed a want of ordinary care on his part.

12. Trial ⇐252(1)

Giving of an instruction although there is no evidence to support it, though proper in form, is error.

13. Trial ⇐351(5)

In action against construction supervisor and property owners for injuries sustained when plaintiff fell into a conveyor gutter in a building under construction, no prejudicial error resulted in failing to give a special interrogatory on issue of agency and independent contractor relationship in view of other instructions concerning relationship between supervisor and owners.

14. Master and Servant ⇐332(4)

In action against construction supervisor and property owners for injuries sustained when plaintiff fell into a conveyor gutter in a building under construction, giving of instruction on issue of agency and independent contractor between supervisor and owners was a discretionary matter with the trial court.

Hanna & Brophy for appellant Sun-Best Fruit Distributors.

Hays & Hays, James N. Hays, Fresno, for appellant Rockie Gamber.

Lopez & Hyde, Floyd H. Hyde, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff-respondent brought this action for personal injuries resulting from a fall into a conveyor gutter or trench in a building under construction. At the time and place defendant-appellant Rockie Gamber (referred to in the pleadings and testimony as Rocky or Rock and hereinafter referred to as Gamber) individually and doing business as Gamber Construction Company, was supervising the construction of a fruit-processing shed for the defendant-appellant Sun-Best Fruit Distributors, a copartnership (hereinafter referred to as Sun-Best). It is alleged plaintiff's injuries were the proximate result of the negligence of all defendants. By answer defendants denied this allegation alleged contributory negligence on the part of plaintiff and that he assumed the risk.

The facts show generally that prior to July 20, 1954, Gamber was employed by

Sun-Best, which was the owner of the real property. Sun-Best agreed with Gamber that he would be paid a fixed fee for supervising and running the job of constructing a fruit-processing shed. Gamber testified this arrangement was not a contract on a bid basis or for cost plus a fixed percentage. He was to supervise the construction and obtain bids from subcontractors. Bids were submitted to Sun-Best. It determined which subcontractor was to obtain the job. Plaintiff Philips, aged 46, prior to this job, had been a salesman for Drake Steel Company. Shortly prior to July 20th, Gamber and plaintiff discussed the possibility of Gamber getting this contract. Plaintiff suggested he contact Abco Co., a steel fabricator, and introduced Gamber to its president. That company's bid obtained the contract to fabricate and erect the steel in the building. Plaintiff received an order from Abco Co. for the steel required. He advised the fabricator and the contractor as to the kind of steel that was available, but had nothing to do with the plans and specifications or supervising of the work. During the course of construction plaintiff met Gamber on several occasions in a restaurant across the street from this building to advise him on the availability of certain items of steel or to tell him of the progress of the fabrication at the Abco Co. plant. He said he was sort of a liaison between the contractor and fabricator.

The building was of concrete blocks. The floor was poured concrete over a compacted fill 140 x 60 feet, creating a floor level about 48 inches above the original ground level. A gutter or trench for a conveyor, 32 inches wide and from 18 to 30 inches in depth was left open in the floor surface. The east-west gutter commenced near the east wall and ran west for about 30 feet. It then made a right-angle turn and ran to the north wall and out of the building. Near the turn was a pit or sump deeper than the gutter. The roofing to the building had not been placed. On July 20th plaintiff received a message to meet Gamber and a Mr. Smith of the Abco Co. at the building. Plaintiff said he had never been in the building before. When he arrived, Gamber was seated in a car parked across the street from the building. According to plaintiff's story, Gamber asked plaintiff if he would check the steel in the building and see what he thought of its erection. Without going inside, he noticed some framework out of line and told Gamber about it. Gamber suggested that plaintiff check with one Naden, job superintendent for Abco Co. inside the partially completed building. Plaintiff, according to his testimony, entered by a doorway on the south end, walked northwesterly to a point where he said he found a lot of things in his way, such as a truck, wheelbarrow, pile of brick, sand and mortar, empty sacks and debris; that he noticed a board across the east-west gutter in the floor; that it was his understanding that a conveyor was to be placed there; that it was three feet wide by three feet deep,—deep enough for him to fall into on his return trip; that from there the trench extended both to his right and to his left, how far he could not guess; that before going to the crossing, somewhere near the middle of the floor he observed a trench and thought the debris was covering it; that he could not step across the gutter at that point so he continued west over to the board crossing; that he walked across the board and then saw Naden on top of the north wall near the northeast corner; that he walked over and told him he thought the girders forming the canopy were crooked and Naden informed him they would straighten out when properly tightened down; that at Naden's request he examined other girders on his way out of the building; that while he was walking south from that point toward the south end of the building he was looking up at the girders and fell into the east-west gutter between the center and the east side of the building and was severely injured; that there was considerable debris along this route and near this point; and that the pit or trench there was hidden by debris so he could not see it. He later testified he did not fall over any of the debris because he had a clear path and did not see the hole because he was

looking at the trusses overhead; that from the time he entered the building until he fell he had only crossed one trench; that he did not know the other trench existed until he fell into it; that the reason he did not see the trench was because he was looking at the trusses and not because of the debris; that had Naden not asked him to inspect the girders he would have been looking where he was going on his way out; and that he later heard Gamber say: "We should have covered it, that excavation, last week when a brick mason fell into a hole on the other side of the building."

Naden testified he told plaintiff, on his way out, to look and see how straight the steel purlins on the trusses were on the southern end which was completed; that he did not thereafter observe plaintiff until he fell; that there was a pile or two of bricks around but he did not recall seeing the debris material described by plaintiff.

Gamber testified plaintiff had been in the building two or three times prior to July 20th; that he did not remember telling plaintiff to go into the building on that date and probably did not ask him to look at the steel work; that the pit at the west end of the gutter was completely covered with boards, and planks had been spread across the gutter at intervals to walk across but no barricades had been placed around the gutter; and that when he entered through the south door that morning both the east-west and north-south trenches were perfectly visible. Other witnesses so testified and stated that the plaintiff's pictures of a trailer and papers covering, to some extent, the gutter near the place where plaintiff fell, which pictures were subsequently taken, were not true pictures of conditions as they existed on July 20th; and that there was nothing blocking or obstructing plaintiff's view as he approached the trench from the north just before he fell. The evidence further shows that one of defendant partners of Sun-Best would go to the job, possibly daily, to see how it was progressing, ask questions of Gamber, inspect the completed work and see if it was satisfactory. The plans for the building were prepared for Sun-Best by a registered civil engineer obtained by Gamber. Upon this evidence a jury found in favor of plaintiff and against both defendants for $10,000. They filed separate notices of appeal.

Gamber now claims (1) That the evidence is insufficient to show negligence on his part; (2) That the contributory negligence of plaintiff was established as a matter of law; (3) That the evidence showed plaintiff assumed the risk; and (4) That the court erred in giving and refusing certain instructions.

[1] As to the first, second and third claims it is argued that since the jury impliedly found plaintiff to be an invitee his rights must be determined by the four tests of recovery set forth in Solen v. Singer, 89 Cal.App.2d 708, 714, 201 P.2d 869, i. e., a recovery cannot be had when the owner or occupant has no knowledge of the danger, where the plaintiff has such knowledge, where the danger is obvious, or where the plaintiff is guilty of contributory negligence, citing Mawhiney v. Signal Trucking Co., 132 Cal.App.2d 809, 813, 283 P.2d 27; and Nagle v. City of Long Beach, 113 Cal. App.2d 669, 671, 248 P.2d 799. There is sufficient evidence to show that plaintiff was an invitee of defendant Gamber at the time of the accident. Obviously, the invitation to enter the building and discuss the steel work with an employee to the rear of the building necessarily implies that the invitee, after discussing the matter, would have to leave the building and the invitation would naturally extend to any portion of the premises by which he might reasonably be expected to leave. 35 Cal. Jur.2d p. 657, sec. 140; Stewart v. Lido Cafe, 13 Cal.App.2d 46, 50, 56 P.2d 553; Gastine v. Ewing, 65 Cal.App.2d 131, 141, 150 P.2d 266; Pierson v. Holly Sugar Corp., 107 Cal.App.2d 298, 302, 237 P.2d 28.

[2–7] It is true that there are several inconsistencies in plaintiff's testimony as to his conduct, what he saw by way of debris, and the reason he fell into the trench. In support of the verdict we must assume the

jury adopted that evidence which was most favorable to plaintiff, even though it was in conflict. 4 Cal.Jur.2d 481, 482, sec. 602; Sherman v. Kirkpatrick, 83 Cal.App. 307, 311, 256 P. 570. It may be well said that had the jury found that plaintiff was guilty of contributory negligence, as alleged, the evidence produced would have supported such a finding, but it cannot be said that plaintiff was guilty of contributory negligence as a matter of law. There is evidence that there was certain debris and materials scattered about the immediate vicinity of the gutters, and some may have obscured, to some extent, plaintiff's vision of the open and uncovered gutter or trench in the center and on the easterly side of the building. The evidence would support a finding that plaintiff's attention had been distracted by Naden in suggesting that plaintiff observe the overhead steel beams on his way out of the building and if plaintiff did have knowledge of the length of the trench which he observed on his way in, his attention to it was momentarily distracted from it. It is, of course, true that a plaintiff is under a duty to look where he is going and to observe that which is in plain sight in front of him. Curland v. Los Angeles County Fair Association, 118 Cal.App.2d 691, 695, 258 P.2d 1063. Whether a person, under the circumstances, made a reasonable use of his faculties and whether the danger was obvious, generally, is a question for the jury. It is also the rule that an invitor is not required to give an invitee warning or notice of an obvious danger but is entitled to assume that the invitee will see that which would be obvious to him upon the ordinary use of his own senses, and that one who enters an uncompleted building takes the risk of using the premises in the condition in which he finds them. Mawhiney v. Signal Trucking Co., 132 Cal.App.2d 809, 813, 283 P.2d 27; Allen v. Jim Ruby Construction Co., 138 Cal.App.2d 428, 434, 291 P.2d 991. Whether plaintiff's action was reasonable and prudent under the circumstances was a question for the jury to determine. Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury. There was sufficient evidence of defendants' negligence to submit the question to the jury. Neel v. Mannings, Inc., 19 Cal. 2d 647, 122 P.2d 576; Atherley v. MacDonald, Young and Nelson, 142 Cal.App.2d 575, 298 P.2d 700; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346; Louie v. Hagstrom's Food Stores, Inc., 81 Cal. App.2d 601, 184 P.2d 708; Art. 14, Sec. 1571, subdivisions (a), (b) and (c) California Administrative Code. For the same reasons expressed the evidence does not show, as a matter of law, that plaintiff assumed the risk, as pleaded by way of defense. Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal.App.2d 795, 803, 151 P.2d 647.

[8, 9] Article 14, Sec. 1571, subdivisions (a), (b) and (c) of the California Administrative Code, which was a constructive safety order then in effect (See secs. 1501 and 1620 California Administrative Code, published by the Division of Administrative Procedure), was given as an instruction to the jury, with the exception of the "Note" indicated. It reads:

"Article 14. Floor Openings to Be Guarded.

"1571. (a) As soon as the hole is framed all floor or roof openings within a building or other structure during the course of construction, alteration or repairing, shall be covered with planks so as to carry safely any load which may be required to be supported thereon or it shall be fenced in on all sides by a standard railing.

"Note.—'As soon as the hole is framed' means when the header beams are nailed to the joist and before the sheathing is laid.

"(b) If any runway or scaffold is built across any floor opening, the entire opening shall be completely planked over or otherwise the said runway or scaffold shall be provided with a standard railing and toeboard.

"(c) All planks, railings or barriers guarding floor openings shall be left in place until such openings are permanently protected, or the permanent protection is being installed. The temporary protection shall be removed only as the permanent protection is installed."

The court then instructed the jury: "These orders, of which the courts take judicial notice, are now considered to be in evidence to be weighed by you in arriving at your decision as to whether the defendants or any of them have been negligent toward the plaintiff."

[10] Defendants argue such instruction (1) Was not applicable to the facts of the instant case; (2) Was not complete because the court omitted reading the "Note" above mentioned to the jury, defining the meaning of the term "As soon as the hole is framed"; (3) That sec. 1620, supra, now clearly defines what was meant by the provisions of section 1571, and accordingly its provisions could not be interpreted as requiring a cover for a trench or hole in the floor, as here described; that accordingly, the jury was given an erroneous yardstick by which it was to determine the negligence of the defendants. The "Note" defining the term used, might well have been given as being the interpretation placed thereon by the Division. However, we do not believe this omission was prejudicial. It applies only to paragraph (a). Paragraph (b) provides that if any runway is built across "any" floor opening, the entire opening shall be completely planked over. The application of the safety order to the facts produced was, under the instruction, left to the determination of the jury in deciding the question of negligence. The order, as read, was admissible for this purpose. Porter v. Montgomery Ward & Co., Inc., 48 Cal.2d 846, 313 P.2d 854; Pierson v. Holly Sugar Corp., supra.

Contrary to defendants' claim that plaintiff was not a member of the class for whose protection the order was designed, i. e., employer-employee relationship—we are convinced it had application to plaintiff as an invitee. The court, in Porter v. Montgomery Ward & Co., Inc., supra, after discussing the conflict in the cases on this point, sustained our holding in Pierson v. Holly Sugar Corp., and overruled a contrary holding in Douglas v. Maloney, 105 Cal.App.2d 284, 233 P.2d 59; and Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501, cited by defendants.

[11, 12] A more serious question arises as to the claimed error in giving plaintiff's proffered instruction on "momentary forgetfulness", as modified by the court. It reads: "If you find that a defect existed in the premises in question which was dangerous, obvious and patent, and that plaintiff had knowledge thereof, you are instructed that if the plaintiff momentarily forgot the same, such forgetting is not in itself contributory negligence unless it shows a want of ordinary care on his part." Judging from plaintiff's testimony, the claim that plaintiff knew of the dangerous defect in the premises and momentarily forgot it, is somewhat lacking in evidentiary support. It has been often held that the giving of an instruction where there is no evidence to support it, though proper in form, is error. Fletter v. City and County of San Francisco, 110 Cal.App.2d 820, 824, 244 P.2d 59; 24 Cal.Jur. p. 830, sec. 95. There is evidence that plaintiff did see, at least some portion of the open trench, when he deviated his course and crossed the trench by means of a board ramp. No doubt this same trench did exist across to the easterly portion of the building and was the one which involved him on his exit from the building. It was not covered by planks. There is some evidence it was, to some extent, covered with debris and papers. The jury might reasonably imply that if plaintiff did see it he had forgotten about it and his attention was momentarily attracted elsewhere. Under the instruction, as modified, the trial court stated to the jury that *if it finds* certain facts to exist and *if plaintiff* momentarily forgot, then the rule would apply. It has been held, under similar circumstances, that it was not

prejudicial error to give such an instruction where the question of its application was left to the jury. Fidelity & Casualty Co. v. Paraffine Paint Co., 188 Cal. 184, 204 P. 1076; Lay v. Pacific Perforating Co., 62 Cal.App.2d 233, 144 P.2d 395; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; 24 Cal.Jur. p. 842, sec. 101, and cases cited. We conclude that no prejudicial error resulted from the giving of this instruction.

[13] Defendant Sun-Best raises many of the same points here discussed. In addition, it argues that certain instructions given the jury, in effect, assumed the existence of control over the premises in this defendant, and effectively withdrew from the jury the issue as to whether the building was being constructed by Gamber, as its agent or as an independent contractor, and accordingly the court erred in refusing to give a special interrogatory to the jury on that question. We have examined the instructions given on this subject. Suffice it to say the court, at the request of Sun-Best, defined the terms "independent contractor" and "agent". It concluded with the statement: "If you find that at the time of the accident involved in this case Gamber Construction Company was an independant contractor, you cannot hold Sun-Best Fruit Distributors on the theory that Gamber Construction Company's acts or omissions were the acts or omissions of Sun-Best Fruit Distributors."

This was followed by plaintiff's instruction: "When an unsafe condition which causes injury to an invitee has been created by the owner or occupier of the property himself, or by an employee of such owner or occupier in the scope of his employment, the invitee need not prove such owner's or occupier's notice or knowledge of the dangerous condition. Such knowledge is imputed to the owner or occupier of the premises."

[14] The claim is that this instruction ignores the matter of control. The instruction as to the definition of an agent, fully set forth the fact that before Gamber could be found to be an agent the agent must first be found to be subject to the orders and control of the principal as to details of the work. The court then instructed as to the distinction of liability between a principal and agent and that of an independent contractor, and concluded with the statement that one who merely employs an independent contractor is not liable to others for his negligence; that the liability of each defendant must be considered separately and that the instructions given were to govern the case as to each defendant only insofar as they were applicable. The instructions, when considered as a whole, sufficiently covered the subject matter. No prejudicial error resulted in failing to order a separate and special interrogatory on the issue of agency and independent contractor, the giving of such an instruction being a discretionary matter with the trial court. King v. Schumacher, 32 Cal.App.2d 172, 89 P.2d 466.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



160 Cal.App.2d 117

Janice HENSLEY, an Infant, by Otis Hensley, her Guardian ad litem, Plaintiff and Appellant,

v.

Gladys SELLERS, Jack Warren Sellers, and Virginia Ruth Roper, Individually, and as co-partners, doing business under the fictitious firm name and style of Coca Cola Bottling Company of Sacramento, and James Larry Dawson, Defendants and Respondents.

Civ. 9226.

District Court of Appeal, Third District, California.

May 5, 1958.

Rehearing Denied May 29, 1958.

Hearing Denied July 2, 1958.

Action for injuries to child who was struck by truck while crossing street. The

Superior Court of Yuba County, Warren Steel, J., rendered judgment on verdict for defendants, and plaintiff appealed. The District Court of Appeal, Peek, Acting P. J., held that in action for injuries to child who was struck by defendant's truck while running across street, refusal of instruction on doctrine of last clear chance was error under the evidence.

Reversed.

1. Appeal and Error ⇐110

An order denying new trial is not appealable and purported appeal therefrom must be dismissed.

2. Automobiles ⇐246(58)

In action for injuries to child who was struck by defendant's truck while running across street, refusal of instruction on doctrine of last clear chance was error under the evidence.

3. Appeal and Error ⇐1067, 1107

Where plaintiff's counsel, at time of trial, had every reason to believe that his proposed instruction on last clear chance in language of BAJI 205 was correct and had been approved by Supreme Court and District Courts of Appeal, court's failure to instruct on last clear chance was reversible error though language of proposed instruction was subsequently held to be erroneous.

James G. Changaris, Manwell & Manwell, Marysville, for appellant.

Rich, Fuidge & Dawson, Marysville, for respondents.

PEEK, Acting Presiding Justice.

[1] By her guardian ad litem the minor plaintiff sought damages for personal injuries alleged to have resulted from the negligent operation by the defendant Dawson of a truck owned by the defendants Sellers, a partnership doing business as the Coca Cola Bottling Company of Sacramento, which we shall refer to as the company. Plaintiff appeals from the judgment entered pursuant to a verdict of the jury in favor of defendant. Since an order denying a new trial is not appealable, her purported appeal therefrom must be dismissed.

[2] Our examination of the record leads to the conclusion that the case must be reversed by reason of the failure of the trial court to give instructions on the doctrine of the last clear chance.

The evidence when viewed in the light "* * * most favorable to the contention that the doctrine is applicable * * *" (Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, 646) shows that while plaintiff was diagonally crossing Riverside Avenue in Yuba County she was struck by a 1½-ton Ford truck equipped for the delivery of soft drinks and owned by the defendant company. At that point Riverside Avenue is approximately 20 feet wide and runs generally in a northerly-southerly direction. There are neither curbs nor sidewalks on either side of the avenue. The area is residential and was posted at 25 miles per hour. At the time of day when the accident occurred the street is used by numerous school buses discharging children who attend a nearby school. It is also used by a considerable number of children who walk to and from their homes. It further appears that there were only three pedestrian crossings within a distance of a mile and one-half, and that the school children crossed the street at random. Also, because of the physical characteristics of the area, children played along the streets. These facts admittedly were known by the driver of the truck, the defendant Dawson, who in making his rounds of deliveries had traveled along Riverside Avenue once each week, usually between 2:30 and 3:30 p. m., for a period of two and one-half years. On the date of the accident he was proceeding south on Riverside Avenue. As he neared the point of impact he noticed a northbound school bus approximately 100 to 150 feet in front of him. It was stopped to discharge school children and its red warning lights were flashing. Although the plaintiff could remember no car parked immediately to the rear of the school bus, Dawson testi-

fied such a car was so parked; that it had just begun to move out from its parked position as he approached, and that plaintiff was behind this car. His testimony was that at that time his speed was approximately 20 to 30 miles or more per hour. He further testified he saw the plaintiff for a couple of seconds while she stood at the edge of the pavement and before she started to cross the street. The plaintiff had been on the east side of the street looking at a puppy which her parents were going to get for her. From the exhibits there appears to be a considerable distance between the fence at the yard where the puppy was and the edge of the pavement. While our examination of the record has failed to produce any statement therein as to the exact distance from the fence to the paved portion of the highway, plaintiff in her reply brief has stated it to be 50 feet, which statement has not been denied. According to the plaintiff, before crossing Riverside Avenue she looked in both directions and seeing no approaching vehicles started running across the street diagonally in a southwesterly direction. This would have placed her in such position that her back was toward the approaching truck. As she was stepping off the pavement on the west side she turned her head and saw the front of the truck just before it hit her. When the ambulance arrived to take her to a hospital she was near the center of the pavement.

Plaintiff's primary contention is that the court erred in refusing to give her proposed instruction in the language of BAJI 205 on the doctrine of last clear chance. Respondents' answer to such contention is twofold; (1) that the identical instruction proposed by plaintiff was held erroneous in Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 306 P.2d 432. Hence to have given the instruction in the present case would have been error. And (2) in any event by reason of the factual situation it could not have been given with propriety.

Answering defendants' arguments in support of the judgment in reverse order, it appears to us that the evidence as summarized more than meets the rule as stated in the Brandelius case: "'(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where is he totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'" 47 Cal. 2d at page 740, 306 P.2d at page 439.

[3] The second portion of respondents' argument is equally without merit. In Parrott v. Furesz, 153 Cal.App.2d 26, 314 P.2d 47, the identical situation was presented. It was there held that at the time of the trial counsel had every reason to believe that said instruction not only correctly stated the law but that it had the approval of the Supreme Court and the District Courts of Appeal. Therefore, said the court, "Appellant is entitled to a trial on the issue of last clear chance. He has not had one. It would be manifestly unfair and a mockery of justice to deprive him of one because his counsel lacked the gift of prophecy and could not foresee that in 1957 the Supreme Court in Brandelius would have pointed out to it an error in the instruction which had theretofore escaped the combined observation of several appellate courts and numerous able attorneys." 153 Cal.App.2d at page 30, 314 P.2d at page 51. And in conclusion the court held, at pages 31 and 32 of 153 Cal.App.2d, at page 52 of 314 P.2d: "In equity and justice appellant should not be deprived of his right to a trial on the issue of last clear chance because the instruction proposed by his counsel on the subject in reliance upon earlier decisions has since been held to be erroneous. Obviously on a new trial an instruc-

tion conformable to the rule announced in Brandelius should be given." The evidence as summarized here amply satisfies the rule.

It becomes unnecessary to discuss plaintiff's further contentions in view of the conclusion we have reached concerning the failure of the court to instruct on the doctrine of last clear chance.

The judgment is reversed.

SCHOTTKY, J., and WARNE, Justice pro tem., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



160 Cal.App.2d 89

Thomas EISTRAT et ux., Plaintiffs and Appellants,

v.

William I. HUMISTON et ux., Defendants and Respondents.

Civ. 5656.

District Court of Appeal, Fourth District, California.

May 2, 1958.

Rehearing Denied May 29, 1958.

Hearing Denied June 25, 1958.

Proceeding on motion by plaintiffs to tax costs of appeal taken by plaintiffs from a judgment in their favor against defendant husband but in favor of defendant wife and for offset of such costs against unpaid judgment rendered against husband. From an order of the Superior Court, Tulare County, Robert K. Meyers, J., denying the motion, the plaintiffs appealed. The District Court of Appeal, Griffin, J., held that where wife was made a party to appeal taken by plaintiffs from a judgment against her husband but in favor of her and it was incumbent upon her to join with her husband in filing reply brief, and judgment of lower court was affirmed on appeal and husband and wife were jointly allowed to recover their costs on appeal, judgment against husband was not a mutual debt and plaintiffs could not offset costs of appeal against such judgment.

Order affirmed.

1. Set-Off and Counterclaim ⇐41, 46(1)

Generally, right to setoff exists when parties hold mutual cross-demands under such circumstances that in equity they should be applied one against the other, but in order to warrant an offset, debts must be mutual and principle of mutuality requires that debts should not only be due to and from same person, but in the same capacity.

2. Costs ⇐270

Where wife was made party to appeal taken by plaintiffs from a judgment against her husband but in favor of her and it was incumbent upon her to join with her husband in filing reply brief, and judgment of lower court was affirmed on appeal and husband and wife were jointly allowed to recover their costs on appeal, judgment against husband was not a mutual debt and plaintiffs could not offset costs of appeal against such judgment.

3. Set-Off and Counterclaim ⇐44(1)

A court of equity will not offset claim of individual creditor of one joint owner of a judgment against other.

4. Set-Off and Counterclaim ⇐1

The doctrine of setoff is preeminently an equitable doctrine.

5. Appeal and Error ⇐907(1)

In absence of full record, reviewing court must indulge in the usual presumption in favor of order of trial court.

6. Attorney and Client ⇐174

Where costs of appeal by plaintiffs from a judgment in favor of defendent wife and against defendant husband were assessed against plaintiffs and amount of such costs was assigned by defendants to their attorney to reimburse him for amount expended in contesting appeal, attorney had an equitable lien for money advanced by him in payment of costs on appeal.

Thomas Eistrat, in pro. per. for appellants.

W. Floyd Cobb, Los Angeles, for respondents.

GRIFFIN, Justice.

In an action by plaintiff and his wife against defendants William I. Humiston and Marjorie Humiston, husband and wife, plaintiffs recovered judgment against William I. Humiston alone for $19,157.46, plus interest and costs. The court denied judgment against Marjorie Humiston and allowed costs in her favor. Plaintiffs were denied allowance for claimed attorney's fees alleged to be due them on the note involved, because no attorney's fees had been actually incurred. Plaintiffs appealed from that part of the judgment denying them such attorney's fees, holding that Mrs. Humiston was not liable on said note, and in giving her judgment for her costs. Other grounds for reversal of the judgment are set forth but are not here material. For further particulars see Eistrat v. Humiston, 150 Cal.App.2d 391, 309 P.2d 925, where this court affirmed the judgment as rendered. A hearing by the Supreme Court was denied on June 19, 1957. Thereafter, defendants jointly filed their memorandum of costs on appeal amounting to $126.60. On July 9th, plaintiffs moved to tax those costs and also moved for offset of those costs against the unpaid judgment in favor of plaintiffs and against William I. Humiston individually. Plaintiff's affidavit and supplemental affidavit in support of the motion recites that he believed the $126.10 was expended by William I. Humiston and not by his wife Marjorie; that it was excessive in amount; that after plaintiffs filed this suit William I. Humiston transferred his property to his wife, was unable and failed to pay any portion of the judgment, and that it would be inequitable not to allow the $126.10 costs to be offset against the judgment.

Defendants' attorney, after denying generally the facts related in plaintiff's original affidavit, recites in his affidavit, in opposition to the motion, that this amount was paid to the printing firm by his personal check on behalf of defendant and his wife in contesting plaintiffs' appeal from the portion of the judgment indicated; that in order to compensate their attorney defendants did, on July 3rd, assign to him, in writing, the costs awarded them on the appeal, and such assignment was filed with the clerk of the court to be considered in connection with the plaintiffs' motion; that he is the owner of said sum and plaintiffs have no offset against affiant; that such costs were properly incurred on behalf of both respondents on the appeal and no formal abandonment of the appeal as to Marjorie was ever filed in any court; that said sum was properly due to them jointly and it would be unjust and inequitable to permit plaintiffs to offset any sum or amount of the judgment for costs against the judgment rendered solely against William I. Humiston; and that it would also deprive affiant of being reimbursed for costs necessarily incurred by him to sustain the ruling of the trial court on appeal.

After a full hearing the court denied the motion and taxed the costs as indicated. The argument that the trial court should not have allowed any costs on appeal in favor of Mrs. Humiston because it is claimed she was not in fact a respondent on appeal since appellant abandoned his appeal as to her by limiting his points on appeal to claimed errors not affecting Marjorie Humiston, is not supported by the record or facts related. There is no indication that plaintiffs effectively abandoned their appeal as to Mrs. Humiston. In fact, in plaintiffs' closing brief on that appeal (page 3) plaintiffs claim that "The judgment in her favor should not stand".

[1] It is a general rule that the right to setoff exists when the parties hold mutual cross-demands under such circumstances that in equity they should be applied one against the other. Harrison v. Adams, 20 Cal.2d 646, 128 P.2d 9; 29 Cal.Jur.2d pp. 308–9, sec. 326. However, in order to warrant an offset the debts must be mutual and the principle of mutuality requires

that the debts should not only be due to and from the same person, but in the same capacity. Kaye v. Metz, 186 Cal. 42, 49, 198 P. 1047; Petersen v. Lyders, 139 Cal. App. 303, 306, 33 P.2d 1030; H. K. McCann Co. v. Week, 115 Cal.App. 393, 398, 1 P.2d 452.

[2–4] In the instant action it will be noted that Marjorie Humiston was made a party to the appeal taken by plaintiffs herein and it was incumbent upon her to join with her husband in filing a reply brief. The judgment of the lower court was affirmed on appeal. Both were jointly allowed to recover their costs on appeal in the sum indicated. The judgment in which plaintiffs seek the offset is against only one, namely, William I. Humiston. Therefore, it is not a mutual debt due from the same person within the meaning of the above-cited cases. It has been held that a court of equity will not offset the claim of an individual creditor of one joint owner of a judgment against the other. Collins v. Butler, 14 Cal. 223, 230. The doctrine of setoff is pre-eminently an equitable doctrine. Meherin v. Saunders, 131 Cal. 681, 63 P. 1084, 54 L.R.A. 272.

[5] It further appears that the cost bill was filed on July 2nd, 1957. It recites: "Affidavit of service attached". The record does not contain such an affidavit. The motion to tax was not filed until July 9th. It was claimed by defendants in the trial court that plaintiffs' motion was filed more than five days after service and filing of the memorandum of costs. Under section 1033 of the Code of Civil Procedure such motion should be filed within five days after service of a copy, otherwise objections thereto will be deemed to have been waived. San Francisco Unified School Dist. v. Board of National Missions, 129 Cal.App.2d 236, 276 P.2d 829. Plaintiff, by affidavit, stated he was not served with such memorandum until July 8th. There is no finding of fact with respect to the service of a copy of this cost bill. In the absence of the full record we must indulge in the usual presumption in favor of the order. 4 Cal.Jur.2d p. 242, sec. 428.

[6] The trial court was justified in holding that under the circumstances related, the costs allowed were proper and defendants' attorney had an equitable lien for the money advanced by him in payment of the costs on appeal, and in denying a setoff against plaintiffs' judgment obtained against Mr. Humiston only. Wagner v. Sariotti, 56 Cal.App.2d 693, 133 P.2d 430. No abuse of discretion appears warranting a finding of prejudicial error.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



160 Cal.App.2d 154

Vera Allen DAWSON, also known as Vera Allen, also known as Vera Whitney Allen, Plaintiff and Appellant,

v.

Elvin RASH, Defendant and Respondent.

Civ. 9344.

District Court of Appeal, Third District, California.

May 6, 1958.

Hearing Denied July 2, 1958.

Suit by property owner against deputy building inspector for malicious prosecution. The Superior Court, Stanislaus County, H. L. Chamberlain, J., granted building inspector's motion for summary judgment, and property owner appealed. The District Court of Appeal, Schottky, J., held that filing of complaint against property owner charging owner with erecting dwelling without securing a building permit was within scope of building inspector's duties and he was immune from civil liability for malicious prosecution.

Affirmed.

1. Officers ⇐114

A public officer is not liable for civil damage for acts done in performance of his official duties.

2. Municipal Corporations ⇐192

Filing of complaint by county deputy building inspector against property owner charging owner with erecting dwelling without securing a building permit was within scope of inspector's duties and he was immune from civil liability for malicious prosecution.

3. Pleading ⇐245(7)

Where, during hearing of motion for summary judgment filed by deputy building inspector who was defendant in suit for malicious prosecution, plaintiff stated that, if court came to conclusion that it would grant motion unless complaint were amended, he would request permission to amend but that he felt no amendment was necessary, no request for permission to amend was made, plaintiff at no time stated what amendmant he wished to make and it did not appear that plaintiff could offer any amendment that would present an issue as to whether inspector was acting within his official capacity, refusal to permit amendment was not improper. West's Ann.Code Civ.Proc. § 437c.

Ernest E. Emmons, Jr., San Francisco, for appellant.

Frederick W. Reyland, Jr., County Counsel, Modesto, for respondent.

SCHOTTKY, Justice.

Plaintiff sued defendant for malicious prosecution. It was alleged in the complaint that defendant is and was employed by the county of Stanislaus as a deputy building inspector; that on January 6, 1954, before a justice of the peace, defendant falsely and maliciously and without probable cause charged plaintiff with willfully and unlawfully erecting a dwelling without first securing a building permit; that defendant prayed plaintiff be apprehended on the charge; that as a result plaintiff was arrested and deprived of her liberty, brought before a magistrate and arraigned to plead on said charge; that plaintiff was wrongfully deprived of her liberty until bail was arranged; that the charge was later dismissed and the prosecution ended; that plaintiff was not guilty of such charge; that the charge was made by defendant without probable cause to suspect plaintiff of guilt and was caused by defendant in furtherance of his expressed intent and design to prosecute plaintiff and involve plaintiff in expensive litigation; and that as a result plaintiff has been damaged in her credit and reputation in the community.

Defendant's demurrer to this complaint was overruled and he filed an answer to the complaint in which he denied the charges and in which he alleged as an affirmative defense that he acted within the scope of his employment as a deputy building inspector. Thereafter defendant made a motion for summary judgment. The basis for the motion was that defendant at all times was acting within the scope of his official duties as a deputy building inspector and accordingly was immune from liability for alleged malicious prosecution. Five affidavits in support of the motion were filed. The first was an affidavit of the county clerk setting forth the ordinance constituting a second unit of the county zoning plan. The second was by the personnel officer showing defendant's employment as a deputy building inspector and stating that one of his duties was to enforce the provisions of the county zoning ordinance. The third was an affidavit of the clerk of the justice court containing a copy of the request of the district attorney for the dismissal of the charge, which request stated that the dismissal was for the purpose of filing a new complaint. (Penal Code, section 1387, provides that an order for the dismissal of an action is a bar to any other prosecution for the same offense if it is a misdemeanor.) The fourth was an affidavit by the building inspector stating that all of the defendant's acts were done in the course of his duties as deputy building

inspector and in obedience to the building inspector's orders. The fifth was an affidavit by defendant in which he stated that acting under the instruction of his superior officer he called on plaintiff and ascertained that she had no permit for the erection of more than one structure as required by the ordinance; that he gave this information to the building inspector and then to the assistant county counsel who after hearing this information advised that defendant consult the district attorney; that he did so and that an assistant district attorney advised defendant that he was of the opinion that plaintiff had violated the county ordinance; that the assistant district attorney drafted a criminal complaint and gave it to defendant with instructions that defendant take it before the judge of a justice court and sign it; that defendant did so; and that all of defendant's acts were within the scope of his employment and done pursuant to instructions of his superior officer after legal advice from the county counsel and the district attorney; and that he has not now nor did he ever have any malice toward the plaintiff.

Plaintiff, in her affidavit in opposition to the motion, alleged that the complaint filed in the justice court did not state a cause of action because no permit was required for the building; that the complaint was dismissed; that her complaint states a good cause of action because it shows there was lack of probable cause in signing the complaint; that defendant's general demurrer to the complaint was overruled so it does state a cause of action; that "it was not within the scope of duties, or course of employment, of an agent, officer, or employee of the County of Stanislaus to file a criminal complaint, and order a warrant of arrest issued against the affiant on a complaint that did not state a public offense, and which complaint was dismissed thereafter at the request of the District Attorney of the County of Stanislaus; that no privilege or immunity exists because of poor legal advice"; and that defendant's statement of lack of malice is untrue and inconsistent with threats made before witnesses to the effect he would arrest her.

The motion for summary judgment was granted. Plaintiff has appealed from the judgment and her principal contention is that the court erred in determining that there were no triable issues of fact.

Section 437c of the Code of Civil Procedure provides in part as follows:

> "* * * when an answer is filed in any kind of action if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party, * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact."

The rules applicable to a motion for summary judgment under section 437c are well stated in Eagle Oil & Refining Co., Inc., v. Prentice, 19 Cal.2d 553, at page 555, 122 P.2d 264, at page 265, as follows:

> "At the outset it should be observed that there are several pertinent fundamental principles which should be observed in the application of and procedure under section 437c. The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. [Citing cases.] If that were not true controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in

giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto.

"The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact. See Walsh v. Walsh, supra [18 Cal.2d 439, 116 P.2d 62]."

[1] Preliminarily, it should be stated that the principal question with which we are confronted is whether or not respondent, in swearing to the complaint against appellant, was acting within the scope of his duties as building inspector. If he was so acting, it is clear that he would have a defense to the action, for a public officer is not liable for civil damage for acts done in the performance of his official duties, and the enforcement of building ordinances would be part of the official duty of a deputy building inspector.

As was said in the leading case of White v. Brinkman, 23 Cal.App.2d 307, at pages 313, 317, 73 P.2d 254, at page 257:

"* * * The exemption of judicial or *quasi* judicial officers from civil liability for acts done in performance of their official duties has been established not primarily for the protection of such officers, but as a settled rule of public policy for the protection of the public, and the better assurance of fair and impartial administration of justice, without fear or favor, in the protection of life and property. The immunity applies even despite malicious or corrupt conduct in the exercise of jurisdiction.

* * * * * *

"The defendant Thompson is joined as a tort-feasor in his capacity as city manager. The city charter is a state statute of which judicial notice may be taken; and in the defendant's brief there is quoted section 28 of the charter. That section makes the manager responsible to the council for the efficient administration of all the affairs of the city. And with him rest the power and the duty 'to see that all laws and ordinances are duly enforced,' he being 'declared to be beneficially interested in their enforcement, and to have the power to sue in the proper court to enforce them.' As the chief executive and person in authority over the building inspector, he stands alongside Brinkman, and is favored with the same immunity. As an illustration of the application of the general rule, reference may be had to Downer v. Lent, 6 Cal. 94, 65 Am.Dec. 489, an action brought by a pilot whose license had been revoked by the pilot commissioners, and, as was alleged, wrongfully and maliciously. The plaintiff had judgment which, however, was reversed on appeal; the court holding that the commissioners were intrusted with certain duties, the performance of which required the exercise of judgment. 'Whenever, from the necessity of the case,' said the court, 'the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment.' So in Turpen v. Booth, 56 Cal. 65, 38 Am.Rep. 48, exemption was extended to grand jurors, however erroneous their action may be and however malicious their motives.

"The principle is one so well established as to have become elementary; and it affords protection in general to officers and public servants exercising judgment and discretion in the discharge of their duties, howsoever they may be called. Among those in whose behalf the rule has been successfully invoked have been members of a board of health, county supervisors, food inspectors, registrars of voters, election inspectors and other officers and commissioners charged with duties of

various kinds involving judgment and discretion." See, also, White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636.

[2] Bearing the foregoing well-settled principles in mind, we are convinced that no issue was presented as to whether respondent was acting in his official capacity as deputy building inspector. The complaint alleged that respondent was deputy building inspector and alleged further that in procuring the issuance of the warrant of arrest respondent, "as deputy Building Inspector, well knew that plaintiff was not in violation of the provisions of County Ordinance 353." The affidavits filed by respondent in support of the motion for summary judgment, as hereinbefore summarized, set forth the ordinance, the duties of the deputy building inspector, and stated that the acts of respondent in filing the criminal complaint were within the scope of his employment.

Appellant, in her affidavit in opposition to the motion, did not deny that respondent filed the complaint as deputy building inspector, but stated that "it was not within the scope of duties, or course of employment, of an agent, officer, or employee of the County of Stanislaus to file a criminal complaint, and order a warrant of arrest issued against the affiant on a complaint that did not state a public offense." We do not believe that this presented any real issue to the court. There is no fact stated in the affidavit in opposition denying that the duty of a deputy building inspector would include enforcement of the ordinance if one erected a building without a permit or that he acted outside his authority when he filed the complaint. The gist of the affidavit is that where a complaint does not state an offense the public officer does not act within the scope of his duties and therefore is not within the immunity allowed public officers when acting within the scope of their duties. Such is not the rule. A building inspector charged with the investigation of purported violations of building ordinances is immune from civil liability for alleged malicious prosecution. We agree with the following statement of the trial judge in his memorandum opinion:

> "The complaint alleges that the Defendant was a Deputy Building Inspector. If this is not surplusage, the inference is that he acted as such, and this is alleged in the affidavits in support of the motion, and is nowhere denied either in the Complaint or in the Counter Affidavits of the Plaintiff. If Plaintiff desired to specifically allege that Defendant did *not* act in his official capacity, she should have so stated in her affidavit and asked leave to amend the Complaint accordingly. But she did neither. In the face of the allegations of the Complaint and the Affidavits in support of the motion, it would seem difficult, if not impossible, to successfully contend that the defendant was *not* acting in his official capacity."

[3] Appellant's final contention is that the court erred in failing to permit her to amend her complaint. During the course of the hearing of the motion for summary judgment, counsel for appellant stated that if the court came to the conclusion that it would grant the motion unless the complaint were amended he would request permission to amend, but that he felt that no amendment was necessary. No request was made for permission to amend and the motion was submitted. Appellant's counsel at no time stated just what amendment he wished to make, but instead stated that he felt that no amendment was necessary. Furthermore, it is difficult to understand how, in view of the allegations of the complaint and appellant's affidavit, appellant could offer any amendment that would present an issue as to whether respondent was acting in his official capacity as deputy building inspector. There is, therefore, no merit in appellant's contention that the court erred in failing to permit her to amend her complaint.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.



159 Cal.App.2d 815

Edwin R. JEFFERY, Plaintiff and Respondent,

v.

Lewis C. VOLBERG and Elizabeth Volberg, Defendants and Appellants.

Civ. 9319.

District Court of Appeal, Third District, California.

April 30, 1958.

Action by seller for purchase price of stock in trade. The Superior Court, Butte County, J. F. Good, J., rendered judgment for seller, and buyers appealed. The District Court of Appeal, Warne, J. pro tem., held that where compliance with bulk sales law was not made a condition of sale, seller was not precluded from recovering purchase price because he did not comply with such law.

Affirmed.

1. Sales ⇐342

Where, as condition of lease, lessees agreed to purchase lessor's stock in trade and, at lessees' request and solely for their benefit and convenience, some items were left in another store in which lessor had no interest and remainder of items were delivered to leased premises, lessor was entitled to recover agreed selling price and not just damages when lessees refused to pay for the stock, since it could be ascertained what stock was delivered.

2. Sales ⇐357(1)

In action by seller for purchase price of stock in trade, purchasers, who actively participated in checking and moving of stock, could not, in absence of proof of mistake, complain that count may have been inaccurate, and purchasers who failed to establish that amount of claimed shortage was greater than that found by trial court could not challenge the allowance as inadequate.

3. Sales ⇐359(1)

In action by seller for purchase price of stock in trade, evidence sustained implied finding that there was no agreement between parties that an inventory would be taken by a third party at time of sale, especially in view of fact that when purchasers checked and took possession of stock they did not request that it be inventoried by a third party.

4. Fraudulent Conveyances ⇐177

Where compliance with bulk sales law was not made a condition of sale of stock in trade, seller was not precluded from recovering purchase price because of failure to comply with law. West's Ann.Civ.Code, § 3440.1.

5. Fraudulent Conveyances ⇐172(1)

Under bulk sales law, seller, when making a sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof, other than in ordinary course of trade, need not record and publish notice of intended sale, in order that sale, transfer or assignment be valid as between the parties. West's Ann.Civ.Code, § 3440.1.

6. Fraudulent Conveyances ⇐172(1), 177

Bulk sales statutes are for benefit of creditor and not for benefit of purchaser, do not in any way affect validity of sale as between immediate parties, and do not preclude seller from recovering purchase price of sale made in violation thereof. West's Ann.Civ.Code, § 3440.1.

7. Names ⇐10

Even if seller had operated business under fictitious name and had failed to comply with statute providing that no person operating business under fictitious name shall maintain any action on contract made under fictitious name until certificate stat-

ing name and residence of such person had been filed with county clerk and certificate has been published in county newspaper, such failure would not affect seller's action against buyers for purchase price where buyers did not plead in defense seller's omission to comply with statutes. West's Ann.Civ.Code, §§ 2466, 2468.

Millington & Millington, Gridley, for appellants.

Clewe, Blade & McDonald, Oroville, for respondent.

WARNE, Justice pro tem.

This is an appeal from a money judgment entered in an action brought to recover the price of a stock of electrical fixtures, appliances and materials sold by respondent to appellants.

At the time of the sale the stock was located, displayed and offered for sale in the ordinary course of business in a paint store operated by respondent's sister and brother-in-law. As a condition to obtaining a lease of a storeroom in the same building in which the paint store was located appellants were required by the owner-lessors to purchase respondent's stock in trade. This the appellants agreed to do and the stock was sold to appellants at the wholesale price thereof. The stock was not then formally inventoried but appellants and respondent checked off the items against the wholesale invoices and, except for some light fixtures and two TV sets, the stock was moved into that portion of the building which appellants had leased. A few days thereafter, appellants informed respondent that they did not want the stock as they had been advised that they could not get good title thereto unless respondent recorded and published notice of the intended sale as required by the so-called "bulk sales law" (Civ.Code, sec. 3440.1). This respondent refused to do. Appellants then refused to go ahead with the "deal" or pay for the stock and respondent brought this action to recover the price thereof. Judgment was for respondent and this appeal followed.

We shall first consider appellants' contention that respondent has misconceived his cause of action.

[1–3] It is appellants' position that respondent could only bring an action for damages and not one for the agreed selling price since it cannot be ascertained what stock was delivered. Such is not the case. Although appellants did not take physical possession of the light fixtures and the two TV sets, it was upon appellants' request and solely for their benefit and convenience that those items were left in the paint store operated by respondent's sister and brother-in-law and in which establishment respondent had no interest. The balance of the items checked off against the wholesale invoices were delivered to the premises leased and occupied by the appellants. In fact, the record shows that even before such checking, appellants had appropriated some of the stock to their own use. Appellants actively participated in the checking and moving of the stock and in the absence of proof of some mistake cannot now complain that the count may have been inaccurate. The trial court, however, deducted $350 for the claimed shortage, and since appellants failed to establish that the amount was greater they are in no position to challenge the allowance as inadequate. Neither can appellants successfully assert that respondent is precluded from recovery because an inventory was not taken by a third party at the time of the sale. There was a conflict in the evidence as to whether the parties had agreed to have such an inventory taken. Impliedly, the trial court found that there was no such agreement, therefore, under the familiar rule on appeal concerning findings based upon conflicting evidence, this court must resolve that issue against appellants. Moreover, it is significant that when appellants checked and took possession of the stock they did not request that it be inventoried by a third party. There is no merit in appellants' contention that respondent misconceived his cause of ac-

tion nor is there any merit in respondent's contention as to a lack of proper inventory.

[4–6] Likewise, it was not until after appellants accepted possession of the stock that they insisted respondent must comply with the bulk sales law (Civ.Code, sec. 3440.1). Such compliance was not made a condition of the sale. That statute provides that the sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof, other than in the usual course of business, is conclusively presumed to be fraudulent and void as against existing creditors of the transferor unless the requirements as to recording and notice of intended sale are complied with. There is no provision in the statute declaring such a transaction to be void as between the immediate vendor and vendee. Nor is it the law that the seller, when making a sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof, other than in the ordinary course of trade, must record and publish notice of intended sale, in order that the sale, transfer or assignment be valid as between the parties. By the great weight of authority bulk sales statutes are for the benefit of creditor and not for the benefit of the purchaser and do not in any way affect the validity of a sale as between the immediate parties. Cooley v. Brennan, 102 Cal.App.2d Supp. 952, 228 P.2d 104; 23 Cal.Jur.2d, sec. 78, p. 527. Nor does the statute preclude the seller from recovering the purchase price of a sale made in violation thereof. 37 C.J.S. Fraudulent Conveyances § 485, p. 1354; 24 A.L.R.2d 1030–1031. "A conveyance in fraud of creditors vests title to the property transferred in the grantee, except as against the creditors." Withrow v. National Surety Co., 122 Cal.App. 242, 10 P.2d 83, 85.

The case of Ashton v. Leysen, Tex.Civ. App., 237 S.W.2d 713, 714, 24 A.L.R.2d 1027–1029, relied upon by appellants, is not in conflict with the rules above stated. In that case the contract expressly provided that the seller was to pay all outstanding obligations and, according to the contract, the transfer was to be "free and clear of any and all encumbrances, except those herein named." Before completion of the sale the purchaser demanded that the seller comply with the bulk sales law. The seller refused to do so and the purchaser then declined to go further without such compliance. It was undisputed that at the time of such demand there were outstanding accounts owing by the seller covering the merchandise being sold, and that unless all debts had been paid, or seller had furnished the affidavit required by the bulk sales law stating that all debts had been paid, the seller would not have been complying with the contract which called for a transfer of the stock of goods free and clear of liens. A judgment for the seller was reversed and upon a rehearing the court said: "As we view our original opinion, nothing therein holds that the sale by appellee Leysen to appellant Ashton was void or voidable 'because of the Bulk Sales Law.' What we held and intended to hold was that appellee as seller agreed to pay all outstanding obligations and to transfer the business and stock of goods 'free and clear of any and all encumbrances except those named in the contract.'" In the instant case there was no such contract, or requirement for the giving of any notice of intended sale.

Lastly, appellants contend that the following provisions of section 2468 of the Civil Code preclude the maintenance of this action: "No person doing business under a fictitious name * * * shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, * * * until the certificate has been filed and the publication has been made as herein required." Respondent's sister and brother-in-law were operating the paint store under the name of Elliott and Robertson Paint Company. None of the parties had complied with section 2466 of the Civil Code. The facts are that respondent was sole owner of the electrical business and conducted it in his own name and there is no evidence that the respondent contracted with appellants under the fictitious name.

Therefore, section 2468 of the Civil Code does not bar this action brought in respondent's name to recover for the goods and merchandise sold by him as an individual.

[7] But even if the facts were otherwise and as claimed by appellants, it would not affect this action since they failed to plead in defense respondent's alleged omission to comply with the sections mentioned. As stated in Folden v. Lobrovich, 153 Cal.App. 2d 32, 34, 314 P.2d 56, 57: "Failure to comply with sections 2466 and 2468 is a technical defense which must be raised by the defendants or it is waived and will not be considered by the trial court. Cook v. Fowler, 101 Cal. 89, 35 P. 431; Messick v. Houx Bros., 105 Cal.App. 637, 288 P. 434." Also see Phillips v. Goldtree, 74 Cal. 151, 13 P. 313, 15 P. 451; and Bryant v. Wellbanks, 88 Cal.App. 144, 152, 263 P. 332.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



160 Cal.App.2d 110

Application of Guy N. STAFFORD for a Writ of Habeas Corpus.

Cr. 6193.

District Court of Appeal, Second District, Division 3, California.

May 5, 1958.

Hearing Denied July 2, 1958.

Habeas corpus proceeding to determine validity of orders finding petitioner in contempt for violation of injunction. The District Court of Appeal, Vallée, J., held that evidence was insufficient to sustain petitioner's burden of proof.

Writ discharged and petitioner remanded.

1. Habeas Corpus ⇐52

The function of petition for writ of habeas corpus is to secure issuance of writ, and when writ is issued the petition has accomplished its purpose and becomes functus officio.

2. Habeas Corpus ⇐75, 84

In habeas corpus proceeding, the return is to the writ, not to the petition, and to the return the petitioner may present exceptions raising questions of law, or a traverse raising issues of fact, or both.

3. Habeas Corpus ⇐85.2(1)

In habeas corpus proceeding, when return sets forth process which on its face shows good ground for holding the person, such process being produced at the hearing, but traverse alleges matter tending to invalidate the apparent effect of the process, burden of proving such new matter is on petitioner. West's Ann.Pen.Code, § 1480.

4. Contempt ⇐72

Where separate contemptuous acts are committed, the contemner can be fined for each offense in the amount authorized by statutes.

5. Injunction ⇐216

Every separate act of disobedience of injunction was a separate contempt.

6. Judgment ⇐489

A judgment is not void for lack of jurisdiction because it lacks evidentiary support.

7. Habeas Corpus ⇐92(3)

Habeas corpus is not available to raise questions of merits of action in which injunction, violated by petitioner, issued.

8. Habeas Corpus ⇐85.1(2), 85.2(1)

In habeas corpus proceeding to review a judgment of contempt, petitioner has burden of establishing necessary grounds for his release, and the presumption of regularity in support of the judgment prevails in absence of evidence to contrary.

9. Habeas Corpus ⇐85.4(5)

In habeas corpus proceeding by one who had been adjudicated in contempt for violation of injunction against asserting

claims to property, evidence was insufficient to sustain petitioner's burden of proof.

10. Injunction ⊂=232

In contempt proceeding for violation of injunction against assertion of claims to property, punishment for each count by fine of $500 and five days' imprisonment was not excessive.

Guy N. Stafford in pro. per., for petitioner.

Harold W. Kennedy, County Counsel, and Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Proceeding in habeas corpus to determine the validity of orders of the superior court finding petitioner in contempt, sentencing him to the county jail, imposing fines, and directing that he be imprisoned until the fines are satisfied.

On May 13, 1952 a judgment was entered in an action in the Superior Court of Los Angeles County titled Stafford v. Russell, number 568668, which "perpetually enjoined, restrained, and debarred" petitioner "from making, asserting, claiming or demanding any estate, right, title or interest whatsoever by action, proceeding or in any other manner whatsoever adverse or hostile to" certain defendants named therein in or to certain described property or in or to the leasehold estate of G. M. Russell covering said property. The judgment became final.

On August 25, 1955 the People brought suit to condemn certain of the property described in the judgment in action 568668. The defendants in action 568668 were named parties defendants in the condemnation suit. Petitioner was not named as a party therein.

On June 4, 1956 petitioner filed an answer in the condemnation suit and also filed a cross-complaint against the defendants therein. The answer and cross-complaint asserted claims in and to the property sought to be condemned. They were ordered stricken from the files. On September 10, 1956 petitioner filed a notice of appeal from the order striking the cross-complaint. On September 19, 1956 he filed a "Notice of Election to Prosecute Appeal on a Settled Statement." On January 21, 1957 the notice was ordered stricken. On October 7, 1957 petitioner appeared at a pretrial conference in the condemnation suit and filed a memorandum wherein he urged a claim to the property and the oil and gas lease described in the injunction.

On November 13, 1957 petitioner was ordered to show cause why he should not be adjudged in contempt. One count charged the filing of the notice of appeal in the condemnation suit. Another charged the filing of the notice to proceed with the appeal on a settled statement. A third charged the appearance at the pretrial conference and the filing of the memorandum.

The court found petitioner in contempt on each of the three counts. As to each count the court imposed a fine of $500 and five days' imprisonment in the county jail; the imprisonment with respect to each of the three counts to run consecutively. The court ordered that in default of payment of the fines petitioner be imprisoned one day for each $5 of the fines not paid. Petitioner has served the five days' imprisonment and paid the fine imposed as to Count I.

[1–3] The function of a petition for a writ of habeas corpus is to secure the issuance of the writ; and when the writ is issued, the petition has accomplished its purpose and becomes *functus officio*. The writ requires a return by the officer or other person having custody of the person claimed to be unlawfully detained. The return is to the writ, not to the petition. To the return the petitioner may present exceptions raising questions of law, or a traverse raising issues of fact, or both. As a rule the parties stipulate at the hearing that the petition be treated as a traverse to the return. When the return sets forth process which on its face shows good

ground for holding the person, such process being produced at the hearing (Pen. Code, § 1480), and the traverse alleges matter tending to invalidate the apparent effect of the process, the burden of proving such new matter is on the petitioner. In re Collins, 151 Cal. 340, 342, 90 P. 827, 91 P. 397; In re Egan, 24 Cal.2d 323, 330, 149 P.2d 693. In the present case petitioner did not present any exceptions raising questions of law nor did he file a traverse to the return; nor did the parties stipulate that the petition be treated as a traverse. However, at the argument the parties treated the matter as if the petition was a traverse to the return and we shall do the same. In re Silverstein, 52 Cal.App.2d 725, 126 P.2d 962.

The first question is: Was petitioner guilty of more than one contempt? He asserts he was not.

[4] "Where separate contemptuous acts are committed, the contemner can be fined for each offense in the amount authorized by the code. [Citations.] Petitioners contend that they were not guilty of separate contemptuous acts, but rather of a single course of conduct for which but one $500 fine could be imposed. However, the trial court could properly consider the several acts of the petitioners—in renting apartments to persons other than members of their own family, in failing to remove apartments from the main structure and to reconvert the same to a single-family dwelling, and in failing to remove the apartments from the garage—as separate contemptuous acts. [Citations.] Each act, or failure to act, considered alone could be the basis for a contempt proceeding." Donovan v. Superior Court, 39 Cal. 2d 848, 855, 250 P.2d 246, 250.

[5] Every separate act of disobedience of the injunction was a separate contempt. (Golden Gate Con. H. M. Co. v. Superior Court, 65 Cal. 187, 3 P. 628, discharging mining debris into a stream on three separate occasions in violation of an injunction—three separate contempts; Ex parte Stice, 70 Cal. 51, 11 P. 459, refusal to be sworn as a witness in a criminal action on February 27 and again on March 1, 1886—two separate contempts; Solano Aquatic Club v. Superior Court, 165 Cal. 278, 131 P. 874, operating a ferry service on three separate days in violation of a temporary restraining order—three separate contempts; Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482, filing a contemptuous affidavit, citation for contempt therefor, sending scandalous letter to judge before citation heard and producing same in open court at contempt hearing—two separate contempts; In re Shuler, 210 Cal. 377, 292 P. 481, broadcasts on four days—each broadcast a separate contempt for which the punishment could run consecutively; Hume v. Superior Court, 17 Cal.2d 506, 110 P.2d 669, filing a complaint in an action on June 5, 1940, filing amended complaint and an affidavit on June 8, 1940 all in the same action—three separate contempts; Lindsley v. Superior Court, 76 Cal.App. 419, 245 P. 212, publication of newspaper articles containing contumacious matter on four different days—each publication a separate contempt.)

[6] In his answer to the order to show cause petitioner alleged that the judgment in which the injunction was granted is void on its face for lack of jurisdiction. The only facts alleged in support of this conclusion were that the injunctive judgment was without evidentiary support. A judgment is not void for lack of jurisdiction because it lacks evidentiary support. Petitioner appealed from the injunctive judgment and it was affirmed. Stafford v. Russell, 117 Cal.App.2d 319, 255 P.2d 872. It is conclusive on the question whether it has evidentiary support. Aside from that question there is nothing in the record in the action in which the injunction was granted showing that the judgment is void on any ground. On the contrary, as the court in the contempt proceeding found, it is a valid, final judgment in full force. It has been repeatedly so held.

On the appeal from the injunctive judgment (Stafford v. Russell, 117 Cal.App.2d 319, at page 320, 255 P.2d 872, at page 873) it was said:

"In the present case plaintiff reiterates the allegations of the previous two actions and raises the same questions that were previously raised in the prior actions where the rulings were adverse to him. Such adverse rulings are binding upon plaintiff herein and need not further be considered for the reason that though he was not a nominal party to the prior actions the Coburg Oil Company was, and plaintiff had a proprietary and financial interest in the judgment and controlled the Coburg Oil Company's conduct in the actions. * * *

"[117 Cal.App.2d at page 321, 255 P.2d at page 873] In the instant case an examination of the record discloses not only that there has not been a miscarriage of justice but that plaintiff has over a period of years in various and sundry proceedings had full and fair trial before the trier of fact, whose findings and conclusions have been affirmed by the District Court of Appeal and the Supreme Court in each instance. It is a salutary rule that litigation should not be protracted indefinitely. In the present case no useful purpose would be served by further litigation between the parties involving the subject matter of the present action."

In Stafford v. Russell, 128 Cal.App.2d 794, at page 797, 276 P.2d 41, at page 42, this court stated:

"This appellant has received the thoughtful and patient consideration of court after court over the years. He apparently intends to continue indefinitely this vexatious litigation. The fruitless harassment of respondents would be a sufficient evil to be condemned, but his conduct has now become a burdensome imposition upon the courts. The appeal being manifestly unmeritorious and frivolous, appellant is required to pay to respondent not only the usual and ordinary costs of appeal, but also a penalty in the sum of $100."

And in Coburg Oil Co. v. Russell, 136 Cal. App.2d 165, at page 167, 288 P.2d 305, at page 307, we said:

"Stafford's repeated efforts in the trial court and by his numerous appeals to relitigate issues that have been decided against him so often have been contumacious and inexcusable except upon the ground of ignorance (and Stafford is not ignorant), or the existence of an incurable litigation complex and an arrogant assumption of final success. Nevertheless, his persistent assertion of claims that have been carefully considered and held untenable by many courts have rendered him an insufferable nuisance. He has been penalized for his frivolous appeals (128 Cal.App.2d 794, 276 P.2d 41) in the sum of $100, which, as we are informed, he has not paid. Respondents request that a further penalty be assessed on the present appeal. We are not disposed to do so vain a thing as to impose a penalty that will be ignored. We may observe, however, that it would seem to be in order for the trial courts to place Mr. Stafford under appropriate restraint and thus cause him to divert his energies into some profitable channels."

Also see Coburg Oil Co. v. Russell, 129 Cal.App.2d 214, 276 P.2d 637, and Stafford v. Russell, 9 Cir., 220 F.2d 853.

[7] Other grounds urged by petitioner go to the merits of the action in which the injunction issued. Habeas corpus is not available to raise such questions. In re Dixon, 41 Cal.2d 756, 760, 264 P.2d 513; In re Oxman, 100 Cal.App.2d 148, 151, 223 P.2d 66.

[8, 9] In a proceeding in habeas corpus to review a judgment of contempt the burden is on the petitioner to establish the necessary grounds for his release, and the

presumption of regularity in support of the judgment prevails in the absence of evidence to the contrary. In re Oxman, 100 Cal.App.2d 148, 150–151, 223 P.2d 66. Petitioner has failed to sustain that burden.

[10] While from the record the punishment imposed appears to be extremely severe, the trial court had jurisdiction to impose a fine not exceeding $500 and to adjudge that petitioner be imprisoned not exceeding five days for each contemptuous act. As the court did not impose a fine in excess of that amount or adjudge that he be imprisoned in excess of that time for any such act, we cannot hold the aggregate amount of the fines and the sentences imposed on petitioner to be excessive. Lindsley v. Superior Court, supra, 76 Cal.App. 419, 433–434, 245 P. 212.

The writ is discharged and petitioner is remanded to custody.

SHINN, P. J., and PATROSSO, J. pro tem., concur.



160 Cal.App.2d 301

Vera BLACKBURN, Plaintiff and Appellant,

v.

Willis E. BLACKBURN, Individually and doing business under the firm name and style of Blackburn Auto Parts Company, a corporation, et al., Defendants and Respondents.

Vera BLACKBURN, Plaintiff, Cross-Defendant and Appellant,

v.

Willis E. BLACKBURN, Defendant, Cross-Complainant and Respondent.

Civ. 17807.

District Court of Appeal, First District, Division 2, California.

May 12, 1958.

Wife's action for divorce and to recover sums of money alleged to be due her from her husband. From interlocutory decree of the Superior Court, City and County of San Francisco, Clarence W. Morris, J., awarding to wife divorce and other relief, wife appealed. The District Court of Appeal, Draper, J., held that evidence sustained finding that wife had failed to show she made any advances of her own personal funds, or that husband had ever asked for or agreed to repay any advances.

Affirmed.

1. Divorce ⇐253

In wife's action for divorce in which she sought to recover sums of money allegedly advanced to husband, and findings of court were to the effect that evidence failed to show that husband had promised to repay advances and that wife had advanced sums and that husband had failed to repay such advances, in spite of the negative pregnant, findings and conclusions viewed as a whole and considered in the light of evidence disclosed that trial court intended to find that wife had failed to sustain burden of proving that she had ever advanced any funds to husband, or that husband had ever asked for or agreed to repay them.

2. Divorce ⇐253

In wife's action for divorce where she also sought to recover money allegedly owing to her from husband, evidence sustained finding of court that wife had failed to sustain burden of proving that she had ever advanced any funds to husband or that husband had ever asked for or agreed to repay them.

3. Divorce ⇐235

A broad discretion is vested in trial court in determining amount of alimony.

4. Divorce ⇐235

In wife's action for divorce from husband with whom she had lived approximately eight and one-half months where husband was ordered to pay more than $5,000 in community debts, most of which were incurred by wife for clothing, there was no showing of an abuse of discretion in awarding alimony of $250 per month for only four months to wife who had already

received $500 per month as alimony pendente lite over a long period.

Orlando J. Bowman, Oakland, Robert H. Kroninger, Oakland, for appellant.

Morris M. Grupp, San Francisco, for respondent.

DRAPER, Justice.

After filing two actions, twice amending one, dismissing a portion of one, and obtaining an order consolidating the two actions, plaintiff went to trial upon complaints seeking divorce, separate maintenance, and recovery of three different sums of money alleged to be due to her from her husband. She was awarded an interlocutory decree of divorce, by which the court determined that there was no community property, directed defendant to pay community debts amounting to $5,403.04, and awarded plaintiff alimony at the rate of $250 per month for 4 months only, together with her attorney's fees and costs. Judgment was entered in favor of defendant upon the three causes of action for money. Plaintiff appeals, seeking reversal only of the judgment in defendant's favor on the fourth cause of action, and of the portion of the decree limiting alimony to $250 per month for 4 months.

The fourth count contained 4 paragraphs. The first incorporated by reference a number of paragraphs of the first count, that for separate maintenance. The second paragraph alleged that, immediately after the marriage of the parties, respondent asked appellant to spend "her own personal funds" for her personal needs and those of respondent, and agreed to repay her therefor. Paragraph 3 alleges that she spent $6,000, and paragraph 4 that he failed to repay any part of this amount. The trial court found that "the allegations of paragraphs I, II, III and IV * * * are untrue."

[1] Appellant points out that this finding, by reason of its denial only in the conjunctive, is phrased as a negative pregnant. To find it untrue that he promised to pay, *and* that she advanced, *and* that he failed to repay, is to leave open the implication that all but one of these facts are true. The use of "or" rather than "and" would make clear that each averment is found to be untrue. Appellant relies upon Mardesich v. C. J. Hendry Co., 51 Cal.App.2d 567, 125 P.2d 595. But that case differs materally from ours. There the findings wholly failed to cover some allegations of contributory negligence, and negatived others in a way to create hopeless confusion. The rule applicable to the case at bar is laid down in Johndrow v. Thomas, 31 Cal.2d 202, 187 P.2d 681. There the Supreme Court pointed out the conflict between the rule that findings are to be construed liberally to support the judgment, and the proposition that, merely because a negative pregnant exists, the findings are insufficient. The court concludes (31 Cal.2d at page 209, 187 P.2d at page 685) that "the appropriate rule should be that the sufficiency of findings turns upon the particular case and that there is no absolute rule regarding negatives pregnant, which at best is nothing more than a rule of construction." Here, as in the Johndrow case, the findings and conclusions, viewed as a whole and considered in the light of the evidence, make it completely clear that the trial court intended to find that appellant failed to sustain her burden of proving that she had ever advanced any such funds, or that respondent had ever asked for or agreed to repay them. In the modern approach to findings and in the light of the record here, appellant's contention is without merit.

[2] Appellant also contends that the findings upon this count, even if adequate in law, are unsupported by the evidence. The evidence was conflicting as to whether respondent ever requested any advances, whether he agreed to repay any advances if made, and whether any advances were made. Mergenthaler v. Mergenthaler, 69 Cal.App.2d 525, 160 P.2d 121, relied upon by appellant, makes clear that the wife's right to recover in such a situation arises only where there is a "distinct

agreement" to repay. Where the wife uses her separate funds in payment of family expenses, without any agreement or understanding as to repayment, she cannot require her husband to reimburse her. Thomson v. Thomson, 81 Cal.App. 678, 684, 254 P. 644. The conflict of evidence upon this point alone sustains the trial court's finding and conclusion.

[3, 4] The award of alimony is not, as a matter of law, inadequate. The parties were married March 13, 1953. The court found that they separated December 1, 1953. There were no children. Appellant had received $500 per month as alimony pendente lite over a long period. Respondent was ordered to pay more than $5,000 in community debts, most of which were incurred by the wife for clothing during the 8½ months of marriage. A broad discretion is vested in the trial court in determining the amount of alimony. 16 Cal.Jur.2d 499. We cannot say that this discretion was abused here.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



159 Cal.App.2d 657

Manuel ARECHIGA and Avrana Arechiga, Plaintiffs and Appellants,

v.

HOUSING AUTHORITY OF CITY OF LOS ANGELES, California, a public body, corporate and politic, and The City of Los Angeles, a municipal corporation, Defendants and Respondents.

Civ. 22714.

District Court of Appeal, Second District, Division 2, California.

April 24, 1958.

Hearing Denied June 17, 1958.

Action by property owners to set aside or enjoin enforcement of judgment obtained in condemnation action against property owners. The Superior Court of Los Angeles County, Kenneth N. Chantry, J., entered judgment against property owners, and they appealed. The District Court of Appeal, Fox, P. J., held that where property owners' property was condemned for purpose of constructing a low rental municipal housing project and issue of necessity was litigated, which resulted in judgment, even though housing project was not built but was, in fact, abandoned, property owners were not entitled to have judgment in condemnation action set aside and could not enjoin its enforcement.

Judgment affirmed.

See also Housing Authority of City of Los Angeles v. Lopez, 324 P.2d 976.

1. Eminent Domain ⇐317(2)

Where property was condemned by judgment in condemnation action instituted by municipal housing authority, entire fee estate in property passed to housing authority. West's Ann.Code Civ.Proc. § 1239, subd. 1.

2. Eminent Domain ⇐325

Where condemnation vests a fee, property does not revert to its former owner when it ceases to be used for purpose for which it was condemned.

3. Eminent Domain ⇐324

Property acquired in fee simple by public body for particular purpose may be diverted to another use.

4. Judgment ⇐405

Where property owners' property was condemned for purpose of constructing a low rental municipal housing project and issue of necessity was litigated which resulted in judgment, even though housing project was not built but was, in fact, abandoned, property owners were not entitled to have judgment in condemnation proceedings set aside and could not enjoin its enforcement.

5. Audita Querela ⇐1

The common-law writ of audita querela does not obtain in California. West's Ann.Code Civ.Proc. §§ 473, 657.

G. G. Baumen, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Peyton H. Moore, Jr., Milton N. Sherman, Deputies City Atty., Los Angeles, for respondent City of Los Angeles.

FOX, Presiding Justice.

Plaintiffs were among the many property owners who were defendants in Housing Authority of City of Los Angeles v. Lopez, which was an action initiated in 1951 to condemn property in the city of Los Angeles for a low rental housing project. The issue of necessity was litigated in that action, which resulted in a judgment for the Housing Authority in March, 1953, fixing the value of the property here in question at $10,050. No appeal was taken by the Arechigas and that judgment in due course became final. The amount of the award was deposited with the county clerk by the Housing Authority. The Arechigas, however, did not withdraw these funds. The housing project was not built but was, in fact, abandoned about July, 1953. On September 30, 1953, the Arechigas filed this suit against the Housing Authority "to set aside or enjoin enforcement" of the judgment in the condemnation action. Thereafter the property was conveyed to the city of Los Angeles and early in 1957 a supplemental complaint was filed making the city a party to this action. The city's demurrer was sustained without leave to amend. Plaintiffs appeal from the judgment of dismissal.

Plaintiffs base their claim for relief on the fact that "the Housing Authority has abandoned the purpose for which said property was condemned." They argue that this change of circumstances makes the enforcement of the judgment inequitable.

Plaintiffs make no claim of fraud, collusion, bad faith or other misconduct on the part of any governmental agency involved in this case and make no effort to state any of the traditional grounds of equitable relief from judgment. Nor do plaintiffs contend that a public purpose did not exist at the time of the trial or at the time the judgment was entered.

[1, 2] By the judgment in the condemnation action the entire fee estate in the property (Crockett Land & Cattle Co. v. American Toll Bridge Co., 211 Cal. 361, 364, 295 P. 328; see Code of Civ.Proc. § 1239(1)) passed to the Housing Authority. "Need for taking the particular land, * * * like the issue of compensation for the taking, is judged by the conditions existing at the time of the taking. * * Conceding the grant of power to the State and its municipal subdivisions to condemn a fee estate in land, we know of no case, and are not cited any, wherein the owner has been permitted to later attack and modify a title taken from him by condemnation on the basis of subsequent events." Fischer v. Oklahoma City, 198 Okl. 22, 174 P.2d 244, 246–247, appeal denied 331 U.S. 824, 67 S.Ct. 1315, 91 L.Ed. 1840. This is precisely what plaintiffs here are attempting by their contention that they are entitled to the return of the property in question because the public project has since been abandoned. But the principle of abandonment does not apply in these circumstances (O'Hara v. District of Columbia, 79 U.S.App.D.C. 302, 147 F.2d 146); where the condemnation vests a fee, the general rule is that the property does not revert to its former owner when it ceases to be used for the purpose for which it was condemned. Skelly Oil Co. v. Kelly, 134 Kan. 176, 5 P.2d 823; Maguire v. Police Jury of Caddo Parish, 197 La. 247, 1 So.2d 92; Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580, certiorari denied 308 U.S. 601, 60 S.Ct. 138, 84 L.Ed. 503; Wright v. Walcott, 238 Mass. 432, 131 N.E. 291, 18 A.L.R. 1242; Valentine v. Lamont, 25 N.J.Super. 342, 96 A.2d 417, affirmed 13 N.J. 569, 100 A.2d 668, certiorari denied 347 U.S. 966, 74 S.Ct. 776, 98 L.Ed. 1108; Pifer v. Board of Education, 25 Ohio App. 469, 159 N.E.

99; Fischer v. Oklahoma City, supra; Vilbig v. Housing Authority of City of Dallas, Tex.Civ.App., 287 S.W.2d 323; Jackson v. City of Abilene, Tex.Civ.App., 281 S.W.2d 767; Chesapeake & Ohio Canal Co. v. Great Falls Power Co., 143 Va. 697, 129 S.E. 731, certiorari denied 270 U.S. 650, 46 S.Ct. 350, 70 L.Ed. 780. Any other rule would mean that there never could be any finality to a judgment in a condemnation proceeding.

[3] Property acquired in fee simple by a public body for a particular public purpose may nevertheless be diverted to another use. Ritzman v. City of Los Angeles, 38 Cal.App.2d 470, 101 P.2d 541; Reichelderfer v. Quinn, 287 U.S. 315, 53 S.Ct. 177, 72 L.Ed. 331. In the Reichelderfer case, relied upon in the Ritzman case (38 Cal.App.2d at pages 476–477, 101 P.2d at page 544) park lands acquired in fee under an act of Congress were by a later act of Congress directed to be used in part for another purpose. It was held that since the government had acquired the fee to the lands it did not, by dedicating the lands to a park use, purport to deprive itself of the power to change that use and devote the land to another purpose. In Jackson v. City of Abilene, supra, the court, quoting from 18 Am.Jr., Eminent Domain, section 124, stated (281 S.W.2d at page 768): "When land has been acquired for the public use in fee simple unconditional, either by the exercise of the power of eminent domain or by purchase, the former owners retain no rights in the land, and the public use may be abandoned or the land may be devoted to a different use without any impairment of the estate acquired or any reversion to the former owners." The reason underlying this principle is that it enables public bodies to meet changing conditions. See Ritzman v. City of Los Angeles, supra, 38 Cal.App.2d at page 475, 101 P.2d at page 543.

[4] It is clear from the foregoing that plaintiffs have not stated facts sufficient to entitle them to any relief. When the judgment in the condemnation case became final plaintiffs were divested of all interest in the property regardless of the purpose for which the property might later be used.

[5] Plaintiffs argue that their complaint may be sustained as the common law writ of Audita Querela. This writ does not exist in California. 3 Witkin, California Procedure, p. 2463; see Eureka Cas. Co. v. Municipal Court, 136 Cal.App. 261, 28 P.2d 709. Its function is covered by Code of Civil Procedure, sections 473 and 657. Eureka Cas. Co. v. Municipal Court, supra, 136 Cal.App. at page 196, 28 P.2d 709.

Plaintiffs rely upon Application of Gillespie, 172 Misc. 1041, 17 N.Y.S.2d 15. That case is not applicable here. It involved the vacation of an award obtained by means of false representations. The New York Central Railroad had prevailed in an action to reimburse it for future maintenance of the abutments and foundations of a bridge, the cost of which, according to the railroad, would be greatly increased by the release of flood waters at its base by the city. After the railroad had obtained an award based upon the anticipated expense of future maintenance of the bridge, it was discovered that the company had been prosecuting before the Interstate Commerce Commission a petition for leave to abandon the line which the bridge served. The award was vacated because it was based upon the future cost of maintaining a structure which the railroad was in the process of abandoning. In the instant case there is no question as to the bona fides of the Housing Authority in procuring the judgment in the condemnation proceeding.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

159 Cal.App.2d 661

HOUSING AUTHORITY OF CITY OF LOS ANGELES, a Public Body, Corporate and Politic, Plaintiff,

City of Los Angeles, a Municipal Corporation, Respondent,

v.

Margarita LOPEZ et al., Including Manuel Arechiga and Avrana Arechiga, Defendants,

Manuel Arechiga and Avrana Arechiga, Appellants.

Civ. 22918.

District Court of Appeal, Second District, Division 2, California.

April 24, 1958.

Proceedings on city's motion for order directing issuance of a writ of possession. The Superior Court of Los Angeles County, Kenneth N. Chantry, J., entered judgment for city, and property owners appealed. The District Court of Appeal, Fox, P. J., held that where municipal housing authority obtained title to land by means of judgment in condemnation proceedings and thereafter housing authority conveyed title to city, it was unnecessary for housing authority to assign judgment in order to transfer all its rights and interest in property, and therefore city was entitled to a writ of possession even though judgment was not assigned to it and it was not party to condemnation proceedings.

Affirmed.

1. Eminent Domain ⇐249

Trial court has power to issue a writ of possession to place plaintiff in a condemnation suit in possession of property condemned.

2. Eminent Domain ⇐249

Where municipal housing authority obtained title to land by means of judgment in condemnation proceedings and thereafter housing authority conveyed title to city, it was unnecessary for housing authority to assign judgment to city in order to transfer all the authority's rights and interest in property, and therefore city was entitled to writ of possession even though judgment was not assigned to it and it was not party to condemnation proceedings.

G. G. Baumen, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Peyton H. Moore, Jr., Milton N. Sherman, Deputies City Atty., Los Angeles, for respondent.

FOX, Presiding Justice.

The property with which we are here concerned is the same as that involved in Arechiga v. Housing Authority of the City of Los Angeles, Cal.App., 324 P.2d 973.

After the Housing Authority acquired the title to this property through the judgment in the condemnation suit, it conveyed said property to the city of Los Angeles. The deed to the city was recorded on September 27, 1955. The Arechigas ignored the demands of the city that they vacate the premises. In May, 1957, the trial court granted the city's noticed motion for an order directing the issuance of a writ of possession. This motion was supported by an affidavit showing title in the city. The Arechigas did not file any affidavit in opposition. They have appealed from the order.

The Arechigas contend that the city was not entitled to a writ of possession since the city had been neither substituted as a party in the condemnation action nor assigned the judgment therein.

[1] It is clear that the trial court has the power to issue a writ of possession to place the plaintiff in a condemnation suit in possession of the property condemned. Marblehead Land Co. v. Los Angeles County, D.C., 276 F. 305. The question which then arises is whether the grant to the city gave it the same right to obtain a writ of possession.

[2] In this connection it must be borne in mind that the Housing Authority obtained its title to the land in question by means of a judgment. Such title was the

very essence of the judgment. When the Housing Authority conveyed that title to the city it thereby transferred everything it acquired by the judgment even though the judgment itself was not specifically assigned. The judgment was merely a muniment of the title which the Housing Authority acquired and transferred to the city. The judgment is analogous to a deed to land. When a grantee transfers the title to land represented by the deed to him, he simply executes a new deed rather than assigning the deed which he holds. It follows that it was unnecessary for the Housing Authority to assign the judgment in order to transfer all its rights and interest in the property. Since the Housing Authority had a right to possession of the property, such right passed to the city as a result of the conveyance. Therefore the city was entitled to a writ of possession even though the judgment was not assigned to it and it was not made a party to the action. It would be idle to require either of these acts.

Our conclusion finds support in Richardson v. Superior Court, 101 Cal.App. 638, 281 P. 1077. In that case a wife brought an action for partition of certain real property against her husband, and after judgment she purchased the property at a foreclosure sale. She assigned the certificate of sale to one Richardson, who was thereafter given a deed to the property by the sheriff. Upon being denied a writ of possession by the county clerk, Richardson petitioned for a writ of mandate to compel the clerk to issue the writ. The appellate court granted the writ of mandate. In answer to the argument that Richardson was not entitled to a writ of possession because he was not a party to the partition and foreclosure proceedings, the court stated (101 Cal.App. at page 643, 281 P. at page 1079): "While it is true that the petitioner herein was not himself a purchaser of the property at the sale, there would seem to be neither reason nor rhyme in holding that a purchaser at a sale would be entitled to a writ of assistance to gain possession of the property, but that the assignee or grantee of the purchaser should not have the aid of the arm of the court to be placed into possession of property which has been duly deeded to him by the sheriff upon a proper transfer and assignment of the sheriff's certificate." To the same effect, see Beck v. Kirk, 69 Mont. 592, 223 P. 499, 501; Emerick v. Miller, 159 Ind. 317, 64 N.E. 28, 31; Ann. Cases 1913D, 1124; 4 Am.Jur., Writ of Assistance § 11; 7 C.J.S. Assistance, Writ of, § 3.

The order is affirmed.

HERNDON, J., concurs.

ASHBURN, J., concurs in the judgment.



160 Cal.App.2d 10

In the Matter of the ESTATE of Max A. ELFTMAN, a.k.a. M. A. Elftman, a.k.a. Maximillian Augustus Elftman, Deceased.

Oscar ELFTMAN, Executor, Appellant,

v.

Bonnie W. MERRILL, Executrix, and individually, Respondents.

Civ. 17890.

District Court of Appeal, First District, Division 2, California.

May 1, 1958.

Rehearing Denied May 29, 1958.

Proceeding in the matter of a decedent's estate, wherein the Superior Court, San Mateo County, A. R. Cotton, J., entered an order authorizing and directing disbursement from funds of estate in a specified amount to an attorney, and an appeal was taken. The District Court of Appeal, Brazil, J. pro tem., held that decedent's estate had been improperly required to pay fee of attorney who had represented executrix in quiet title action against her, as executrix and individually, to recover property transferred to her by decedent shortly before his death.

Reversed.

1. Appearance ⇐20

By his voluntary and active participation in proceeding on executrix' motion, for authority to make disbursements for attorneys' fees in quiet title action filed against her by executor to recover property transferred to her by decedent, executor waived necessity of previous notice. West's Ann.Code Civ.Proc. § 473; West's Ann.Prob.Code, §§ 588, 1200.

2. Executors and Administrators ⇐216(2)

Probate Code section, providing that attorneys for executrix shall be allowed fees for ordinary probate proceedings and a further amount for extraordinary services, contemplates that fee shall be for services to executrix on behalf of estate, and it does not contemplate payment for services which of necessity would be adverse to interests of estate. West's Ann. Prob.Code, § 910.

3. Executors and Administrators ⇐236

Order, providing that executor and executrix be authorized to disburse reasonable sum for attorneys' fees and costs incurred by executrix in quiet title action brought against her, as executrix and individually, to recover property transferred to her by decedent shortly before his death, was not an appealable order, and was not conclusive of issues presented by appeal from subsequent order authorizing and directing executor and executrix to disburse from funds of estate a specified sum to an attorney for services rendered for executrix in defense of such quiet title action. West's Ann.Prob.Code, § 1240.

4. Executors and Administrators ⇐216(2)

Decedent's estate was improperly required to pay fee of attorney who represented executrix in quiet title action against her, as executrix and individually, to recover property transferred to her by decedent shortly before his death. West's Ann. Prob.Code, §§ 910, 911.

Marshall Rutherford, Oakland, for appellant.

Frank W. Rose, San Mateo, for respondents.

BRAZIL, Justice pro tem.

Max A. Elftman died on January 29, 1955. Soon thereafter letters testamentary were issued to his brother, Oscar Elftman the appellant, and to his sister-in-law, Bonnie W. Merrill the respondent, as joint executor and executrix of the will. The decedent conveyed a piece of real property to Mrs. Merrill four days before he died. The executor filed a quiet title action against her as executrix and individually to recover the property, so transferred, for the estate, the basis of the action being that the testator was incompetent at the time the deed was executed. It is alleged in the complaint that Bonnie W. Merrill in her capacity as executrix is named as a defendant because she refuses as executrix to act as a plaintiff. The relief actually sought is against her only in order to get the property deeded to her personally into the estate. The answer to the complaint begins, "Comes now the defendant Bonnie W. Merrill, sued herein individually and as Executrix" etc., and then in paragraph III thereof "[a]dmits that Bonnie W. Merrill, individually, claims and asserts title in fee simple in and to certain real property adverse to said plaintiff, as such executor, and Bonnie W. Merrill, as such executrix." It is thus apparent that Bonnie W. Merrill in her capacity as executrix was only a nominal defendant.

The attorneys of record in the probate proceeding made the following motion for the executrix: "That the executor and executrix of the estate of Max A. Elftman, deceased, be authorized to disburse a reasonable sum for attorneys' fees and costs which will be incurred by said Bonnie W. Merrill in the above entitled action." The above entitled action was the quiet title suit, not the probate matter. A motion for attorneys' fees for the executor to prosecute the quiet title action was on the calendar in the probate proceeding at the same time as the other motion.

Although the respondent's motion was under the caption of the quiet title suit, the matter was treated by the parties as an inadvertent mistake; and this motion, as shown by the minutes of the court, was heard in probate. On June 29, 1956, under the caption of the estate, an order was made "that the Executor and Executrix of the estate of Max A. Elftman, alias, deceased, be authorized to disburse a reasonable sum for attorneys' fees and costs incurred by said Bonnie W. Merrill in the above described quiet title action." Described by title and case number in the forepart of the order. No appeal was ever taken from this order, nor was any motion ever made to set it aside under the provisions of Code of Civil Procedure, § 473.

[1] Before relating any more facts, it is well to dispose of the appellant executor's first contention that there was no jurisdiction to make this order because notice of the hearing was not given in the manner provided by law. Section 588 of the Probate Code would require the ten day notice provided for in section 1200 of that code. Despite the faulty caption the matter was actually heard in probate, and the appellant actively took part in the proceedings even though he might have refused to do so because of lack of proper notice. The situation is just the same as in Re Estate of Pailhe, 114 Cal.App.2d 658, 251 P. 2d 76, which was an appeal from an order directing an administrator to pay attorneys' fees. There it was said, "By his voluntary appearance at the hearing appellant waived any defect there may have been in the giving of notice." From page 661 of 114 Cal.App.2d, page 78 of 251 P.2d. So, in this case the appellant by his voluntary and active participation in the proceeding waived the necessity of previous notice.

On November 29, 1956, there was a substitution of attorneys in the quiet title action for Bonnie W. Merrill as an individual only. In the subsequent trial the defendant prevailed and judgment was entered in favor of "Bonnie W. Merrill, individually and Bonnie W. Merrill, as Executrix."

Thereafter, and on May 22, 1957, on a motion of Bonnie W. Merrill as co-executrix and individually, an order was made in probate by which the executor and executrix were "authorized and directed forthwith to disburse from the funds in said Estate the sum of $1,500.00 to Frank W. Rose." Among other things, the order recites that theretofore an order had been made authorizing the disbursement of a reasonable attorney fee and costs "incurred by said Bonnie W. Merrill, Executrix" in the quiet title action; that said order was final, as no appeal had been taken and motion to set it aside had ever been made; and that the services of Frank W. Rose necessarily incurred by said Bonnie W. Merrill in defense of that action were worth $1,500.

It is from this order of May 22, 1957, that the executor appeals on the ground that the probate court was in error in makin the order. He does not, however, appeal on the ground that the amount allowed is excessive and therefore an abuse of discretion.

[2] The basis for any order allowing respondent executrix attorney fees for the defense of the quiet title suit brought by the estate, must be, if at all, in sections 910 and 911 of the Probate Code. Section 910 provides that attorneys for executors shall be allowed fees for ordinary probate proceedings and a further amount for extraordinary services. This section, without saying so in so many words, obviously contemplates that the fees are for services to the executor on behalf of the estate. It does not contemplate payment for services to another which of necessity would be adverse to the interest of the estate. In like manner, section 911 provides: "Any attorney who has rendered services to an executor" etc. may apply to the court for an allowance upon his fees; "and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith."

It is respondent's position that the order of June 29, 1956, authorizing the disbursement of reasonable attorney fees was a final appealable order; that the second order directing the payment of $1500 attorney fees is only an order fixing the amount due as result of an order previously made. If this be true, then that first order cannot now be reviewed on the appeal from the second order unless that first order was not merely erroneous but void. In re Estate of Lucas, 23 Cal.2d 454 [2a], 144 P.2d 340. In a similar situation it is said in Re Estate of Keet, 15 Cal.2d 328, at page 333, 100 P. 2d 1045, at page 1048: "The petition for instructions and authority to sell was a distinct and independent proceeding, and the order of the court was appealable. Prob.Code, sec. 1240. No appeal was taken, and consequently it became a final determination of the matters adjudged, with the force and effect of a final judgment. [Citations.] On a collateral attack, any attempt to show mere error of the court must necessarily fail. The judgment is conclusive unless wholly invalid on its face * * *." The appellant has not contended that the first order was invalid on its face.

[3, 4] The question to be determined is whether or not the order of June 29, 1956, can be reviewed on this appeal and the answer depends entirely on whether or not that first order was an appealable order. If it was, then the issues presented by this appeal are res judicata. Respondent relies entirely on the principle of res judicata based on her claim that the order of June 29, 1956, was appealable and it has become final. The respondent does not attempt to justify the court's determination in that first order that attorney fees be allowed to an attorney for the adversary of an estate in the event we find that the order was in fact a non-appealable one.

In probate cases, with certain limited exceptions not here applicable, only those orders specified in section 1240 of the Probate Code are appealable. If they are not mentioned in that section they are not appealable. In re Estate of Cole, 106 Cal. App.2d 823, 236 P.2d 206. The only portions of that section upon which an appeal could conceivably have been taken from the first order are: "An appeal may be taken * * * from an order * * * [1] instructing or directing an executor or administrator; [2] directing or allowing the payment of a debt, claim * * * or attorney's fee * * *".

The order with which we are here concerned does not "instruct or direct" the executor and executrix to do anything; it provides only that they "be authorized to disburse a reasonable sum for attorneys' fees and costs which will be incurred." With less reason can it be said that it is an order "directing or allowing the payment of a debt, claim * * * or attorney's fee," for in addition to the fact that it is not a direction or allowance, at the time of the order no services had yet been performed, nor in fact, had an attorney even been retained.

In Re Estate of Cole, supra, which was an appeal from an order allowing a claim against estate, it was held that the order was not appealable. In its discussion the court considered that portion of section 1240 of the Probate Code which reads: "An appeal may be taken to the Supreme Court from an order * * * directing or allowing the payment of a debt, claim, legacy or attorney's fee;" the following quotation from that case is in its reasoning applicable here [106 Cal.App.2d 823, 236 P.2d 207]: "It will be noted that this section allows an appeal from an order 'directing or allowing the *payment*' of a debt or claim. It does not authorize an appeal from an order merely allowing or approving the claim. This rule was stated as follows in Miller v. California Trust Co., 15 Cal.App.2d 612, 616, 59 P.2d 1035, 1037: 'As appellant points out, section 1240 of the Probate Code, treating of "Appealable Orders," includes, as such, an order "directing or allowing the payment of a debt, claim, legacy or attorney's fees." But we note a distinction between an order *directing payment or allowing payment of* a claim and an order of the court merely *approving* or *"allowing"* the claim. We believe that

the order which is appealable under this section is an order directing or allowing *payment* of a claim which has already been "allowed."' "

The order of June 29, 1956, not being an appealable order under the provisions of section 1240 of the Probate Code, the propriety of the order of May 22, 1957, directing the payment of a fee to the attorney, whose services could only have been detrimental to the estate, as he was actually representing an adversary of the estate, can be reviewed in its entirety. The first order is not res judicata of the issues presented by this appeal. The order directing payment of the attorney fee was an improper one under the circumstances.

Order reversed.

KAUFMAN, P. J., and DRAPER, J., concur.



160 Cal.App.2d 364

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wallace LeRoy SCHIERS, Defendant and Appellant.

Cr. 6063.

District Court of Appeal, Second District, Division 3, California.

May 12, 1958.

Hearing Denied July 11, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Walter H. Odemar, J., for second degree murder, and he appealed. The District Court of Appeal, Shinn, P. J., held that prosecutor should have interrupted when his witness volunteered information concerning lie detector test taken by defendant, and that court should have halted testimony of witness at first mention of lie detector test, even in absence of objection; but held that error in permitting such evidence to be adduced before jury had not been so prejudicial that it could not be removed by granting of motion to strike and admonition to jury.

Affirmed.

1. Criminal Law ⇐698(2), 706, 1169(5)

In homicide prosecution, prosecutor should have interrupted when his witness volunteered information concerning lie detector test taken by defendant, and court should have halted testimony of witness at first mention of lie detector test, even in absence of objection; but error in permitting such evidence to be adduced before jury was not so prejudicial that it could not be removed by granting of motion to strike and admonition to jury.

2. Criminal Law ⇐438

Repugnant photographs of scene of crime may not be introduced in evidence where their sole purpose is to inflame jury against accused, but such pictures are admissible if they have some evidentiary value; the matter being one for sound discretion of trial court.

3. Criminal Law ⇐438

Where there was a logical connection between nature of victim's wounds and blood stains found on defendant's body, it was not an abuse of discretion to admit photographs of the victim's body.

4. Criminal Law ⇐683(1)

Where defense witness stated that she had heard unusual noises on night of homicide, that her gate had been knocked down and that there had been suspicious footprints in her yard, evidence that police examination of area had disclosed no strange footprints and no indication of forcible entry was properly introduced on rebuttal to dispel inference, which could be drawn from defense witness' testimony, that a prowler had been in neighborhood at approximate time decedent was murdered.

5. Criminal Law ⇐656(2)

It was not misconduct for trial judge, in homicide prosecution, to intervene for

purpose of eliciting a responsive answer to a question asked by defendant's own attorney while defendant was on witness stand.

6. Criminal Law ⇐656(2)

In homicide prosecution, it was not misconduct for trial judge to inquire of expert witness whether reaction to benzidine test depended upon presence of hemoglobin.

7. Homicide ⇐254

In uxoricide prosecution, evidence sustained second degree murder conviction.

8. Criminal Law ⇐741(4)

Resolution of conflicts in testimony of expert witnesses was a matter for jury in homicide prosecution.

9. Criminal Law ⇐741(1)

Weight to be given witness' testimony was question for trier of facts.

10. Criminal Law ⇐316

Where defendant in uxoricide prosecution testified that he could not explain how he happened to have blood on his person, jury was warranted in drawing inference that he gave no exculpatory explanation because he had none to give.

11. Criminal Law ⇐641(1)

When it is claimed on appeal in a criminal case that accused was inadequately represented by counsel at trial, question is whether he was substantially denied his constitutional right to be represented by counsel, and mere fact that he may have received poor advice from his attorney is not sufficient ground for disturbing judgment.

12. Criminal Law ⇐641(1)

Before it can be said that right to counsel has been abridged, it must be shown that representation afforded accused was of so low a degree of competence that trial became a farce and a mockery of justice.

13. Criminal Law ⇐641(1)

On record presented on appeal from second degree murder conviction, it could not be said that defendant had been denied adequate representation because of court's failure to postpone proceeding upon being advised of defendant's counsel's illness.

14. Criminal Law ⇐781(1), 1172(2)

On record presented, in uxoricide prosecution, there was no occasion for an instruction on accusatory statements and none should have been given; but in view of strong evidence of defendant's guilt, reversal of second degree murder conviction was not required.

Wallace LeRoy Schiers, in pro. per.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial, Wallace LeRoy Schiers was convicted of the second degree murder of his wife, Lillian R. Schiers. He appeals from the judgment and the denial of his motion for new trial.

The conviction was based upon evidence of the following facts: Mr. and Mrs. Schiers were married in 1952. They resided in a single-story two-bedroom house in Granada Hills. Defendant, a major in the air force reserve, was employed as an electronic assembly supervisor at the Bendix aviation plant in San Fernando Valley. His wife was a member of the Granada Hills Women's Club and took a prominent part in club activities.

On the morning of February 12, 1957, Mrs. Schiers had an appointment to meet a Mrs. Butcher and a Mrs. Peterson at the women's club. Alarmed by her failure to keep the appointment, the two ladies went to the Schiers' residence at 10914 Gaynor Street. They rang the bell and knocked on the door, but no one answered. Mrs. Peterson went to the rear of the house and entered through the back door, which was unlocked. Upon opening the door to Mrs. Schiers' bedroom, Mrs. Peterson discovered her nude body lying on the floor beside the closet. Mrs. Schiers had been brutally beaten; there were thirteen horrible wounds and lacerations on her face and head. The cause of death was subsequently established as multiple fractures of the skull with intracranial hemorrhage and cerebral contusions. The murder weapon

was never found, although Mrs. Schiers' mother testified that two small star-shaped glass candlestick holders and a heavy ornamental champagne bottle were missing from the house about a week after her daughter's death.

An investigation by Los Angeles police officers called by Mrs. Butcher disclosed no signs of a struggle anywhere in the house. None of the outside doors or windows had been forced, although, as we have said, the rear door was unlocked. The only fingerprints in Mrs. Schiers' bedroom were those of the deceased and there were no fingerprints elsewhere in the house that could not be identified. Mrs. Schiers' purse, containing a check and some cash, was in the kitchen; her gold wristwatch was lying on the dresser in her bedroom.

Leland V. Jones, a police lieutenant assigned to the Scientific Investigation Division, arrived at the scene at 1:30 p. m. He observed that the bed and the walls in Mrs. Schiers' room were covered with blood and there were bloodstains on the ceiling. On the floor beside the bed were a man's undershirt and a pair of men's shorts; the former was spattered with blood. Officer Jones qualified as an expert witness on the subject of forensic chemistry. He stated his opinion, based upon the pattern of the stains on the undershirt, that the garment had been lying in the same position when the blood spurted around the room.

The officer went to Mr. Schiers' bathroom and made a benzidine test, which is a standard test for blood. He gave the following description of the test: If a benzidine base, called a latent color, is mixed with an oxidase, the oxidase will carry oxygen to the latent color and the solution will turn blue. Blood is an exceptionally good oxidase and will react to benzidine even when the solution is diluted to the extent of one part blood to three hundred thousand parts water; the higher the proportion of blood, the more immediate and vivid will be the blue color reaction. Officer Jones tested the wash basin and obtained an immediate and vivid blue reaction from all parts of the bowl; he tested the water in the commode and got a similar reaction. There was also a spot of diluted blood just above the faucets of the wash basin. There was no blood in the shower stall.

Meanwhile, defendant arrived home from work, having been informed by telephone of his wife's death. One of the officers present suggested that he submit to a benzidine test in order to eliminate him as a suspect; defendant consented to the test. Officer Jones asked Schiers to step into his wife's bathroom and remove his shirt, which defendant did. The officer then dipped some cotton swabs fastened to short sticks into the benzidine reagent and began to apply the solution to defendant's hands; his hands turned blue immediately. Jones testified that defendant's fingers "were all saturated with blood." Color transparencies, showing the marks on his hands, were received in evidence. There was no blood under the fingernails, for they were cut short. (In this connection, Fred Hartley, a brother-in-law of the deceased, testified that defendant usually wore his nails quite long so that they covered the fingertips.) Jones then applied more swabs to defendant's arms and chest; at each application of the solution, the affected area turned blue immediately. Defendant said: "My God, this puts me in an awful position." At the officer's request, Schiers removed his trousers and the solution was applied to his legs; the officer obtained a uniformly distributed blue reaction all over the front of defendant's body down to his knees. There was no indication of blood below the knees, on the feet, or on defendant's back. Jones did not test Mr. Schiers' face. The witness made a blood test in Mrs. Schiers' bathroom and in other parts of the house, but found no traces of blood.

On cross-examination Officer Jones testified that bleaches, lead salts, nitrates and certain vegetable substances would also react positively to the benzidine test. However, it was his opinion that these substances would have to be applied systematically, rather than accidentally, to the

body in order to produce a uniformly distributed color reaction.

Ray Pinker, chief forensic chemist with the Los Angeles Police Department, also qualified as an expert witness. Officer Pinker testified that he went to the Schiers' residence on February 14th and 15th and repeated the benzidine tests of the premises made by Lieutenant Jones. He used a solution containing hydrogen peroxide so as to eliminate the possibility of "false" color reactions arising from bleaches. Pinker found no traces of blood in Mrs. Schiers' bathroom but in defendant's bathroom he got the same reactions that had been obtained by Officer Jones. The witness tested the soaps and detergents used in the Schiers household and found none which could produce a color reaction. He also tested the dirty clothes in the kitchen washtub, but he found no traces of blood on the clothing.

There was conflicting evidence as to the time of death. Mrs. Schiers' liver temperature was taken by a deputy county coroner at 2:10 p. m. on February 12th; the temperature was 84 degrees. Dr. Frederick Newbarr, the coroner's chief autopsy surgeon, testified that the normal temperature of the human liver is 99.6 degrees. He gave his opinion, based upon his reading of the medical literature and upon studies he had conducted personally, that the temperature of the liver decreases, under ordinary conditions, on an average of between 1.3 and 2.0 degrees per hour after death; the rate of cooling will vary according to the room temperature. It was his opinion that Mrs. Schiers died at some time between 10:30 p. m. on February 11th and 6:15 the following morning; he fixed the approximate time of her death at 2 a. m. Kenneth Johnson, an expert witness called by the defense, gave his opinion that the time of death was 7 a. m.

Officer Louis Belle was one of the investigating officers in the case. He had a conversation with Schiers at the police station on February 13th while defendant was in custody. In response to the officer's questions, defendant said that he spent the evening of February 11th at home with his wife. They ordinarily slept in separate bedrooms, but they retired to her bedroom that night around 1 a. m. He returned to his own bedroom an hour later, read a little and went to sleep. He heard nothing unusual during the night; had anything unusual occurred, he would have heard it because he was a light sleeper. Defendant said that he arose at 5 or 6, showered and shaved in his bathroom and left for work around 6:30 a. m. Upon being questioned about the benzidine test he stated that he had not cut himself and that he could not understand why the test indicated the presence of blood on his body. We will refer to other statements made by defendant in this and in subsequent conversations with Officer Belle at a later point in our opinion.

Defendant, testifying in his own behalf, denied killing his wife. He spent the evening at home with Mrs. Schiers. After dinner, he played solitaire and worked on income tax while Mrs. Schiers watched television. They drank a great deal. During the evening, Mrs. Schiers consumed six cans of beer and some scotch; defendant also drank some scotch. Around 10 p. m. they had "a little tiff" about politics. Shortly thereafter, Mr. Schiers went to the store and bought a pint of scotch and some bottles of soda, which they also consumed. They retired to Mrs. Schiers' bedroom at 1 a. m. and had sexual intercourse; defendant left his undergarments on the floor. He went to his own bedroom an hour or so later. He did not see his wife or hear her voice thereafter, as she usually kept her door closed after retiring for the night. He heard no noise during the night. He awoke at 5 a. m., took a shower, shaved and left for work about 5:30. The candlestick holders were missing from his wife's bedroom several months before her death; he threw away the champagne bottle while cleaning out the kitchen a week or so after the murder. Defendant stated that the officer, in making the benzidine test, had only "made crossmarks up and down my

arms and made, I think, three or four marks on the right and left sides of my chest." However, he could not account for his positive reaction to the test. He did not recall having come in contact with any of the other substances mentioned by the People's experts.

On cross-examination, defendant admitted that he and Mrs. Schiers had separated briefly in 1955 on account of his excessive drinking and gambling; she thought that gambling evidenced moral degeneration. He obtained a $2,450 loan from the bank in December 1956 in order to finance the construction of a rumpus room and patio. However, none of the loan proceeds were spent for that purpose. Defendant gave $690 to Mrs. Schiers, sent some of the money to his former wife, lost $900 gambling at the race track and spent much of the remainder at Christmas and in subsequent parties. He told Mrs. Schiers about $400 of his gambling losses but could not recall telling her about sending the money to his former wife, although he felt that she knew of it.

Mrs. Ramona Allen who lived in the house to the rear of the Schiers residence, testified on behalf of defendant that she was awakened in the early morning of February 12th by an unusual noise in her back yard. The following day she discovered that her rear gate had been knocked down. One of the investigating officers called her attention to some footprints near the back of her house. Officer John J. Marrell, called by the People in rebuttal, testified that he examined the footprints with Mrs. Allen and pointed out to her that they were not fresh footprints. Officer Marrell and Officer Belle also testified in rebuttal that they had examined the area surrounding the Schiers residence and found no indication that a prowler had been in the neighborhood on the night of February 11th.

Four of defendant's fellow employes at the aircraft plant testified that his demeanor on the morning of February 12th was calm and that he performed his duties in the usual manner. Six persons, one of whom was defendant's former wife, testified that they knew of Schiers' reputation for peace and quiet and that his reputation was good. It was stipulated that there were 22 other character witnesses in court and that, if called to the stand, their testimony would be in agreement with that already given.

Defendant has filed several briefs in support of his appeal. The briefs are adequate as a statement of all the points that could be urged in his behalf. We have made a thorough examination of the record and have discovered no insufficiency of the evidence and no error at the trial which could have affected the result.

Defendant argues the following points in his briefs: (1) Reference was made to a lie detector test by one of the People's witnesses; (2) the court allowed inflammatory photographs to be exhibited to the jury; (3) the People were permitted to introduce a part of their case in chief in rebuttal; (4) the court committed misconduct; (5) the evidence was insufficient to support the verdict; (6) defense counsel was ill throughout most of the trial proceedings and was unable to defend him properly; (7) the court erred in giving an instruction as to accusatory statements.

[1] The first point to be considered is that the results of a polygraph test administered to defendant were improperly before the jury. The incident occurred during the direct examination of Officer Belle. The prosecutor was inquiring as to the conversation the witness had with defendant at the police station on February 13th. The deputy asked: "Did you at any time ask him [Schiers] about the benzidine showing up blood on his skin?" Belle replied that he did, and after relating that part of the conversation we mentioned earlier, the witness proceeded to relate a conversation he had with Schiers about a lie detector test taken by defendant voluntarily at the Police Administration Building on the night of February 12th. Schiers had denied his guilt to the officers. Belle told

him that the test indicated he was lying. Upon being asked to reconcile his denials with the results of the test, defendant said that "there was something wrong with the machine" and that "he couldn't understand it, even though he believed it [the machine] was accurate when they showed him the experiment." This testimony was received without objection.

Following the noon recess, which immediately ensued, defendant's counsel informed the court that he had "no recollection of the last fifteen minutes of the proceedings this morning" and stated that had he been aware of the officer's testimony he would have entered an objection. The court granted defendant's motion to strike the testimony and admonished the jury to disregard it in the following terms: "Ladies and gentlemen of the jury, just before the noon recess, Mr. Belle was testifying. There was some testimony regarding the conversation had between Mr. Belle and the defendant in this case in which a polygraph or so-called lie detector was a part of the conversation. The Court has granted a motion of the defendant to strike all of that testimony. Now, you are not to consider or even recall that part of Mr. Belle's testimony where he made any mention of * * * that part of any conversation * * * wherein anything regarding a lie detector was even hinted at. You are to pass it all out of your mind * * * and as far as you and I are concerned, no mention thereof has been made * * * it is no part of the record and is not to enter into your consideration or even be mentioned by any of you from this moment on."

Officer Belle's testimony was clearly inadmissible and the motion to strike was properly granted. Had the court denied the motion, it would have committed grievous error. People v. Wochnick, 98 Cal. App.2d 124, 219 P.2d 70; People v. Aragon, 154 Cal.App.2d 646, 316 P.2d 370.

The court should have halted the testimony of the officer at the first mention of the lie detector test, even in the absence of an objection. The defendant should not have been required to make an objection. It cannot be said that it was a situation in which the prosecutor should have anticipated the voluntary statement concerning the use of the lie detector. Nevertheless, although his question did not call for testimony concerning a discussion of the lie detector test it was his duty to interrupt the voluntary and improper statements of his witness.

We have no doubt that had prompt objection been made during the course of the officer's recital, the objection would have been sustained and the jury instructed to disregard the improper statements. Defendant argues, however, that the testimony was so prejudicial that its effect was not removed by the subsequent ruling. We cannot agree. In addition to granting the motion to strike, the court gave the strong admonition which we have quoted above. It is to be presumed that the jurors gave heed to the admonition and, in our opinion, the instruction was sufficient to dissipate the harm that had been done.

[2, 3] As to the second point, defendant argues that the court should have excluded from the evidence four gruesome photographs purporting to show the body of the deceased, the blood-stained bed in Mrs. Schiers' room, and the terrible wounds inflicted on her face and head. The argument cannot be maintained. While repugnant photographs of the scene of a crime may not be introduced in evidence where their sole purpose is to inflame the jury against an accused, such pictures are admissible if they have some evidentiary value; the matter lies within the sound discretion of the trial court. People v. Guldbrandsen, 35 Cal.2d 514, 521–522, 218 P.2d 977, and cases cited. In overruling defendant's objections to the admission of the photographs in evidence, the court ruled that they might be of assistance to the jury in determining the nature of the assault upon Mrs. Schiers and the weapon used to commit the crime. There was a logical connection between the nature of the wounds and the blood stains found on defendant's body. We cannot say that the

court abused its discretion in allowing the exhibits in evidence.

[4] With respect to the third point, defendant argues that the People were permitted to introduce on rebuttal a portion of their case in chief. The argument is without merit. As we have said, Mrs. Allen was called by the defense and stated that she heard unusual noises on the night of February 11th; her gate had been knocked down and there were suspicious footprints in her yard. Officer Belle testified on rebuttal, over defendant's objection, that he and several other officers made a thorough examination of the area surrounding the Schiers residence and found no strange footprints and no indication of forcible entry. The objection was properly overruled. The purpose of the officer's testimony was to dispel the inference, to be drawn from Mrs. Allen's testimony, that a prowler had been in the neighborhood at the approximate time Mrs. Schiers was murdered. It was properly introduced to rebut the case for the defense.

There is no substance to the assignments of misconduct urged under the fourth point.

[5] The first instance of alleged misconduct by the court occurred during the direct examination of defendant. Counsel was inquiring as to the events of the evening of February 11th while defendant was alone in the house with Mrs. Schiers. After defendant stated that they had a "little tiff" about politics around 10 p. m. his attorney asked: "Well, that gets us into politics. After that did you leave the house?" Defendant replied: "That conversation stopped when I was mixing what I assumed would be the last drink of the fifth. As I poured it out, Mrs. Schiers was standing alongside of me and we were discussing Mr. Morley [a news analyst]." The court said: "I think the question is, did you leave the house." Defendant answered: "I am coming to that." Counsel said: "Let's come to it. Did you leave the house?" Defendant then testified that he went to the store and purchased a pint of scotch and some bottles of soda, as we mentioned earlier. Schiers contends that the court's statement was an improper restriction of his testimony on direct examination. We think not. It is clear from the foregoing that the court intervened solely in order to elicit a responsive answer to a question asked by defendant's own attorney. The court's action was proper and did not constitute misconduct.

[6] The other instance of asserted misconduct occurred during the re-examination of the People's expert, Mr. Pinker. The deputy asked the witness: "And this test [the benzidine test] would show the presence of blood even though there was no blood visible to the naked eye?" Pinker replied: "So sensitive is it to blood that blood diluted 300 thousand times will still give the reaction. Amounts of blood that cannot be found with a microscope will give the reaction." The court then asked: "That is because of the presence of the hemoglobin?" Whereupon the witness gave an affirmative answer. Defendant assigns the court's question as misconduct. There was no misconduct. The question was properly posed in an attempt to elucidate the testimony of the expert witness.

[7–10] The next point to be considered is the insufficiency of the evidence to support the conviction. In this connection, defendant argues that the People's case was inherently improbable and that the circumstances in evidence were consistent with a theory of his innocence and inconsistent with a theory of his guilt. The argument cannot be maintained.

It was the opinion of the autopsy surgeon that Mrs. Schiers was murdered at some time between 10:30 p. m. on February 11th and 6:15 the following morning. Defendant admitted being at home with her until 5:30 a. m. when he left for work, except for a few minutes around 10:30 p. m. when he went to the store to buy liquor. A neighbor of the Schiers, Alex Tisdale, testified that he heard defendant's car drive away at 6:30 a. m. The defense

expert, Dr. Johnson, a chemist and chemical engineer, placed the time of Mrs. Schiers' death at 7 in the morning, basing his opinion upon the rate of cooling of her liver and the amount of alcohol in her blood, which was .04 percent. Johnson was not a doctor of medicine and he admitted never having performed any experiments on the liver cooling rates of deceased persons.

The resolution of conflicts in the testimony of the expert witnesses was a matter for the jury. People v. Tucker, 88 Cal. App.2d 333, 340, 198 P.2d 941. The jury could properly infer that defendant was in the house at the time of his wife's death. And in view of the foregoing, and of the fact that defendant heard no commotion during the night the jury could also infer that no person other than defendant could have committed the crime without detection.

The jury had further to consider the damaging evidence respecting the benzidine tests. Defendant assails the testimony of Lieutenant Jones as being false and contradictory, but the weight to be given to his testimony was a question for the trier of fact, not for a reviewing court. People v. Newland, 15 Cal.2d 678, 104 P. 2d 778. The tests made by Jones and Pinker established that there was blood in defendant's washbasin and commode and a heavy concentration of blood on his hands; more blood was distributed evenly on his arms, chest and legs.

It was a proper inference and, we believe, a necessary one, that Schiers had attempted to wash a considerable quantity of blood from his body. Defendant suggests in his briefs that the blood could be accounted for by a shaving cut. This is obviously an afterthought, for when questioned by the officers, he denied having cut himself. Defendant admitted retiring to his wife's bedroom around 1 a. m., leaving his underclothes on the floor, and, as we mentioned earlier, his undershirt was found to be stained with blood. How Schiers came to have blood on his person was a fact within his own knowledge, yet he testified that he could not explain it. The jury was warranted in drawing the inference that he gave no exculpatory explanation because he had none to give. People v. Bowlby, 135 Cal.App.2d 519, 528, 287 P.2d 547, 53 A.L.R.2d 1147, and cases cited.

No reason is advanced by appellant, nor does the record disclose a reason, for doubt as to the accuracy or reliability of the scientific tests which disclosed the blood stains upon appellant's body and elsewhere, nor as to the competency or the credibility of the witnesses who made the tests. This evidence, if given full effect by the jury, was little short of conclusive as proof of appellant's guilt. There was no other reasonable explanation of Mrs. Schiers' death.

[11–13] Schiers' sixth point is that his attorney was ill during the trial and was unable to defend him adequately. It is his contention that the court should have postponed the proceedings upon being advised of counsel's illness and that the inadequate representation by his attorney deprived him of a fair trial.

The trial lasted ten days, of which five days were actually spent in the trial of the cause. Just before the noon recess on the first day of testimony, July 8, the court stated to the jury: "Ladies and gentlemen, you probably noticed that Mr. Eagan had a little accident over the weekend and he has had quite a loss of blood. So I am going to recess until tomorrow morning so that he may get home and get some rest." On the afternoon of the next day, July 9, following the direct examination of the autopsy surgeon, the court asked defendant's attorney how he felt and Mr. Eagan replied: "I was just going to ask the Court if he would mind if I sat down while I examine Dr. Newbarr. I am running a little out of gas, but I will be able to proceed."

Another incident occurred on the third day of trial, July 10. After the noon recess, Mr. Eagan stated to the court that he had "no recollection" of the last 15 minutes of the morning's proceedings, that he vaguely recalled Officer Belle taking

the stand, and that he was not informed until adjournment that the witness had testified regarding the conversation about a lie detector test to which we have already referred. Upon granting defendant's motion to strike this testimony, the court inquired whether counsel felt well enough to continue; Eagan said that he did. Later that afternoon, the court asked counsel whether he would be well enough to proceed the next day, and upon receiving an affirmative answer, the court ordered a recess until the following morning. We have set forth colloquies in the margin.[1, 2]

When it is claimed on an appeal in a criminal case that the accused was inadequately represented by counsel at the trial, the question is whether he was substantially denied his constitutional right to be represented by counsel, and the mere fact that he may have received poor advice from his attorney is not a sufficient ground for disturbing the judgment. People v. Logan, 137 Cal.App.2d 331, 335, 290 P.2d 11. Before it can be said that the right to counsel has been abridged, it must be shown that the representation afforded the accused was of so low a degree of competence that the trial became a farce and a mockery of justice. People v. Dupree, 156 Cal.App. 2d 60, 319 P.2d 39. Defendant has made no such showing here. A reading of the transcript leaves us in no doubt that Schiers received an able and vigorous defense. The cross-examination of the autopsy surgeon and the police technicians was extensive and searching. There is no substance to Schiers' assertion that he was inadequately represented at the trial.

[14] The final point to be considered is that the court committed error in giving an instruction relating to accusatory statements. The instruction stated that the failure to reply to an accusatory statement may be considered as indicating an admission that the accusation was true, and that while the failure to reply would not be sufficient to prove guilt, it was to be considered as a circumstance tending to prove a consciousness of guilt.

Officer Belle testified that he asked Schiers on several occasions whether he

1. "The Court: Let me ask you, do you feel well enough to continue with the trial?

"Mr. Eagan: I feel that I am well enough to proceed to the extent of cross-examining Sergeant Belle, which cross-examination will be short and then after the further proceedings, I would like to propose to the Court to accede to the taking of the testimony of character witnesses. I have four short witnesses who will merely testify to the defendant's character.

"The Court: I will be glad to go along as long as you think you are well enough, so that will have to come from you.

"Mr. Eagan: I am quite certain I am well enough to proceed. The presentation of the character evidence is a routine matter and I believe I will be able to proceed, although, as I informed the Court, during the noon hour I had another blackout period.

"The Court: Yes, you told me that informally and I want to state that at any time you feel weak, let me know, and we will recess the court until tomorrow or until next week to insure the defendant having all your abilities to defend him.

"Mr. Eagan: Thank you, your Honor. I am prepared to proceed and I will be prepared to proceed tomorrow morning.

"The Court: If you don't feel well, either this afternoon or tomorrow morning, or any time, I will have your witnesses come back and we will recess."

2. "The Court: I want the record also to show, Mr. Eagan, if you don't feel up to it and you are the only one that can tell us, because we can't determine how you feel, if you don't feel well enough so that you can adequately represent your client and examine the witnesses, because I understand you are going to have an expert here and then I take it from your voir dire examination you are going to put the defendant himself on the stand—

"Mr. Eagan: Yes, your Honor.

"The Court: If you don't feel up to it, it is your duty to tell us. It is your duty to your client, and your duty to the Court and to the Bar that you tell us about it.

"Mr. Eagan: I most certainly will. I am quite certain I will be all right tomorrow.

"The Court. May I suggest that you go home and eat a good beef steak and rest?

"Mr. Eagan. I am going to do that and peruse the transcripts at the same time."

killed his wife and Schiers denied his guilt. On another occasion, defendant replied: "My lawyer told me not to say anything to you." Sometime in March, Belle asked him what he did with the money he borrowed from the bank and defendant answered that "he didn't want to answer any questions and his lawyer had told him not to answer any questions about what he did with the money, or what happened to it."

There was no occasion for an instruction on accusatory statements and none should have been given. Although it was error to give the instruction there was strong evidence of defendant's guilt and we are convinced that the error did not result in a miscarriage of justice. People v. Tuthill, 31 Cal.2d 92, 101–102, 187 P.2d 16; People v. MacEwing, 155 Cal.App.2d 117, 317 P.2d 82.

After giving consideration to the many claims of error in the trial, we have found no disregard of defendant's right to a fair trial.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.



160 Cal.App.2d 38

Ralph T. KELLY, Petitioner,

v.

The MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 18048.

District Court of Appeal, First District, Division 1, California.

May 2, 1958.

Hearing Denied June 25, 1958.

Prohibition proceeding to prevent trial of petitioner under complaint charging violation of statute requiring convicts to reregister and report change of address. The District Court of Appeal, Fred B. Wood, J., held that the statutory requirement of registration and reregistration upon changing place of address, imposed upon convicts, is one of the "penalties and disabilities resulting from the offense or crime of which he has been convicted," from which convict would thereafter be released upon being granted probation and fulfilling conditions of probation.

Writ issued.

1. Criminal Law ⇐982

The statutory requirement of registration and reregistration upon changing place of address, imposed upon convicts, is one of the "penalties and disabilities resulting from the offense or crime" of which he had been convicted, from which convict would thereafter be released upon being granted probation and fulfilling conditions of probation. West's Ann.Pen.Code, §§ 290, 1203.4.

See publication Words and Phrases, for other judicial constructions and definitions of "Penalties and Disabilities Resulting From the Offense or Crime".

2. Criminal Law ⇐982

Release from penalties and disabilities upon fulfilling terms of probation operates prospectively, not retroactively, and hence does not necessarily revoke or expunge the record of any registration or reregistration of convict occurring during the probationary period. West's Ann.Pen.Code, §§ 290, 1203.4.

3. Criminal Law ⇐932

Under statute providing that successful probationer shall be released from penalties and disabilities resulting from offense, dictionary definition of "penalty" as penal retribution; the suffering in person, rights or property which is annexed by law or judicial decision to commission of crime or public offense; disadvantage, loss or hardship due to some action, especially transgression or error, is persuasive. West's Ann.Pen.Code, §§ 290, 1203.4.

See publication Words and Phrases, for other judicial constructions and definitions of "Penalty".

4. Criminal Law ⇐982

Under statute providing for release of successful probationer from penalties and disabilities resulting from offense, dictionary definition of "disability" as state of being disabled; deprivation or want of ability; absence of competent physical, intellectual or moral power, means fitness, or the like, is persuasive. West's Ann.Pen. Code, §§ 290, 1203.4.

See publication Words and Phrases, for other judicial constructions and definitions of "Disability".

5. Criminal Law ⇐978

The statute imposing on convict the continuing duty to reregister upon affecting change of address, without expressly recognizing any release of successful probationer from such duty, does not prevail over statute governing such release of probationer either as being the later enactment or as being a special as compared with a general statute. West's Ann.Pen.Code, §§ 290, 1203.4.

6. Prohibition ⇐10(2)

Where complaint for failure to reregister as convicted person charged no public offense, because defendant had been released from duty to reregister by fulfilling terms of probation, prohibition was proper remedy to prevent trial of defendant under such complaint.

Kenneth C. Zwerin, San Francisco, for petitioner.

Albert M. Bendich, Staff Counsel American Civil Liberties Union of N. California, San Francisco, amicus curiæ in support of petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Question: Does the respondent court have jurisdiction to proceed with the trial of petitioner upon a complaint that charges a violation of section 290 of the Penal Code (failure to report a change of address) despite the fact that prior to this alleged failure the conviction (violation of section 288a, Penal Code) upon which the section 290 charge is based was set aside and petitioner "released from all penalties and disabilities" pursuant to the provisions of section 1203.4 of the Penal Code?[1]

In such a state of facts does such a complaint charge the violation of a public offense? Are the registration requirements of section 290 among the "all penalties and disabilities" from which the convicted person is *thereafter* "released" when, having been granted probation, he fulfills the conditions thereof, as provided in section 1203.4? We think they are, and that the complaint does not charge the violation of a public offense.

A person convicted of any of the offenses mentioned in section 290 is by the provisions of that section required to register with the appropriate law enforcement agency. Registration consists of "(a) a statement in writing signed by such person, giving such information as may be required by the State Bureau of Criminal Identification, and (b) the fingerprints and photograph of such person." Three days after the registration, the registering law enforcement agency must forward the statement, the fingerprints and photograph to the State Bureau of Criminal Identification and Investigation.

1. The petition herein alleges these facts in detail and the return of the respondent court expressly admits them.

July 12, 1956, upon plea of guilty, petitioner was sentenced to the county jail, execution of sentence was immediately suspended, and petitioner placed upon probation.

September 18, 1957, petitioner, having fulfilled the terms of his probation, changed his plea to not guilty, the accusation was dismissed and petitioner was released from all penalties and disabilities resulting from the conviction.

The duty thus to register must be performed by the convicted person within a limited period of time after discharge or parole from the penal or correctional institution in which incarcerated as a result of the conviction. If committed to a state hospital as a sexual psychopath, he must register upon release from the hospital. The duty to register also rests upon him if and when he is released upon probation or is discharged upon the payment of a fine.

If any such person changes his residence address he must within ten days report his new address to the law enforcement agency with which he last registered. Such agency must within three days forward the information to the state bureau which in turn must forward appropriate registration data to the local law enforcement agency having jurisdiction of the new place of residence. Failure to observe any of these requirements subjects the convicted person to the penalties of a misdemeanor. Also, conviction of a violation of section 290 renders a person liable to inquiry as to whether he is a sexual psychopath. Welf. and Inst.Code, § 5501.

[1, 2] The duty to reregister upon changing one's place of address is a continuing duty, a burden which the convicted person carries with him until his dying day. Being thus severely limited in his freedom of movement and continuously under police surveillance, all stemming from the conviction which has been set aside, the conclusion seems irresistible that this registration requirement is one of the "penalties and disabilities resulting from the offense or crime of which he has been convicted," from which as a faithful and successful probationer, he is *thereafter* "released" by the mandate of section 1203.4.[2]

[3, 4] A persuasive discussion and interpretation of the expression "penalties and disabilities" as used in this section we find in People v. Mackey, 58 Cal.App. 123, 130, 208 P. 135, 138: "Webster defines the word 'penalty' in part, as: 'Penal retribution; * * * the suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense; * * * Disadvantage, loss, or hardship due to some action, esp. to a transgression or error.' That lexicographer gives the following definition of 'disability,' quoting it in full: 'State of being disabled; deprivation or want of ability; absence of competent physical, intellectual, or moral power, means, fitness, or the like; an instance of such want or deprivation. *Disabilities* to perform what was covenanted.—Milton. Chatham refused to see him, pleading his *disability*.—Bancroft. Want of legal qualification to do a thing; legal incapacity, incompetency, or disqualification; also, an instance or cause of such incapacity.' * * * The two words are together to be given a broad and far-reaching construction because the Legislature has coupled with their use the mandate that, where a convicted felon who has been admitted to probation has passed the period of probation, 'the court shall thereupon dismiss the accusation or information against such defendant.'"

So much for the words "penalties and disabilities." We are mindful of the fact that the words "penal" and "penalty" have a variety of meanings or shades of meaning, according to the subject dealt with and the context in which the words are used. See 23 Am.Jur. 622, § 27. Here, the context suggests that perhaps the Legislature had *criminal* penalties and disabilities in mind. Section 1203.4 speaks of "penalties and disabilities *resulting from* the offense or crime of which he has been convicted." (Emphasis added.) Does this expression suggest, perhaps, that section 1203.4 has reference to *criminal or quasi-criminal* penalties, penalties *imposed for punishment or prevention of crime,* such as imprisonment, fine, posting of a bond to keep the peace, or registration and continuous and lifelong reregistration with the state and local police? This ques-

2. This release obviously operates prospectively not retroactively. It does not necessarily revoke or expunge the record of any registration or reregistration that took place during the probationary period.

tion is important in the current inquiry because of the legislative and judicial history of section 1203.4.

The Legislature from time to time has enacted statutes expressly narrowing the scope of "all penalties and disabilities resulting from," in each case limiting the exclusion to a specific type of situation. Originally, the subject matter of section 1203.4 occurred as a subdivision of section 1203 of the Penal Code. In 1927 the proviso which permits a prosecutor to plead and prove the prior conviction in a subsequent prosecution for any other offense was added to the subdivision. Stats.1927, ch. 770, p. 1493, subd. (4), at p. 1496. In 1935 that subdivision (including the proviso) was lifted out of section 1203 and made into a separate section numbered 1203.4. Stats.1935, ch. 604, p. 1706 at 1709.

The other enactments narrowing the scope and application of section 1203.4 deal with the type of person who after investigation and examination is found and declared duly qualified to practice a given profession or calling or to conduct a certain type of operation that calls for a measurable degree of proficiency; specifically, drivers of motor vehicles, attorneys at law, physicians and surgeons, and public school teachers. The regulatory statutes concerning such persons subject them to disciplinary action (suspension or revocation of license or employment) for various causes including conviction of certain types of crime. Those statutes have been amended to make it clear that the indicated disciplinary action when taken is not affected by an order of release made pursuant to section 1203.4. (§ 309 of the Vehicle Code, added thereto in 1939, relating to the suspension or revocation of a license to drive a motor vehicle; § 6102 of the Bus. and Prof. Code as amended in 1941, concerning the suspension or revocation of a license to practice law; §§ 2383 and 2384 of the Business and Professions Code, as amended in 1951, in respect to the disciplining of a physician and surgeon; and §§ 12011.5, 12011.7, 12107, 12756, 12785, 13001.3 and 14002.3 [particularly § 12011.5] as added to the Education Code in 1952, relating to the suspension and revocation of teachers' credentials and the suspension and discharge of public school teachers.)

Legislation of this type might conceivably reflect a legislative interpretation of section 1203.4 to the effect that, but for the insertion of such exclusionary provisions in these several regulatory statutes, the suspension or revocation of a license or the suspension or discharge of a public school teacher is a "penalty" or "disability" within the meaning of those words as used in section 1203.4. Such a view loses much of its logic when we consider these amendments in the light of certain judicial decisions. The 1939 addition of section 309 to the Vehicle Code must be appraised in the light of the fact that there was then pending a case, involving events that occurred in 1938, which culminated in a decision that such was the effect of a section 1203.4 release order upon the conviction of the holder of a driver's license. Sherry v. Ingels, 34 Cal.App.2d 632, 94 P.2d 77, decided in September, 1939. The addition of section 309 was a legislative rejection of the potentially pending judicial interpretation. At the very least it may be said that while this particular legislative act, standing alone, may not be vividly illuminative of the legislative intent, it is not out of line with the clear import of later enactments concerning section 1203.4, particularly in the 1941 amendment of the State Bar Act and the 1951 amendment of the State Medical Practice Act. In respect to each of these amendments the Supreme Court had previously decided that the suspension or revocation of a license to practice law or to practice medicine and surgery was not a "penalty" or "disability" within the purview of section 1203.4. In re Phillips, 1941, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, construing and applying section 6102 of the State Bar Act as it read prior to its 1941 amendment; Meyer v. Board of Medical Examiners, 1949, 34 Cal. 2d 62, 206 P.2d 1085, in relation to the discipline of physicians and surgeons. The reasoning of the court in the Phillips and the Meyer cases, it would seem, is that "penalties and disabilities" as used in section

1203.4 have reference to *criminal* penalties and disabilities *or something akin thereto* and that the disciplining of a person licensed to practice a profession or calling is for the protection of the public in the exercise of the police power, not for the purpose of "punishing" the licensee (there are other laws for that), a function and a proceeding which is neither criminal nor quasi-criminal in character.

There is considerable support for such a view of that type of disciplinary proceeding. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 537, 110 P.2d 992; Bold v. Board of Medical Examiners, 135 Cal.App. 29, 34, 26 P.2d 707; Traxler v. Board of Medical Examiners, 135 Cal.App. 37, 39, 26 P.2d 710; Stuck v. Board of Medical Examiners, 94 Cal.App.2d 751, 757, 211 P.2d 389. "The object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome. Such proceedings are not conducted for the primary purpose of punishing an individual. (See cases collected 2 Cal.Jur.2d 169, § 87, at p. 170.) Hence, such proceedings are not criminal in nature." Cornell v. Reilly, 127 Cal.App. 2d 178, 184, 273 P.2d 572, 576.

It is a fair inference that when the Legislature amended the State Bar Act and the Medical Practice Act so as to codify the rulings in the Phillips and the Meyer cases, it indicated an acceptance of or concurrence in the interpretation of section 1203.4 upon which those rulings were based.

But that interpretation, those rulings and those amendments do not affect our problem save to emphasize, by contrast, the fact that the "penalties and disabilities" of the registration and reregistration requirements of section 290 are criminal in character. To illustrate, until the enactment of section 290, a person for the first time violating subdivisions (1) or (2) of section 311, or subdivision (5) of section 647, or subdivision (1) of section 647a of the Penal Code, incurred the penalty of a fine not exceeding $500 or imprisonment in the county jail for not more than six months, or both. Section 290 added a life sentence of compulsory police registration and reregistration. That, clearly, is the imposition of a criminal penalty in the strictest and narrowest sense of that term.

[5] Accordingly, we have a seeming conflict between these two statutes. Section 1203.4 releases "thereafter" all penalties and disabilities. Section 290 by imposing the continuing duty to reregister upon effecting a change of address does not *expressly* recognize any such release. Does section 290, as the later enactment, prevail? We think not.

A means of reconciling this conflict is furnished by the separate and distinct policies which these two statutes were respectively designed to effectuate. One deals with probation and is designed to foster rehabilitation by giving the probationer an opportunity to erase for the future the legal consequences which normally flow from a conviction. The other requires registration of a person convicted of any of the offenses enumerated, upon the theory it would seem that such offenders are apt to repeat and therefore should be kept under close police surveillance at all times. It is a fair inference that an offender found deserving of probation is not likely to be in need of further police surveillance if he responds to the confidence reposed in him as a probationer and faithfully fulfills the terms and conditions of his probation, designed to impress upon him a keen awareness of his obligations to society and induce him to exert every effort to develop and prove his ability to meet and discharge those obligations and remain at large without further police surveillance.

In short, the fair intendment of these two statutes when read together is that conviction denotes a need for registration and police surveillance when the convicted person is allowed to return to society, whether after serving a sentence or upon the granting of parole or when released upon probation prior to the imposition or the

execution of a sentence of imprisonment. But in the case of the probationer who demonstrates his ability to go straight, upon his own, by faithfully fulfilling all of the terms and conditions of his probation, the need for further surveillance and registration terminates upon his release pursuant to the sanction of section 1203.4.[3]

A word should be said concerning the state's contention that section 290 should prevail upon the theory that it is a special and 1203.4 is a general statute. They are not in that category. They do not meet the test for the rule which the state invokes, declared in In re Williamson, 43 Cal.2d 651, 654, 276 P.2d 593, 594, in these words: "'It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute * * *'". Section 1203.4 deals with all probationers, including those who have committed none of the offenses mentioned in section 290. In addition, section 290 applies to some convicted persons who are ineligible for probation as well as to some who are eligible. Clearly, the rule invoked does not apply.

The parties have given considerable attention to the applicability or inapplicability of our holding in Truchon v. Toomey, 116 Cal.App.2d 736, 254 P.2d 638, 36 A.L.R.2d 1230, interpretive of the word "conviction" as used in section 1 of article II of the Constitution, relating to loss of the elective franchise. We perceive no similarity, no conflict, and no problem. In the Truchon case we pointed out that the word "conviction" has been used in criminal statutes with varying meanings. As used in the constitutional provision there involved we held that "conviction" referred to a judgment which remained final, thereby differing from a mere plea or verdict of guilty. Here we are considering the use of the word "conviction" as it appears in two statutes. Section 290 uses it in both senses: After judgment, in respect to the convict who has served his sentence or who is released upon parole; during the suspension of imposition or execution of sentence (see § 1203.1, Penal Code), in relation to the probationer. Section 1203.4, because it deals with the probationer, has reference to his status as a convicted person during the period of suspension of imposition or execution of sentence.

[6] We entertain no doubt that prohibition is a proper remedy. The respondent court has already determined, erroneously, that it has jurisdiction and will proceed with the trial unless restrained. The petitioner alleges and respondent admits that the respondent court "threatens to, and will unless prohibited by this [district] court [of appeal], proceed with the trial of petitioner upon the charge of violating Section 290 of the Penal Code," despite the fact that, as we have found, the complaint in question charges no public offense.

Our conclusion that the reregistration provisions of section 290 are not applicable to the petitioner upon the basis of the facts here presented, makes it unnecessary to consider certain questions counsel have discussed in respect to the constitutionality of that section.

Let a peremptory writ of prohibition issue.

PETERS, P. J., and BRAY, J., concur.

3. Other statutes deal with the rehabilitation of a convict who returns to society upon serving his sentence or when released upon parole. See 37 Cal.Jur.2d 109–133; 39 Cal.Jur.2d 718–737.

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